Learning objectives

After reading this chapter you should be able to:

➔ understand the nature of a trust
➔ understand the reasons for creating a trust
➔ explain the trust as a product of fragmentation of ownership
➔ understand the historical development of the trust and its modern-day significance
➔ explain the respective rights of the trustee and the beneficiary
➔ explain the difference of express trusts and implied trusts
➔ understand how express trusts and implied trusts are classified
➔ explain the role of trusts in law reform.
**Setting the scene**

_**Hambro and Others v The Duke of Marlborough and Others**_

_[(1994)](1994) 3 WLR 341: The Blenheim Estates, the Duke of Marlborough and his irresponsible son_

Many readers with an advanced understanding of the law of trust may be a little surprised and taken aback as to why the ‘Setting the scene’ in this chapter begins with a look at a decision of the High Court in 1994 concerning the famous Blenheim Estates. It is quite understandable why such a reader may be surprised, given the fact that litigation of the type in the case is not one which is commonplace in modern trust law. Nonetheless, the facts and the litigation concerning the Blenheim Estates and the 11th Duke of Marlborough illustrate some very important manifestations about the trust concept.

For those students who will recall their history lessons, by 1704 the French King Louis XIV had taken a powerful control over Europe in an attempt to build a massive French Empire. In order to continue with his dominance in Europe, the King formed allies with Bavaria. In 1704, John Churchill, the 1st Duke of Marlborough marched an English army, allied with the Dutch, some 200 miles and successfully triumphed over the French and their allies at a place called Blenheim. In recognition of this triumph, Queen Anne of England gave the Royal Manor of Woodstock, near Oxford, as a gift to the Duke of Marlborough. She instructed that a palace be built on the land. By an Act of Parliament in 1705, the land was subject to a settlement (trust) to the effect that the land be passed on to future generations of the 1st Duke of Marlborough, including female heirs. The effect of this arrangement meant that the land was held for the 1st Duke of Marlborough and his subsequent heirs.

Whilst the land continued to pass to subsequent Dukes of Marlborough, the 11th Duke of Marlborough commenced proceedings in 1994 contending that his son, the Marquis of Blandford, was financially irresponsible and that his right to the enjoyment of the Blenheim estates be subject to restrictions. These restrictions were authorised by the High Court on the grounds that the Marquis of Blandford was not in a position to take control of the Blenheim Estates.

The famous victory at Blenheim and the reward to the 1st Duke of Marlborough and the concerns of the 11th Duke provide good enough facts to illustrate some of the issues arising in trust law. First of all, the land was given by way of a gift to the 1st Duke of Marlborough, albeit subject to a settlement by an Act of Parliament in 1705. A unique feature of a trust is that it involves, in a majority of cases, a gift from one person to another. However, the gift is usually modified in some way: for example, that the enjoyment of it is only for the life of the beneficiary, as in the case of the Duke of Marlborough, or is otherwise postponed until some future time. Secondly, the land forming the subject matter of the Blenheim Estates was held by trustees for the benefit of beneficiaries in the form of the heirs of the Duke of Marlborough. Thirdly, the facts of the case illustrate that a trust often has a long duration and in the course of the duration of a trust certain things can change. When such changes take place, can the trustees or the courts change the nature of the trust which was created many years ago by the settlor? Fourthly, the case is an excellent example of what can happen when a person creating a trust, or indeed trustees administering a trust, find themselves with an irresponsible beneficiary. Is there any means by which the trust property can be protected from the irresponsible...
behaviour of the beneficiary? In the case of the Blenheim Estates, what do you think Queen Anne, or indeed the 1st Duke of Marlborough would have done if they knew that the estates would be under the control of an irresponsible heir? Finally, although the Blenheim Estates and the settlement of the land thereof provides an example of the use of the trust concept, the question arises as to whether the trust continues to operate in the manner it did in the case of the Blenheim Estates, or whether it has other more contemporary functions.

Moving on: thinking about trusts and trust law in the modern law

Most students doing a first degree in law will be unfamiliar with the concept of a trust. Unlike some areas of English law such as contract law or criminal law, the law of trusts is one which students will often find hard to relate to. This is not unusual since most students will not have encountered the trust concept in their lives. They will readily relate to contracts and understand criminal wrongs, but to relate to the idea that a trust allows the fragmentation of ownership of a thing is something of an alien concept. So what is it all about?

In order to understand the role and function of a trust it is best to start thinking about the following scenarios which may arise in everyday life.

Scenario One

Harry is 16 years of age and is doing very well in his studies. It is his intention to qualify as a lawyer and work with his father who has his own law firm. Harry’s father has a sum of money which he would like to give to Harry so that he can use it for his studies and eventually qualify as a lawyer. Harry’s father is concerned that if he simply hands over the money to Harry he may just spend it without using it for his studies. A better solution might be for someone to hold the money for Harry and make it available only for his studies. Can this be done?

Scenario Two

Victor is a wealthy businessman and has a number of shares in a number of different private and public companies. Over the past few years he has received substantial dividends on the shares. He has also had to pay tax on the profits he has made. Victor is taxed at a high rate and is wondering whether his tax liability can be lowered if he was to move some of his shares to his family members.

Scenario Three

Wayne and Hillary purchased a house in 1989 and the legal title to the house was conveyed in Wayne’s name only. It was intended that the house would be their family home and Hillary contributed to the deposit of the house. Hillary also made regular contributions to the mortgage. Recently, Wayne and Hillary, who are not married, decided to split up. Hillary is concerned that she is not on the legal title to the house but feels she must have some interest in it. Hillary has no legal title to the land, but has she got some interest in the house?

As well as the famous Blenheim Estates, the above scenarios depict the type of matters which a student of equity and trusts may have to deal with. Each of these scenarios involves a solution which is provided by the trust concept. The chapter examines the concept of a trust and investigates the key features of a trust and the manner in which it operates.
This book is primarily concerned with trusts and the law of trusts, and therefore the purpose of this chapter is to explore the concept of the trust, in particular, its nature and the means by which trusts are classified. Maitland once wrote: ‘[O]f all the exploits of Equity the largest and most important is the invention and development of the Trust. It is an institute of great elasticity and generality; as elastic, as general as contract. This perhaps forms the most distinctive achievement of English Lawyers. It seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law.’\(^1\) Indeed, the trust has played an important role in achieving various social and economic goals which will be explored in this chapter and throughout the course of this book. For the time being the following illustration explains the versatility of the modern trust by giving some examples of the types of socioeconomic problems that can be resolved by the use of a trust.\(^2\) Some of the problems have already been raised above; however, the following table illustrates just how versatile the trust concept is.

