

# Chapter 1

# Introduction to trusts

## Key points In this chapter we will be looking at:

- ◆ The historical development of equity and the Court of Chancery
- ◆ The maxims of equity
- ◆ The development of the trust and why we need trusts
- ◆ The anatomy of a trust
- ◆ The terminology of trusts
- ◆ The terminology of wills
- ◆ Different types of trust
- ◆ Trusts distinguished from other concepts
- ◆ Modern uses for trusts

## Introduction

Imagine a young man, let us call him Alec, is a member of the armed forces. He is about to embark upon an extended tour of duty in Afghanistan. There is a peace-keeping mission but the country is in a state of political turmoil and the relationship between the soldiers and civilians is volatile at best. He knows he will be gone for a long and uncertain period of time and that there is a possibility he may not return. He leaves a wife, Claudia, and two young children, Charlie and Cecile, behind him.

Concerned for the financial welfare of his young family in the event of his prolonged absence, Alec asks his brother, Brendan, to look after his affairs whilst he is gone. Brendan agrees and, in order to allow him to manage Alec's assets effectively whilst he is away, Alec transfers all of his property into Brendan's name.

Five years on, Alec returns home to find his house has been sold, his savings spent and Claudia and the children living with Claudia's mother. When he confronts his brother about the situation, Brendan simply says

'sorry' but he needed the money to pay off a gambling debt. He has no way of returning the money and property to Alec and, in the eyes of the law, Alec gave Brendan his money and property anyway: from the time Alec transferred the property into Brendan's name, Brendan became the legal owner of that property and any obligation Brendan might have towards Alec's family was a moral one at best. Legally, there is nothing Alec can do to protect his family's rights.

Clearly this situation is unjust. And it is the very situation described above that the concept of the **trust** was designed to protect. Throughout the course of this chapter we will be considering what is meant by the term 'trust' and considering how trusts work on a practical level. We will also be looking at some of the basic terminology appertaining to trusts and trust law which you will come across throughout the course of this book. And finally we will be considering some examples of the everyday uses of trusts. But first it is necessary to spend a little time giving the trust a bit of historical context.

# The development of the court of equity

In medieval times the only court was the court of the **common law**, in which the king's judges enforced the law of the realm. The common law was developed on the basis of previously set **precedent**, judges adhering to judgments made in the cases that went before them. This provided a strict body of law for the courts to follow. If the decisions of the judges were regarded as unfair, or if the rules laid down by precedent were too slow to change where change was required, the parties to the claim had the option to appeal directly to the king, 'throwing themselves upon the king's conscience', for his ultimate judgment in the matter. The king soon became inundated with applications, however, and so he began to delegate his powers to his secretarial department, under the supervision of the Lord Chancellor. The secretariat of the king, which was commonly known as 'the **Chancery**', soon began to resemble a judicial body, and by the fifteenth century the Chancery was formally recognised as having judicial power. It was at this time that it became known as the 'Court of Chancery'.

The Court of Chancery was not without its flaws, however. Unlike the court of the common law, which was administered by lawyers and guided by precedent, the Court of Chancery had at its head the chancellor, who was traditionally a member of the clergy and had no formal legal training. Neither was the chancellor guided by precedent. This naturally led to a wide disparity between the judgments of different chancellors. In contrast to the rigid and unbending application of the common law, the law of **equity**, called such because of its basis on the principles of impartiality and fairness, seemed to be almost entirely dictated by the chancellor's own personal moral code. This highly unsatisfactory state of affairs continued right up until the end of the sixteenth century, when a lawyer, Sir Thomas More, was appointed Lord Chancellor and a new precedent was set. Sir Thomas strove to provide the Court of Chancery with a more ordered, legal framework, and records of proceedings started to be kept. This in turn led to the development of a number of equitable rules, or **doctrines**, and to the formation of the **maxims of equity**. As a result, the Court of Chancery also began to base its equitable judgments on precedent, as the court of the common law did.

This new development of the laws of equity within the Court of Chancery was not without its problems, however. There were now two fully fledged but completely separate legal systems in England, each with their own courts: the common law, which dealt with strict matters of law in the common law courts, and equity, which dealt with matters of fairness, or conscience in the Court of Chancery. This lack of cohesion was a problem: as the two systems were autonomous the developing law of equity, as enforced by the Chancery, soon began to conflict with the rules of the common law, and even to rival them. Tensions broke out between the rival jurisdictions and it became clear that something needed to be done. Eventually, the matter was referred to the Attorney-General of the time, Sir Francis Bacon. Sir Francis, on the authority of King James I, held that, in the event of any conflict between the common law and equity, equity would prevail. Thus, the law of equity was held to override the common law in the event of a conflict between the two courts.

## Unification of the courts

Once equity had become a fully recognised body of law, rather than an arbitrary exercise of the king's (or chancellor's) conscience, the need for a separate court system to run

it became obsolete. In fact, the running of two entirely separate legal systems was rather unwieldy and often inconvenient, parties having to use both courts simultaneously in the resolution of a single dispute. The advent of the Judicature Acts in the 1870s changed all this. The new body of legislation swept away the previous system of separate courts and created one single Supreme Court in their stead. This meant that whilst the two systems of common law and equity still operated under very different rules they could now be administered from one single court, with a single judge (or panel of judges, as appropriate) giving judgment on both legal and equitable matters in the course of a

this fusion of the common law and equity was only administrative

single case. **Claimants** would no longer have to bring two separate actions in order to resolve issues arising under one claim. It is worth stressing that this fusion of the common law and equity was only an administrative advance in the law: it was not a melting together of the two systems. The rules of equity and the common law are still entirely separate and distinct; it is simply that they can now both be administered under the same roof. This system still forms the basis of our courts today.

## The equitable maxims

It was mentioned above that the development of the Court of Chancery into a fully-fledged legal system entailed the developments of a series of equitable maxims. These maxims of equity are, in effect, a set of guidelines or standards devised by the court of equity as an aid to deciding cases which come before them. The equitable maxims are therefore not a strict set of rules, such as those which might be used in the courts of the common law, but rather they serve as an aid or a set of ‘moral markers’ for the court in making its decisions. This means that the court is not bound to