### The versatility of the modern trust

<table>
<thead>
<tr>
<th>A problem requiring a trust solution</th>
<th>The trust solution</th>
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<tr>
<td>Alfred, a wealthy businessman has a number of investments which yield substantial income at the end of each tax year. Because the income exceeds the threshold for higher income tax, the question arises as to how he could possibly reduce his tax liability on the income he is earning.</td>
<td>The trust has, since its very beginnings, been a primary vehicle by which an individual can reduce his tax liability by settling his property for the benefit of his family members, thereby reducing the extent of tax payable on his income. For example, in the problem raised, rather than Alfred retaining beneficial ownership of the investments which yield the income, he can ask for those investments to be held by trustees on trust for his family members who will pay no tax at all or pay at a lower rate of tax.</td>
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<td>Simone, who died recently, is survived by her three children who are all under the age of 18 years. Amongst other property, Simone has left her house to her three children. The children discover that the law does not permit a minor to hold the legal title to land.</td>
<td>The fact that the children cannot hold the legal title to land is not fatal to them enjoying the beneficial interest in the land. The law provides that a conveyance of a legal estate to a minor operates as a declaration of trust of that land in favour of the minor. In this way, the land is held by trustees for the benefit of the children, who on the age of majority can call for the conveyance of the land to them.</td>
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<td>Michael, who is married to Heather, wishes to leave his property to Heather after his death. However, unknown to Heather, Michael has for a long time maintained a very close relationship with his secretary Patsy. He wishes to leave a large sum of money to Patsy after his death. He is quite happy to leave his property to Heather in his will; however, he is also aware that if he leaves a large sum of money to Patsy in the will then this will be subject of much controversy, not least, the disclosure of his relationship with Patsy.</td>
<td>A will is a public document and as such is available to anyone to read. It is understandable why Michael would not want to include Patsy in his will. The trust, however, is an excellent vehicle by which he can provide for Patsy without Heather or anyone else finding out about the gift to her. Michael can leave the money in his will to someone, like his solicitor, who agrees to give it to Patsy after Michael's death. This creates what is known as a secret trust. Michael's solicitor appears to receive the money absolutely; however, during his lifetime he has agreed to be a trustee for Patsy. Indeed, secret trusts, as will be seen later, were a primary vehicle for providing for mistresses and illegitimate children.</td>
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\(^2\) These are just some of the many ways in which the trust has been employed to meet different social and economic objectives.
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<td>Gordon is a very successful lawyer. It has long been his wish that his two sons also qualify as lawyers and continue working for the family business. He wishes to know what incentives he can create so that his sons, who are 17 and 18 respectively, enter the legal profession. Gordon also has a valuable collection of eighteenth and nineteenth century law reports which were handed down from his ancestors. He wishes to retain those reports in the family for generations to come and wishes to know how that can be achieved.</td>
<td>The traditional focus of trusts has been in the context of family provisions and the preservation of wealth. A trust is an excellent means by which a person can make a future gift subject to some contingency. For example, Gordon can transfer £30,000 on trust to trustees to hold for his two sons on them qualifying as lawyers. The sons would have a contingent interest in the £30,000 subject to them qualifying. At the same time he could create a settlement whereby he transfers legal title to the law reports to trustees who are to hold the law reports for Gordon for life, thereafter for his oldest son and thereafter for his grandchildren. Seen in this way, neither Gordon nor his oldest son can dispose of the law reports.</td>
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<td>Phillip and Fiona, an unmarried couple, purchased a house sometime in the early 1990s. The intention of both Phillip and Fiona was that this would be their family home as they planned to get married. However, the house was only conveyed in Phillip’s name. The house was purchased with the aid of a mortgage; however, Fiona contributed £10,000 to the deposit. Phillip and Fiona never got married and now Phillip wishes to sell the house. Fiona is not sure what rights she has in the house.</td>
<td>Since about the middle of the twentieth century the trust has played an important role in determining the ownership rights of cohabitees in circumstances where they have left their beneficial interests ill-defined. Particularly in cases of non-marital cohabitation, the trust has been the means by which the beneficial entitlement to land can be resolved in favour of a person who is not the legal owner of land, but has either made some contribution to the purchase price or is otherwise promised some interest in the land. In such a case the court will imply a trust so that the legal owner of the land holds the land on trust for himself and his cohabitee. The very extent of the interest of the non-legal owner depends on the type of trust the court is prepared to imply in the circumstances.</td>
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<td>A number of law students have formed a mooting club at their law school. The club encourages the students to engage in mooting and other activities. Membership fee is £20 per year. Recently, a local firm of solicitors has donated a sum of £500 to the mooting club. The club is not a separate legal entity and the question is how the funds of the club are held and by whom.</td>
<td>Whereas a company, which is incorporated, acquires a separate legal entity, a club is an unincorporated association with no separate legal status. A club is nothing more than a group of individuals bound together by some common objective. A company can hold property in its own name, but a club cannot. The question arises as to who controls the property belonging to a person who is not the legal owner of land, but has either made some contribution to the purchase price or is otherwise promised some interest in the land. In such a case the court will imply a trust so that the legal owner of the land holds the land on trust for himself and his cohabitee. The very extent of the interest of the non-legal owner depends on the type of trust the court is prepared to imply in the circumstances.</td>
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<td>A lender wishes to lend a sum of money to a borrower. The lender is aware that, should the borrower default on payment, he will only have a personal claim to the recovery of the money loaned. In the case of the insolvency of the borrower, the lender will remain an unsecured creditor. What the lender wishes to know is whether he can loan the money to the borrower and, should the borrower fail to use the money for the purpose for which it was advanced, whether he has a right to claim back the money as his.</td>
<td>It has long been recognised that a trust and contract relationship can coexist. A lender can enter into a contract to loan a sum of money to a borrower who is under a personal obligation to repay the loan money. The lender can at the same time stipulate that the monies advanced under the loan are not to be used for any other purpose other than for the purpose of the loan. The effect of this arrangement will be that the borrower becomes a trustee for the lender and, should the borrower fail to use the money for the purpose of the loan, the lender can claim the money back as his property. Seen in this way, the lender will not be an unsecured creditor should the borrower be declared bankrupt.</td>
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A problem requiring a trust solution

Jenny has built up a large sum of money in her current account at her bank. Her bank manager has advised her that the money would be better invested in stocks and shares where she would be able to allow her money to grow faster than in the current account. Jenny is rather concerned about the risk of investing in shares. She would rather diversify her investments and choose from a portfolio of investments, thereby reducing the risk of losing money on her investment.

In recent times the concept of the unit trust has played an important role in facilitating small-time investors, as well as larger investors, to invest in a portfolio of investments, thereby reducing the risk to their original investment. Typically, a unit trust involves a fund manager investing sums of money in particular types of companies. The investments purchased are invested by the trustee of the unit trust, who will hold any dividends for the original investors according to the amount of their initial investment or typically their units of investment. Unit trusts can have either capital growth or income growth or a combination of both. Should any holder of a unit trust investment wish to sell his investment, or typically units of investment, the value will depend on the stock market.

Mathew has recently secured a job with a large multinational company. The company has advised him that he should contribute a sum out of his salary to provide for a private pension when he retires. The company has advised him that they too will contribute a sum towards his pension and that he will be entitled to a lump sum on retirement as well as an annual pension based on his salary on retirement. Whilst Mathew is keen on this pension, he is also concerned as to how his pension contributions will be held and safeguarded.

Most private pension schemes use the trust as a means by which contributions by employees and employers are held by trustees on trust for the employees. On retirement the employee can look forward to an annual income as well as a lump sum payment. One of the advantages of using the trust is that the pension funds will be held separately from the funds of the company. Therefore, should the company encounter financial problems, the funds of the pension will belong to the beneficiaries and not form part of the assets of the company.

The trust solution

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<td>The basic idea behind the trust lies in the fact that the management and enjoyment functions of ownership are split between different persons. The role of management is vested in a person called a trustee whilst the enjoyment of the thing subject to the trust is vested in persons called beneficiaries. The fragmentation of management and enjoyment is only possible where the legal title to the property is vested in trustees. However, because the trustees have agreed to hold and manage the legal title for the benefit of beneficiaries, their conscience binds them in equity, thereby giving the beneficiaries an equitable interest in the property subject to the trust. The net effect of fragmenting management and enjoyment is that there is a consequential fragmentation of title. The trustees hold the legal title, which is a nominal title, while the beneficiary holds the equitable title full of beneficial rewards from the property. The trust in this sense can be seen as a product of equity. One leading treatise on the law of trusts defines the trust as an equitable obligation, binding on a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiaries), of whom he may himself be one, and any one of who may benefit.</td>
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\[3\] Nominal in the sense that the trustee has no beneficial interest in the property he is holding and, therefore, is not entitled to the fruits of that property.
enforce the obligation. Any act or neglect on the part of the trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust.\(^4\)

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**The key features of the trust**

A trust has a number of key features, each of which requires separate discussion in this section.\(^5\)

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**APPLYING THE LAW**

Harry has three children, all of whom are under the age of 18 years. Harry wants to transfer £100,000 to each of his children; however, he does not want them to spend the money until they have each attained the age of 25. He does not want to hold the money himself for the children but is keen on trustees to hold the money. He is also keen to give the trustees wide investment powers and remuneration for their work. Additionally, he wants his solicitor to have the power to appoint new trustees if the existing ones retire. Harry, the trustees and the children want to know a little more about their rights and duties.

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**The settlor**

Unless a trust is implied by the courts, it is usually created by a deliberate act on the part of a settlor. Where a trust is created in a will, the settlor will be referred to as the testator, or testatrix if it is a woman creating the trust in the will. Where a settlor creates a trust during his lifetime, the trust is said be an *inter vivos* trust. Where the trust is created in a will, the trust is said to be a testamentary trust. There is nothing stopping a settlor also being a trustee, and indeed nothing stopping him being a beneficiary under the trust. For example, A can declare that he is a trustee of £5000 in favour of himself and his children in equal shares.

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**The trustee(s)**

The trust property must be vested in one or more trustees who will hold the legal title to the property on trust for the beneficiaries. In principle there is nothing stopping any individual being a trustee; however, the appointment of an infant as a trustee will be void.\(^6\) In the early days a trustee would often be a family member or a close friend who usually acted out of a sense of moral obligation. In more contemporary times, a trustee will often be a professional person, such as a solicitor or a bank, acting out of some contractual duty rather than a moral one. A trustee can be an individual or a limited company or any other body corporate. In the most typical case the trustee will be vested with the legal title to the trust property; however, it is quite possible to be a trustee of an equitable interest in favour of a beneficiary. For example, in a typical trust a settlor transfers the legal title to


\(^5\) For an excellent discussion of the nature of the trust, see P. Parkinson, ‘Re-Conceptualising the Express Trust’ (2002) 61 CLJ at 657.

\(^6\) S. 20 Law of Property Act 1925.
property to be held on trust for the benefit of a beneficiary. In such a case the trustee is vested with the legal title and the beneficiary has an equitable interest in the trust property. However, suppose that a beneficiary under a subsisting trust declares himself a trustee of his equitable interest in favour of another: in such a case, it is possible that he would become a trustee of his equitable interest in favour of another beneficiary.\(^7\)

The trustee will be appointed by the settlor in the trust instrument, or in the case of a trust intended to take effect on the death of the testator, the will of the testator. The trustee will be required to act in accordance with the trust instrument and trust law in general as developed by cases and statute. In the course of the administration of the trust, the trustee will be conferred a number of duties and powers. With respect to his duties, the trustee has no choice but to execute them. In so far as his powers, the trustee will be given a discretion and, although he need not necessarily exercise these powers, he must from time to time show that he did consider the exercise of his powers. One particular feature of trusteeship is that a trustee stands in a fiduciary relationship to his beneficiaries. A fiduciary is someone who must act in the best interests of their beneficiary or principal. The overriding principle governing a fiduciary is that they must not allow a conflict between their duty to their beneficiary and their own personal interest. They must at all times act in the best interests of the beneficiary.\(^8\)

Once a trustee is appointed by the settlor or by a testator, he may retire from the office of trusteeship, provided other trustees are left to administer the trust. If for some reason there is no trustee, for example the trustee has died, the trust will not fail as there are statutory mechanisms in place to appoint new trustees and, indeed, to remove trustees.\(^9\)

### The beneficiary

A trust must be created in favour of a human beneficiary who can enforce the trust obligation against the trustee. There must be some individual or individuals in whose favour the court can decree performance of the trust. Sometimes it is also said that there must be someone who has *locus standi* to enforce the trust. It is important that the trustees know exactly who their beneficiaries are and that they have been defined with a meaning which is understood by the trustee and the court, which may well have to enforce the trusts should the trustees fail to do so. Therefore, a trust for Jenny, Michael and Robert is perfectly clear. Equally a trust in favour of a class of individuals referred to by some definition will be fine provided the definition has a meaning, for example, the employees of a company. A trust which is not created for a human beneficiary is prima facie void. Thus, a trust which is not directly for the benefit of ascertainable beneficiaries but merely furthers some abstract purpose is prima facie void. The primary reason for this is that there is no one to enforce the obligation against the trustee. It is a central requirement of the law of trusts that a trust is created for the benefit of identifiable human beneficiaries. The courts will not allow a trust to exist in circumstances where it cannot control and execute that trust. The only exception to this rule is a charitable trust, which is enforced by the Attorney General through the Charity Commissioners. Charitable trusts have undergone a major change under the Charities Act 2006. The Act provides a list of purposes which qualify as being charitable, including the established categories or trusts to relieve poverty, and trusts to advance religion and education.\(^10\)

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\(^7\) Such a situation will give rise to what is known as a sub-trust; see Chapter 5 for more detail.

\(^8\) The fiduciary nature of trusteeship is explored in more detail in Chapter 17.

\(^9\) A detailed examination of these principles is in Chapter 14.

\(^10\) Charitable trusts are examined in more detail in Chapter 22.
The trust property

A trust must attach to some identifiable property over which the trustees have some control and over which the beneficiaries can claim an equitable interest. The identification of the trust property is important for two main reasons. Firstly, it gives the beneficiaries an equitable interest in the property. Secondly, because the equitable right is a right in personam, the beneficiaries can follow that property into the hands of third parties who cannot purport to show that they are bona fide purchasers of the legal title without notice of the interest. The ‘bona fide purchaser principle’ is explored in more detail in the next section. For the time being the basic rule is that any type of property is capable of being subject to a trust: thus, both personal and real property can be the subject matter of a trust. Students of property law will recall that personal property is divided into choses in action and choses in possession depending on whether the property is intangible and tangible respectively. It is also possible for both a legal estate and an equitable interest to be held on trust for a beneficiary. In most cases it will be a legal estate or legal interest which is vested in the trustee, for example a freehold title to land or a painting; however, a person who only has an equitable interest in property can vest that interest in a trustee to be held for the benefit of another.\footnote{Such an assignment of an equitable interest on trust will constitute a sub-trust and will be subject to certain formalities which are discussed in Chapter 5.}

The trust instrument

Unless a trust is created in a will, the document purporting to create a trust is referred to as the trust instrument. However, even in the case of trust created in a will, the will may refer to the trust instrument which sets out the details of the trust created in the will. Sometimes the trust instrument is referred to as the trust deed. The nature and extent of detail in a trust instrument will vary according to the type of trust in question. There are, however, a number of general issues which will be found in all properly drafted trust instruments. As well as details of the trust, the trust instrument will refer to a number of important matters such as the power to appoint new trustees, the right of the trustees to receive remuneration and the extent to which trustees can be exonerated from liability for breach of trust. In addition, the trust instrument will refer to the powers which are conferred upon trustees: for example, the power of investment and the power to make capital or income payment to beneficiaries before the trust can be terminated by the beneficiaries.

The legal and equitable interest

A key feature in an effective understanding of the concept of the trust is the distinction between the legal and equitable interest. A legal interest is said to be a right in rem in the sense that it prevails against the whole world. A trustee who holds the legal title to trust property is capable of enforcing that legal title against the whole world. Thus, it does not matter who has interfered with the legal title to the trust property: the trustee can assert the right to recover the legal title from any third party. The same is, however, not true of equitable interests, which are said to be rights in personam in the sense that they are governed by the doctrine of notice. This means that such rights are binding on all persons except a bona fide purchaser of a legal interest without notice of the pre-existing
equitable interest.\textsuperscript{12} Equity, acting \textit{in personam}, clearly binds the conscience of the party against whom an equitable right is granted. It goes further and binds all those persons who subsequently acquire the legal title to the property in which the equitable right is granted with notice of the equitable right. Thus, where a trustee transfers the legal title to the trust property to another person, the equitable right of the beneficiary may bind the transferee if she or he has notice thereof.

The doctrine of notice requires the purchaser to be a bona fide purchaser. This is no more than saying that the purchaser must be one who is innocent, and where there is an absence of notice, this requirement is easily satisfied. The purchaser must have give value, that is, consideration for the receipt of the legal title to the property. Consideration at common law means money or money’s worth; in equity consideration can take the form of marriage consideration.\textsuperscript{13} A purchaser for value need not, however, show that consideration was adequate.\textsuperscript{14} The doctrine of notice does not extend to a person who has not furnished consideration, thus a mere donee or volunteer will be bound by equitable interests irrespective of notice.

The central requirement of the doctrine of notice relates to the question of what constitutes notice. Three types of knowledge have been identified for the purposes of the doctrine of notice. The most obvious type of notice attributable to a person is actual notice. This refers to a situation where a purchaser is consciously aware of the equitable interest in property at the time of the purchase. In such a situation the third party is more or less colluding with the trustee and will almost be acting fraudulently. Actual notice is to be distinguished from constructive notice, which refers to knowledge which would have come to the attention of the purchaser had he carried out a reasonable inspection of the title to the thing in question. It is trite law that a person buying land should carry out a reasonable inspection of the land and the title which he is purchasing. The purpose of such an investigation is to establish whether there are equitable interests in the land which might bind him. These equitable interests may take the form of a beneficial interest in the land. A good example is \textit{Kingsnorth Finance Co Ltd v Tizard}\textsuperscript{15} where a husband was holding the legal title to a matrimonial home on trust for himself and his wife. After they had separated, the wife ceased to live with her husband but did visit the house on a daily basis to look after the children. The husband arranged a mortgage with a mortgagee on a Sunday afternoon when the wife was not present. The mortgage was duly granted to the husband who later absconded with the mortgage money. The court held that the equitable right of the wife bound the mortgagee. The inspection carried out by the mortgagee was simply insufficient and it was affixed with constructive notice. The final type of notice is imputed notice, which arises when an agent of the purchaser has notice, actual or constructive, which is imputed to the purchaser.

The effect of a successful claim that a purchaser purchased the legal title without notice of the equitable interest is to give him an ‘absolute, unqualified, unanswerable defence’\textsuperscript{16} against the holder of an equitable interest in property. The doctrine of notice not only gives the purchaser an unqualified defence against the holder but also operates in a destructive way so that the equitable interest in the property is completely destroyed.

\textsuperscript{12} See \textit{London and South Western Rail Co v Gomn} (1882) 20 Ch. D 562 and \textit{Pilcher v Rawlins} (1872) 7 Ch. App. 259.

\textsuperscript{13} The concept of marriage consideration is considered in more detail in Chapter 6.

\textsuperscript{14} \textit{Midland Bank Co Ltd v Green} [1981] AC 513.

\textsuperscript{15} [1986] 1 WLR 783.

\textsuperscript{16} \textit{Pilcher v Rawlins} (1872) 7 Ch. App. 259 at 269.
It cannot be revived against a subsequent purchaser of the legal title who may have notice of the fact that the equitable interest once existed. 17

In the case of real property the doctrine of notice has largely been superseded by a system of registration of equitable interests in the land. What is typically referred to as the 1925 legislation – culminating in the Law of Property Act 1925, Land Charges Act 1925 (now the Land Charges Act 1972) and the Land Registration Act 1925 (now the Land Registration Act 2002) – provides a framework for governing the registration of various legal and equitable interests in land.

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**A judicial assessment of the nature of a trust**

**CASE SUMMARY**

**Westdeutsche Landesbank Girozentrale v Islington B.C. [1996] AC 669**

The House of Lords took the opportunity to explain the core principles of a trust, as summed up by Lord Browne-Wilkinson.

**The relevant principles of trust law**

(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

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**Trust as a product of fragmentation of ownership**

An effective understanding of the trust concept requires an appreciation of some basic principles of property law. In property law, ownership is the greatest right that an individual has in relation to a thing. Furthermore ownership consists of a number of

17 Wilkes v Spooner [1911] 2 KB 473.
Historical foundations of the trust 49

incidents. The standard incidents of ownership consist of both benefits and burdens, or rights and duties, which are vested in the person who has ownership. The common incidents of ownership include the right to possession, the right to manage, the right to capital and the right to income. Fragmentation of ownership, as the words imply, entails the splitting up of the incidents of ownership and vesting them in more than one person. The idea of splitting ownership and vesting the constituent elements of it in different persons has been a particularly notable feature in English law and other jurisdictions founded on the common law tradition.18 There are a number of reasons for this. Unlike Roman law, English law has not treated ownership as an absolute relationship between the owner and a thing. The Roman law idea of *dominium* revolved around the fact that the owner was vested with the all the incidents of ownership, so that he alone could exercise the incidents of enjoyment and management. In English law, the development of the trust contributed to a large extent in allowing management and enjoyment functions of ownership to be distributed amongst different persons for different social and economic objectives. The trust occupies a central position in the law of fragmentation of ownership.

Another factor which has facilitated fragmentation of ownership is the nature of certain types of resources. The nature of land has allowed it to be put to different yet compatible uses at the same time by different users. Land is virtually indestructible and it can be enjoyed for a variety of purposes. An owner of land can carve smaller segments out of his full ownership and vest them in different users. Unlike land, however, goods and other personal property did not, from a historical point of view, feature significantly in matters of fragmentation.19 Goods are generally less permanent than land and more movable so as to make them susceptible to simultaneous property interests. This is a factor that goes a long way in explaining the relatively fewer property interests that exist in personal property than compared to land. However, things have long changed and ownership in personal property can in many ways be fragmented in the same way as it can in land. Indeed, in the modern law of property, fragmentation of ownership of personal property is much more common and often more important than in the case of land. The relative economic significance of land has been displaced by large trust funds. The modern law of trusts generally recognises the fact that the trust operates predominantly in a commercial setting rather than land and family.20 The idea that management and enjoyment functions can be split is very common in trusts such as pensions funds and other large investments where trustees manage assets for beneficiaries.

Historical foundations of the trust

The origins of the modern trust are deeply rooted in feudal land law which existed in the Middle Ages. The trust, formerly known as a use, was employed to encounter the problems of freedom of alienation and payment of taxes in the system of feudalism.21 The system of tenure operated in a way in which no person, apart from the Crown, was absolute owner of land. Instead the ownership of land was fragmented vertically so that the King granted land to powerful lords who could in return grant further segments of land to tenants. A tenant, of course, could grant certain land vested in him to other tenants. If he did this, he had a dual role to play in connection with the land, for he would

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not only be a overlord to his tenant, but he himself would also be a tenant accountable to a overlord higher up in the feudal ladder. Within this feudal system of tenure, the death of a tenant entitled the heir of the tenant to take possession or seisin of the land, but not without first paying feudal dues to the overlord. The employment of the use allowed land to be transferred to trustees\(^\text{22}\) during the lifetime of the tenant upon use of the tenant and after his death to members of his family, which could include the heir. The advantage of this arrangement lay in the fact that on the death of the tenant, the trustees would simply hold the land for the persons entitled after the tenant. Since there was no acquisition on the death of the tenant, the overlord had no apparent claim to dues. The land simply belonged to the trustees who at all times remained in possession. Equitable intervention, however, meant that the conscience of the trustees would bind them to the use.

In Figure 2.1, A, the owner of land, could not leave property in his will to his sons B, C and D. If A died, his land would revert back up the feudal ladder and be vested in the feudal lord.

![Figure 2.1 The medieval use](image1)

In Figure 2.2, having transferred the legal title to the trustees X, Y and Z, A along with B, C and D could enforce the obligation in the court of equity, compelling the trustees to recognise their interest in the land. Should A die, the land would still belong to A’s sons, albeit in equity, but they could compel the trustees to transfer it to them. In this way, A could achieve what he could not achieve at common law, that is, to leave his property to his sons after his death.

![Figure 2.2](image2)

The second advantage of the trust lay in the fact that it permitted greater freedom to the tenant in devising his property to persons other than just the heir. The common law

\(^{22}\) This basically involved delivery of possession in the presence of witnesses followed by ceremonial acts; see, Thorne, ‘Livery of Seisin’ (1938) 52 LQR at 345.
was strict in requiring land be vested in the heir of the tenant. Where the tenant died without an heir, the overlord became entitled to the land by way of escheat. Transfer to trustees, however, allowed land be enjoyed by those designated in the terms of the use rather than on the strict principles of the common law. In recognition of the potential scope of the use in undermining the system of feudal dues and the consequential emptying of the Crown pocket, the Statute of Uses 1535 was introduced which had the effect of undermining certain uses. The basic aim of the legislation was to deny the beneficiary equitable rights in the land. Rather, where the use was employed, the intended beneficiary acquired a legal title to the land and was thus subject to feudal dues in the event of the death of the tenant. In 1540 the Statute of Wills was also passed in recognition that the landowning aristocracy rejected the strict common law rule requiring land to be acquired by the heir. The statute permitted greater freedom in the disposition of property after the death of the tenant; however, such dispositions would be subject to the same feudal taxes that existed before the statute.

Trusts and law reform

Although the Statue of Uses 1535 did not completely extinguish the use concept, it cannot be overstated that the use played a fundamental role in reforming law in medieval England. The undermining of the feudal system, which was out of touch with the needs of landowning citizens, and the recognition of the need for free alienation of land could not have been achieved without the use. Uses continued to be allowed in cases where they involved the imposition of active duties on the trustees. Where, for example, a tenant put land upon use when he was absent from the land, the trustee's role was essential in collecting rents and paying debts due on the land. In this case the use was entirely genuine and not designed to avoid feudal dues. It was this type of use that paved the way for the development of the modern trust. Furthermore, uses employed in connection with leasehold land did not come within the ambit of the Statue of Uses.

The role of trust in paving the way for law reform was not just seen in the context of feudalism. In the context of married women, it brought about legislation recognising that fact that married women could own property in their own right. Before the Married Women’s Property Act 1882, a wife could enjoy separate property in a number of ways. Firstly, equity recognised that a wife could enjoy a separate estate under a trust created in her favour. Providing that there was good reason for the creation of the trust – as for example, where her husband was a wastrel – the Court of Chancery would enforce the wife’s separate estate in equity. Secondly, marriage settlements, which were essentially a contract between husband and wife recognised and enforced in equity, allowed the wife to claim property as hers which she had acquired after marriage and which trustees of the marriage settlement held for her.

In more recent times, the trust has been a primary vehicle in determining the rights of non-marital cohabitees in circumstances where there has been no statutory framework

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25 The idea that the trust, in the course of its history, provided the means for law reform is argued by A.W. Scott, ‘The Trust as an Instrument of Law Reform’ (1922) 31 Yale LJ 457.
26 Married Women’s Property Act 1882.
to determine the rights of such parties. In the context of married couples there is a fairly well defined statutory framework governing the rights of such couples on separation.\textsuperscript{28} Starting predominantly in the 1970s, implied trusts became important in determining the beneficial entitlements to property where the legal title was taken in the name of one cohabitee only but the other had contributed to the purchase or was otherwise promised an interest in the land.\textsuperscript{29} The intervention of trusts in this context highlighted the problem facing non-married couples and prompted a Law Commission inquiry, resulting in a report published in 2006 calling for law reform by legislation.\textsuperscript{30} More recently the Law Commission revisited this area of the law in 2007 and this time opted for a statutory regime which would address the problem of shared ownership.\textsuperscript{31}

These examples of the role of trusts in bringing about law reform are quite unique and demonstrate the versatility of the trust in engineering the condition for reform. On a much broader note, they also illustrate the ability of equity to deal with new social and economic problems which would remain unresolved because of the rigidity of the common law. The matter is neatly explained by one commentator who argues that trusts are the primary path for statutory law reform.

It was chiefly by means of uses and trusts that the feudal system was undermined in England, that the law of conveyancing was revolutionized, that the economic position of married women was ameliorated, that family settlements have been effected, whereby daughter and younger sons of landed proprietors have been enabled modestly to participate in the family wealth, that unincorporated associations have found a measure of protection, that business enterprises of many kinds have been enabled to accomplish their purposes, that great sums of money have been devoted to charitable enterprises; any by employing the analogy of a trust, by the intervention of the so called constructive trust, the courts have been enabled to give relief against all sorts of fraudulent schemes whereby scoundrels have sought to enrich themselves at the expense of other persons. Many of these reforms in the English law would doubtless have been brought about by other means; but the fact remains that it was the trust device which actually was chiefly instrumental in bringing them to pass.


**Classification of trusts**

**Express trusts**

The modern trust can be used in a wide variety of contexts to achieve different social and economic objectives. The modern trust can take a variety of forms depending on the context in which it is employed. Traditional classification of trusts has distinguished between express and imputed trusts and bare and active trusts. Express trusts are those trusts created by a deliberate act of a person called a settlor, or in the case of a trust created in a will by a testator. Express trusts can be subdivided into private and public or charitable trusts. A private trust is one that seeks to provide for private persons such as

\textsuperscript{28} See Part II Matrimonial Causes Act 1973.
\textsuperscript{29} Implied trusts in the context of family property are examined in more detail in Chapters 10 and 11.
\textsuperscript{30} Law Com. No. 307, *The Financial Consequences of Relationship Breakdown*.
Classification of trusts

members of family, friends or other class of beneficiaries closely connected with the settlor. For example, a father of a child may transfer £2000 on trust to trustees to hold for his child until the child attains the age of 21 years. However, social behaviour dictates that a person may wish to provide for persons who are in need in terms of poverty or education. Where provision is made for purposes that are generally beneficial to the community, such provisions take effect behind a public or charitable trust. Given the importance of charitable trusts in terms of the purposes that they seek to benefit and the monies involved, these types of trust are controlled and enforced by the Attorney General and Charity Commissioners.32

**Fixed and discretionary trusts**

Express trusts can be further divided into fixed and discretionary trusts. A fixed trust is one where the beneficial interest of the beneficiaries is fixed. For example, a settlor may transfer £20,000 on trust for his three children equally. In such a case, the trust is fixed; the beneficiaries are entitled to one-third of the money and the trustees have no discretion in the manner in which the money is distributed to the children. In contrast, a discretionary trust is one where the trustees are given a discretion in the manner in which the trust property is distributed. The trust may be in favour of the children of the settlor or it may be created in favour of a class of persons: for example, a trust for the benefit of employees of a company at the discretion of the trustee. In such a trust, the trustees are under a duty to distribute; however, how they distribute and to which of the beneficiaries is left to their discretion. A discretionary trust is very similar to the concept of a power of appointment, which is discussed in the next chapter.

**Bare and active trusts**

The distinction between bare and active trusts relates to the duties which are imposed upon the trustee.33 Where the trustee has only minimal duties, for example he merely holds the trust property for the beneficiary, the trust is said to be a bare trust. The beneficiaries have paramount control over the trust property which is in the hands of the trustee. An active trust, however, is one where the trustee is under a duty to manage the trust property for the benefit of the beneficiaries. In an active trust the trustee does not merely hold the legal title: instead he is under a duty to manage the trust property in the best interests of the beneficiaries. Thus, if the trust consists of a fund, the trustee must invest the trust fund. The trustee owes fiduciary duties to the beneficiaries and is accountable for failure to manage the trust property effectively.

**Protective trusts**

**APPLYING THE LAW**

Simon wishes to create a trust of his cottage and £300,000 for his son Jacob who is 21 years of age. Simon is aware that Jacob is a spendthrift and generally irresponsible with money. He wishes to know how he can protect the trust money from being wasted by Jacob.

33 See P. Mathews, ‘All About Bare Trusts’ (2005) PCB at 266.
The beginning of this chapter explored the case of *Hambro and Others v Duke of Marlborough*[^34] where the issue before the High Court was whether the 11th Duke of Marlborough and the trustees of the Blenheim Estates could change the nature of the Marquis of Blandford’s interest in the Estates. The principal reason for this was that the Marquis had shown himself to be an irresponsible individual who was likely to harm the property subject to the settlement. The case highlights an interesting dilemma for a person creating a trust. What happens, for example, where a settlor wishes to create a trust, let’s say for his son, but knows that his son is financially irresponsible? Once the trust is created, there is nothing stopping the son from using his interest in the trust property to raise money by way of mortgage of his beneficial interest. Furthermore, what happens should the son become bankrupt? In principal, the bankruptcy of the son will entitle his trustees in bankruptcy to lay hands on the trust property in order to meet the son’s debts.

One way around the problems of providing for an irresponsible beneficiary is to employ a protective trust. The basic idea behind a protective trust is that a settlor, instead of conferring an absolute interest to the trust property, confers upon a beneficiary a determinable life interest only, with a gift over to others. The types of events which determine the interest of the protective beneficiary include his bankruptcy or other attempted alienation of the trust property. Where the determining event takes place, the effect is that the life interest is forfeited and the gift over takes effect. The most typical type of gift over is a direction to the trustees to hold the trust property upon a discretionary trust for members of the original beneficiary or for some other class of persons. Protective trusts can now be created by incorporating the provisions of s. 33 of the Trustee Act 1925 which provide shorthand means by which such trusts can be incorporated into a trust instrument.

Returning to the facts of the decision in *Hambro and Others v Duke of Marlborough*,[^35] the High Court held that a protective trust could be set up for the Marquis of Blandford who would have a right to receive the income from the property; however, the land would be held for the original settlement. The facts of the case actually involved a variation of the interest of the Marquis of Blandford and these matters are analysed in depth in Chapter 19.

### Secret trusts

Secret trusts have played an important role in equity. Historically, such trusts were employed to provide for illegitimate children and a mistress. To name such beneficiaries in the will would, of course, be the subject of much unwanted publicity. In more recent times, secret trusts have been employed by a testator in circumstances where he wants to make a will but is still yet undecided as to the direction of his estate after his decease. By making a will and leaving property to a secret trustee, the testator can reserve to himself the right to make future unwitnessed dispositions of his property by merely naming a trustee and then supplying the objects of the trust closer to his death. Seen in this way, a testator can bypass the formal requirements of s. 9 of the Wills Act 1837.

In order to understand the operation of a secret trust it is best to take the following example which is explored in more detail in Chapter 7. Peter is married and has three children. He wishes to make a will leaving his property to his wife and children in equal shares. However, he also wishes to leave a sum of £60,000 to his secretary Patsy whom

[^34]: [1994] 3 All ER 332.
[^35]: [1994] 3 All ER 332.
he has been very fond of for several years. He does not, however, want anyone to know that Patsy has received a sum of £60,000 after his death. The dilemma he faces is that if he names Patsy in the will then this will become public knowledge. One way around this is for Peter to leave the sum of money absolutely to his solicitor in his will; however, during his lifetime he secures his solicitor’s agreement that he will hand the money over to Patsy after Peter’s death. In this way Peter is said to have created a secret trust. Secret because, on the face of the will, Peter’s solicitor is deemed to have been made an absolute gift; however, beneath the surface Peter is really holding the money for Patsy on trust. The only person who knows of the existence of the trust is Peter’s solicitor and possibly Patsy.

The principal concern over the enforcement of secret trusts is that they ‘fly in the face’ of the Wills Act 1837. In other words, the enforcement of a secret trust goes against the testamentary formalities in s. 9 of the Wills Act 1937, which requires that all bequests taking effect after the death of an individual must be put in a will which is in writing, signed and witnessed. The problem with a secret trust is that the secret beneficiary, who after all is receiving property from an individual after his death, is not named in the will. The secret trustee is named in the will and he or she should take the property absolutely. However, to give the property to the secret trustee, for example Peter’s solicitor in the above example, would allow him to benefit from Peter’s property when that was not Peter’s intention. Indeed, for the solicitor to argue that the property belongs to him and not Patsy would amount to a fraud on his part. Historically, secret trusts were enforced to prevent the fraudulent conduct of the secret trustee; however, as will be explained in more detail in Chapter 7, the modern justification for secret trusts revolves around a principle which holds that they are indeed a species of *inter vivos* trusts and not in conflict with the Wills Act 1837.

**Implied trusts**

Trusts are not always created by a deliberate act on the part of a person; instead the law in certain circumstances may impute a trust. In other words, title to property may become fragmented by trusts which are imputed or implied by law. Implied trusts can take one of two forms: they can be either resulting trusts or constructive trusts. The fundamental distinction between resulting and constructive trusts lies in the fact that resulting trusts are implied by law whereas constructive trusts are imposed by law. Mention must also be made here to trusts which are imposed by statute; although they are often described as forms of imputed trusts, they stand as a freestanding category. They are imposed by statute in certain circumstances: for example, whenever land becomes co-owned, a statutory trust in the form of a trust is imposed by statute. The statutory trust of land imposed by the Trusts of Land and Appointment of Trustees Act 1996 governs the right and duties of both trustees and beneficiaries. In addition, it provides the mechanisms by which disputes relating to co-owned land are resolved.

Resulting trusts are said to be implied by law. Unlike express trusts, they are not founded on the express intentions of the person creating the trust. The House of Lords in *Westdeutsche v Islington London Borough Council* redefined the basis upon which equity implies resulting trusts. In the case, Lord Browne-Wilkinson explained that

under existing law a resulting trust arises in two sets of circumstances: (a) where A makes a voluntary payment to B or pays (wholly or partly) for the purchase of property which is

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36 Trusts of Land and Appointment of Trustees Act 1996, s. 1.

vested either in B alone or in joint names of A and B, there is a presumption that A did not intend to make a gift to B; the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions . . . (b) where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest. Both types of trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties.38

Prior to Lord Browne-Wilkinson’s analysis, traditional trust classification had categorised circumstance (a) as a situation where the implied resulting trust is referred to as a presumed resulting trust. Circumstance (b) is a situation where the implied resulting trust is referred to as an automatic resulting trust. Lord Browne-Wilkinson, however, does not distinguish between presumed and automatic resulting trusts; instead, he argues that circumstances (a) and (b) are simply examples of trusts giving effect to the common and presumed intention of the parties.39 Although resulting trusts are divided into two categories of presumed and automatic, the underlying theme in both trusts is the same. At the heart of the matter is the fact that a person who does not dispose of his property effectively, that is through gift or bargain, that undisposed property remains his as it does not belong to anyone else. It is a fundamental rule of property law that rights in things should not be simply abandoned but must belong to a person.

The basis of a presumed resulting trust lies in the presumed intention of a person transferring property. In other words, in certain types of property transfers, equity presumes that property transferred by a person is intended to be subject to a trust rather than, for example, to be given outright. The most common example of a situation which may give rise to a resulting trust is where A purchases property and has it conveyed in the name of B. Where A has provided all the purchase money, the presumption is that B holds the legal title on resulting trust for A.40 It is important to stress that this is only a presumption which, like any other presumption, can be rebutted by evidence suggesting that the transfer in the name of B was intended to take effect as a gift. The basis upon which equity makes a presumption of a resulting trust is that ‘equity assumes bargains and not gifts’.41 Furthermore, the underlying rationale seems to be that a person does not, in the absence of clear evidence to the contrary, voluntarily give away money or other property to another. An automatic resulting trust arises where property is transferred upon trust to another; however, for some reason or other, the beneficial interest in the property remains unexhausted. The most typical situation where this might happen is when A transfers property on trust, but for some reason does not identify who the beneficiary

39 [1996] AC 699. This has, however, been a source of controversy since it departs from the traditional classification of Meggery J in White v Vandervell’s Trustees Ltd ([Re Vandervell’s Trust No. 2]) [1974] Ch. 269 where automatic and presumed resulting trusts were clearly distinguished as being different. For further discussion, see G. Moffat, Trust Law: Text and Materials 4th edn (2005) at p. 184, and also R. Pearce and J. Stevens, The Law of Trusts and Equitable Obligations 3rd edn (2006) at p. 263. The source of the controversy relates to the fact that automatic resulting trusts are not necessarily based on the presumed or common intentions of the parties in circumstances which give rise to the trust. Thus, where a person seeks to divest himself of his beneficial interest in property, there is no real common or presumed intention that property should result back to his estate. If the beneficial interest remains unexhausted, it results back to the transferor as an automatic consequence, rather than on the implied intentions of the transferor.
40 See, for example, Dyer v Dyer (1788) 2 Cox Eq. Cas. 92 at p. 93, 30 ER 42 at 43 and Burns v Burns [1984] Ch. 317.
of the trust is. The only logical result here is that the property results back to the person creating the trust. The only intention, if there is an intention, is that it is the transferor’s property and not anyone else’s, such as the trustee. The basis of an automatic resulting trust lies in the maxim that ‘equity abhors a beneficial vacuum’. Just like the common law, which holds that property rights should be vested in persons rather than just abandoned, equity requires that proprietary rights be vested in persons.

The juridical basis of a resulting trust is explored in more detail in Chapter 10, however, for now it is sufficient to say that many theories have been advanced for the reasons as to why a resulting trust is imposed. Furthermore, despite the reformulation of resulting trusts by Lord Browne-Wilkinson in Westdeutsche v Islington London Borough Council, many commentators on the law of trusts continue to distinguish between presumed and automatic resulting trusts. One of the reasons for the continued distinction lies in the development of the case law, which prior to Westdeutsche v Islington London Borough Council developed a clear and neat boundary between presumed and automatic resulting trusts. It will be observed in Chapter 10, that whilst the distinction between presumed and automatic resulting trusts helps to explain the existing law, the distinction is somewhat of limited importance today on the grounds that there is a unifying theme which explains the grounds for the imposition of a resulting trust in any given type of situation. That unifying theme is the presumed intention of the donor of property in whose favour a resulting trust is implied. The presumed intention has been analysed in the form of an absence of intention on the part of a donor to part with his beneficial interest in the given circumstances which give rise to the imposition of the resulting trust. In the Privy Council in Air Jamaica v Charlton Lord Millett explained that

[I]ke a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does – since it responds to any absence of intention on his part to pass a beneficial interest to the recipient. It may arise even where the transferor positively wished to part the beneficial interest, as in Vandervell v IRC. In that case the retention of a beneficial interest by the transferor destroyed the effectiveness of a tax avoidance scheme which the transferor was trying to implement. The House of Lords affirmed the principle that a resulting trust is not defeated by evidence that the transferor intended to part with the beneficial interest if he has not in fact succeeded in doing so.

Whereas resulting trusts are implied by law, constructive trusts are said to be imposed by law. Constructive trusts are not necessarily based in the presumed or common intention of parties in a property transaction. Unlike in the case of a resulting trust, finding a coherent and unifying definition of a constructive trust is almost an impossible task. In the course of its history the constructive trust has operated in so many different contexts that it is impossible to find a universal definition which unifies the circumstances in which a constructive trust is imposed. At the heart of the imposition of a constructive

42 See, for example, White v Re Vandervell’s Trustees Ltd (Vandervell’s Trust No. 2) [1974] Ch. 269.
45 [1999] 1 WLR 1399 at 1412.
46 Common intention may, however, be important in some contexts: for example, constructive trusts which are imposed in the co-ownership of land; see Lloyds Bank v Rosset [1991] 1 AC 107.
trust is the unconscionability of a defendant in respect of property which is in his hands. Whilst this goes some way towards explaining the grounds for the imposition of a constructive trust, what constitutes unconscionability, as explained in Chapter 1, can only be understood by investigating the context in which the trust is being imposed.

A further complexity in the search for a universal definition of a resulting trust lies in the fact that not all common law based jurisdictions have analysed the constructive trust in the same manner. The constructive trust has been analysed in two quite different ways. In some countries, and quite clearly in England, the constructive trust has been analysed as an ‘institutional’ constructive trust, whilst in some countries, most notably Canada, the constructive trust has been analysed as a ‘remedial’ constructive trust. The distinction between an institutional and remedial constructive trust is far-reaching. The former is imposed as a result of certain facts which make it unconscionable for one person who has legal title to property to deny the beneficial ownership therein in another. It is the facts which give rise to the constructive trust. On other hand, a remedial trust is not necessarily based on unconscionable conduct of a person who acquires the legal title to property: rather the trust is imposed to reverse an unjust enrichment. The constructive trust operates as a remedy rather than recognising pre-existing property rights. The remedial constructive trust is imposed by the court in order to effect a restitution of property. The remedial constructive trust is a much more powerful property concept than an institutional constructive trust. It does not recognise pre-existing property rights; however, once imposed by the courts, it has the effect of substantially altering pre-existing property rights. It is for this reason and others that the remedial constructive trust has yet to find a safe home in English law.

English law takes the view that a constructive trust should only be imposed in the occurrence of certain events which make it unconscionable for the legal owner of property to deny the beneficial interest therein to another. In *Westdeutsche v Islington London Borough Council* Lord Browne-Wilkinson, in an attempt to provide some generalisation about the constructive trust, commented that such a trust is imposed on a person by ‘reason of his unconscionable conduct.’ His Lordship went on to explain that the constructive trust ‘arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is to merely declare that such a trust has arisen in the past.’ Chapter 13 of this book explores the various social and commercial contexts in which constructive trusts operate; for the time being, some examples can be given where the constructive trust is imposed by reason of the unconscionable conduct of a person. Historically, constructive trusts were imposed on persons standing in a fiduciary relationship who had made profits as a result of the fiduciary relationship. The purpose of the constructive trust was to prevent the fiduciary taking the profit which he had made as a result of an abuse of his position. For example, in the seminal case of *Keech v Sandford* a trustee was holding a lease on trust for an infant beneficiary; when

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49 As, for example, in the case of insolvency or bankruptcy of a person. Where such a constructive trust is imposed, it can grant equitable rights of property in some so as to gain priority in insolvency proceedings, whilst at the same time denying others right to the same property.
52 Ibid. at 705.
53 Ibid. at 714.
55 (1726) Sel. Cas. Ch. 61.
the lease expired, the trustee renewed the lease for his own benefit. Despite the fact that the landlord was not willing to renew the lease for the benefit of the infant, the court held that the trustee held the lease on constructive trust for the infant.56

In the past fifty years or so, the constructive trust has played an important role in determining the property rights of cohabitees of land. In doing so, the constructive trust has often become the only vehicle by which certain types of cohabiting individuals have been able to lay claim to ownership of cohabited land in circumstances where the common law has been unable to afford any legal rights in the land to such individuals. The primary reason for the resort to the constructive trust, and the resulting trust, has been the social and economic changes that took place after a period preceding the middle of the twentieth century in relation to home ownership. Before the Second World War, the English courts did not face the same degree of co-ownership disputes that it did after the War, particularly in the period starting the late 1960s. With the incidence of divorce being low and title to land taken in the husband’s name, there was very little by way of ownership dispute of the family home. The social and economic pattern of home ownership, however, changed significantly in the 1970s.57 The incidence of divorce increased, thereby giving rise to ownership disputes of the house once occupied by husband and wife. As well as marital cohabitation, a significant trend which continues today, was the increased non-marital cohabitation. In the context of non-marital cohabitation, where the parties are unable to take advantage of the Matrimonial Causes Act 1973,58 the recourse to the equitable principles and doctrine of resulting and constructive trust became ever more pressing. A further development which saw a rise in the application of constructive trusts in land was the availability of mortgage finance. Typically, a husband may have taken out a mortgage to purchase the family home or may have remortgaged the family home in order to pick up further monies on the land. In such cases, where the husband defaulted on payment of the mortgage money, the bank sought to vacate possession of the land. However, in some cases the wife asserted that a beneficial interest in the land was binding on the bank on the grounds of a constructive trust.

Whilst title to co-owned land may become fragmented by the express declarations of the co-owners of land, it often happens in practice that title to land may be vested in one person whilst the interests of other cohabitees may be silent on the legal title. There may be a number of reasons why the interests of other cohabitees of land may be undisclosed

56 Although the constructive trust is generally imposed where a person has acted unconscionably, in the case of profits made by a fiduciary, it may not be possible to point to any unconscionable behaviour despite the imposition of the constructive trust. This stems from the strict principle of equity that no fiduciary is allowed to make a profit irrespective of honesty and good faith; see Bray v Ford [1896] AC 44 at 51. The policy of equity here is to take a deterrence approach rather than examine each case on its facts, since it would be a very difficult from an evidential point of view to question the fiduciary’s motives and whether he acted in good faith. In Guinness plc v Saunders [1990] 2 AC 663 the House of Lords held that a director of company who had received an unauthorised payment of some £5.2 million was liable to account for it to the company. This liability to account was imposed irrespective of the director’s honesty and good faith; the director had allowed his duty and his interest to conflict and this was sufficient to impose the constructive trust. It is precisely these varying contexts and the different policy considerations within them that have made it difficult to provide a comprehensive definition of a constructive trust. These matters are explored in more detail in Chapter 14.


58 This will be discussed in Chapter 11 under the context of purchase price resulting trusts.
on the legal title. Where it is a husband and wife, it may just so happen that the husband, who is the sole provider, takes both the legal title and mortgage on his own name. Where it is an unmarried couple, it may happen that the land may have been purchased before the relationship began, but then a partner moves in with the legal title-holder and makes some contribution towards the land, either directly through payment of the purchase price or indirectly by looking after the house. Often disputes which occur much later on after the purchase of land, or the time at which cohabitation took place, are extremely difficult for the courts to resolve. The main questions are: on what principles do such cohabitees acquire an interest in land and, how is such interest to be quantified? The constructive trust has been used in this context to allow cohabitees to acquire interests in land when they have acted to their detriment in reliance of a common intention that they will acquire an interest in the property. Whilst in the case of marital breakdown, the Matrimonial Causes Act 1973 affords the court with a power to adjust property rights on divorce, no such power exists in relation to non-marital cohabitees. In the context of non-marital cohabitation, ownership disputes can only be resolved by applying the technical and often inflexible rules of resulting and constructive trusts.

Finally, some of the other contexts in which the constructive trust been imposed include the imposition of the trust in order to prevent a person benefiting from his crime; to find liability in the case where a stranger intermeddles with a trust either through dishonestly assisting in a breach of trust or knowingly receiving trust property; to prevent a landowner from denying a claimant an interest in land where it would inequitable to do so, and where a vendor enters into a specifically enforceable contract for the sale of land.

Although the institutional constructive trust is firmly accepted as a trust category in English law, the English courts have generally not warmed to the remedial trust. There are many reasons for this reluctance, not least the fact that it represents a very broad proposition of law. The idea that it is imposed to reverse an unjust enrichment irrespective of the cause and nature of that enrichment has traditionally been regarded as being too vague a proposition. Lord Denning attempted to introduce something along the lines of a remedial constructive trust in the 1970s and it is his statement in one case which illustrates the broad nature of such a trust. In *Hussey v Palmer* Lord Denning commented that a constructive trust ‘is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.’ A further obstacle in the recognition of a remedial constructive trust in English law relates to the uncertainty as to the cause of action which gives rise to its

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61 A similar power does, however, exist for same-sex partnerships registered under the Civil Partnership Act 2004.
63 See *Binions v Evans* [1972] Ch. 359, see post Chapter 11.
64 *Lsyaght v Edwards* (1876) 2 Ch. D 499, the equitable maxim, which holds that equity sees that as done which ought to be done, treats the purchaser of land as equitable owner as soon as the contract is entered into. The remedy of specific performance makes it inequitable for the vendor to deny the transfer of the land to the purchaser.
65 [1972] 1 WLR 1286.
66 Ibid. at 1289.
The contemporary significance of trusts

imposition. An institutional constructive trust, which is imposed to reverse the unconscionable conduct of a person, requires a breach of a recognised legal duty, for example, a breach of fiduciary duty. Until recently it has been unclear in the minds of English lawyers as to what is the basis of imposing a remedial constructive trust. The idea that it is a remedy without a cause of action troubles the legal mind and introduces uncertainty into law. It is submitted that these concerns and obstacles surrounding the remedial trust in English law may no longer be valid in the twenty-first century. English law has now recognised that there exists an independent law of restitution founded on the principle of unjust enrichment. Where a defendant has been unjustly enriched at the expense of the plaintiff, a remedial constructive trust may be one of the remedies to effect restitution. It may well be very soon that the remedial constructive trusts finds a home in English law as a means by which restitution can be made in cases of unjust enrichment. In *Westdeutsche v Islington London Borough Council* Lord Browne-Wilkinson suggested that the remedial constructive trust, if introduced into English law, would provide a suitable restitutionary remedy.

The contemporary significance of trusts

This chapter has said a lot about the historical development of the trust and its historical importance. What is equally important to stress here is that the trust has continued to play an important role throughout time and continues to do so in the contemporary world. The versatility of the trust concept has allowed both express and implied trusts to be used in a wide number of circumstances to achieve different legal, social and economic objectives. Given the flexibility of the modern trust to operate in a wide number of circumstances, mention can be made here of a few of those circumstances. It has already been seen at the outset of this chapter that, in modern practice, express trusts can be employed in family as well as commercial settings. In the context of the family, a parent may wish to provide a future gift for the child. Money can be transferred to trustees to hold for the child until he or she attains a specified age or meets any other condition specified in the instrument purporting to create the trust. Another example is where a parent wishes to provide for his children in the future in light of circumstances not yet arisen. Money can be given to trustees on trust, either at their discretion, or subject to other factors, and to be payable to children who may be in more need of money than others. Also within the family context, express trusts can be used as a means by which the incidence of tax can be reduced. Indeed, in the modern law, issues of trusts and taxation are intertwined. Liability to income tax, capital gains tax and inheritance tax can be reduced by the careful imposition of trusts to family wealth. It is inevitable that a person with a high income will pay a much higher rate of income tax; however, if some of that income can be distributed to other members of the family who have only a modest income or no income at all, substantial tax savings can be made. Another example

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67 The words ‘legal duty’ used here in the wider sense to include both the rules of the common law and equity.

68 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 where the principle of unjust enrichment was recognised as the foundation of claims in restitution. More recently see the landmark decision of the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.


of a trust in the family context is where property is given to an infant beneficiary. An infant beneficiary is incapable of managing property on its own behalf. A trustee may be appointed to deal with the property until the beneficiary attains majority.72

Although express trusts historically featured dominantly in family matters where property was preserved for member of the family, in modern times the express trust plays an important role in financial and commercial matters. Rather than just providing for family members in the form of a future gift or a settlement of property, a person can make an investment of money through the use of a unit trust. A unit trust is a form of investment which allows the investor to spread the risk over a number of investments. Basically, a managing company who acts as a trustee invests money belonging to investors in a portfolio of securities such as shares. A unit trust is a particularly useful form of investment for a small investor. The reason for this is that, on his own, it is impossible to obtain the same degree of risk minimisation that is offered by pooling in funds with other investors and buying a unit of investment in the larger pool managed by the unit trust company. Along similar lines as the unit trust, there is the pension trust. Private pension schemes have become very popular in recent times as a means for providing financial provision on retirement. The basic structure of such schemes is that they operate under a trust alongside the law of contract. The trust nature of the scheme revolves around the fact that trustees invest money which is contributed by both the employer and employee during the course of an employee’s occupation. The contractual nature of the scheme revolves around the fact that the employee’s rights are founded upon the contract creating the entitlement to pension. It is the contract that guarantees the payment of retirement on final salary rather than the contributions made. Given the importance of pensions to those who contribute to a pension scheme and the fact that these schemes essentially lie in the control of private individuals, there is much scope for abuse of such schemes. Such abuse was apparent in the Maxwell saga in the early 1990s when pension monies, which were essentially in the control of Maxwell companies, were wrongfully appropriated and dissipated. In modern times such pensions are governed by the law of trusts alongside the Pensions Act 1995, which seeks to provide regulation of such schemes from abuse.

Imputed trusts are as important in property matters as express trusts. Imputed trusts play an important role in both commercial and family matters. In the context of the family, imputed trusts have become a very important means by which disputes relating to the ownership of land can be resolved.73 So far mention has been made to implied trusts in the form of implied and constructive trusts; however, a form of imputed trust is one that is imposed by statute. In the context of the co-ownership of land, the Trusts of Land and Appointment of Trustees Act 1996 imposes a trust of land in every case of the co-ownership of land. Such a trust plays an important function in spelling out the rights and duties of the co-owners of land and how disputes relating to co-ownership of land can be resolved. However, where families fail to express their intentions as to the ownership of family property such as land in a formal way, imputed trusts are the only means by which such intentions can be implied. Furthermore, where the relationship between the parties is one not founded on marriage, unlike in divorce proceedings, property law is the only way that such disputes can be resolved. Thus, as we have already seen above,

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72 In the case of land, a conveyance to a minor has the automatic effect that the land is held upon trust by the transferor for the minor; see s. 2(6) Trusts of Land and Appointment of Trustees Act 1996 which applies to conveyances of land after 1996.

where a cohabitee of land has no legal title to land, but contributes directly to the purchase of the price of the land, such cohabitee may acquire an interest under a resulting trust. The role of implied trusts in the family context and the family home are explored in more detail later in Chapters 11 and 13 of this book.

In the context of commercial matters, imputed trusts play an important role in effecting restitution of profits and money gains made by abuse of fiduciary obligations by fiduciaries. An example is the imposition of the constructive trust on a person who makes a profit by abuse of his fiduciary obligations owned to others. For example, in *A-G for Hong Kong v Reid*74 Reid, who was the Director of Public Prosecutions in Hong Kong, had accepted bribes in the course of his employment. The bribe money was the used to purchase freehold properties in New Zealand. The Privy Council held that the freehold properties, which were purchased by Reid, were held by him on constructive trust for the Crown. The bribes had been made by the abuse of his fiduciary relationship with the Crown.

Some key players and concepts in the trust relationship

This chapter has explored a number of key aspects of the trust relationship and has introduced a number of key concepts which will be employed throughout this book. Therefore, it is a useful exercise at this stage to take stock of some of the key players and concepts in the trust relationship.

<table>
<thead>
<tr>
<th>Key concept/player</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Trust</td>
<td>Equitable obligation binding upon a trustee to hold property for a beneficiary.</td>
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<tr>
<td>Administrator</td>
<td>An individual who administers an estate of a person when there is no will.</td>
</tr>
<tr>
<td>Beneficiary</td>
<td>The person entitled to the equitable interest in the trust property.</td>
</tr>
<tr>
<td>Bequest</td>
<td>A gift which is received under a will.</td>
</tr>
<tr>
<td>Breach of trust</td>
<td>A failure to comply with a duty or an improper exercise of a power by trustees either conferred by the trust instrument or trust law in general.</td>
</tr>
<tr>
<td>Charitable trust</td>
<td>A trust which is for a charitable purpose and for the benefit of the public at large.</td>
</tr>
<tr>
<td>Constrictive trust</td>
<td>A trust implied by law by virtue of the unconscionable conduct of the constructive trustee with respect to property in his hands.</td>
</tr>
<tr>
<td>Discretionary trust</td>
<td>A trust where the interest of the beneficiaries is at the discretion of the trustees.</td>
</tr>
<tr>
<td>Equitable interest</td>
<td>The interest of a beneficiary in the trust property.</td>
</tr>
<tr>
<td>Executor</td>
<td>Appointed under a will to administer the estate of the testator.</td>
</tr>
<tr>
<td>Fixed trust</td>
<td>A trust where the interests of the beneficiaries are fixed from the start, e.g. £1000 equally to A, B, and C.</td>
</tr>
<tr>
<td>Inter-vivos</td>
<td>An act done during the lifetime of a settlor or testator/testatrix.</td>
</tr>
<tr>
<td>Purpose trust</td>
<td>A trust which is for a purpose and not for ascertainable beneficiaries. Prima facie void.</td>
</tr>
</tbody>
</table>

74 [1994] 1 All ER 1.
Chapter 2 The trust concept

<table>
<thead>
<tr>
<th>Key concept/player</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restitution</td>
<td>The process by which the law reverses an unjust enrichment, that is, a gain made at the expense of a claimant. Restitution is primary effected by an account for the gain or profit or by the imposition of a constructive trust on the gain.</td>
</tr>
<tr>
<td>Resulting trust</td>
<td>A trust implied by law giving effect to the imputed intentions of the person in whose favour it arises.</td>
</tr>
<tr>
<td>Secret trust</td>
<td>A trust where the identity of the beneficiary is not disclosed and one which takes effect after the testator’s death.</td>
</tr>
<tr>
<td>Settlor</td>
<td>An act which takes effect on the death of an individual and complies with s. 9 Wills Act.</td>
</tr>
<tr>
<td>Testamentary</td>
<td>Individuals (male/female) creating a trust in a will.</td>
</tr>
<tr>
<td>Testator/Testatrix</td>
<td>The process by which a beneficiary can follow his or her beneficial interest in property into the hands of third parties.</td>
</tr>
<tr>
<td>Trust instrument</td>
<td>The document creating a trust.</td>
</tr>
</tbody>
</table>

Conclusion

This chapter has explored the very nature of a trust and, in doing so, has examined a number of key features relating it. In particular, the respective positions of the trustee and beneficiaries under a trust and the nature of their interests. The chapter has examined the classification of trusts in the modern law of trust. The primary classification of trusts is between express and implied trust; however, as explained in this chapter, express and implied trusts can be further subdivided into categories. The chapter has further explored the instrumental role of trusts in achieving a number of social and economic goals and eventually contributing to law reform. It was observed that one of the main characteristics of a trust is its versatility and flexibility. It is because of this characteristic that the trust has been employed in both family and commercial settings to resolve entitlements to property. The basic feature of the trust is that it facilitates the fragmentation of ownership of property, thereby creating duality of rights in respect of the same thing. Although the legal title to the trust property is vested in the trustee, the equitable interest belongs to the beneficiary. The importance of the trust in English law cannot be underestimated and it is for this precise reason that Maitland was to comment that it is one of the greatest achievements of English lawyers.

Moot points

1. A trust is often described as a product of fragmentation of ownership. Explain exactly what aspects of ownership are fragmented when a trust is created.

2. Explain the significance of the distinction between rights in rem and rights in personam.

3. Why are equitable rights, for example, the equitable right of a beneficiary under a trust, often referred to as rights in personam?
4. In a system of registration of equitable interests in land, is it possible to say that equitable interests become more and more akin to rights in rem rather than in personam?

5. What were the reasons for the enactment of the Statute of Uses 1535?

6. Why has the trust concept been a primary vehicle for dealing with new social and economic problems? Can you give examples of where the trust has made a major impact in protecting the rights of certain individuals which would otherwise not be protected in the common law?

7. Identify the key differences between express and implied trust.

**Further reading**

Hayton, D. ‘Developing the Obligation Characteristics of the Trust’ (2001) 117 LQR. Explores the enforcement of trusts from the perspective of settlor and beneficiary.

Mathews, P. ‘All About Bare Trusts’ (2005) PCB at 266. Examines the nature of bare trusts and distinguishes such trusts from special trusts.

Panesar, S. ‘General Principles of Property Law’ (Longmans) (2001). Explores property concepts such as ownership, the nature of legal and equitable rights in addition to fragmentation of ownership.

Parkinson, P. ‘Reconceptualising the Express Trust’ [2002] 61 CLJ 65. For a discussion on the nature of an express trust. The author examines the express trust from a number of different angles, including the trust as a species of property as well as a species of obligation.


Visit [www.mylawchamber.co.uk/panesar](http://www.mylawchamber.co.uk/panesar) to access the equity and trust law glossary, weblinks and live updates, to test yourself on this chapter.

Use [Case Navigator](http://www.mylawchamber.co.uk) to read in full some of the key cases referenced in this chapter:

- A-G for Hong Kong v Reid [1994] 1 AC 324; [1994] 1 All ER 1
- Boardman v Phipps [1967] 2 AC 46
- Re Montagu’s Settlement Trusts [1987] Ch 264
- Vandervell v JRC [1967] 2 AC 291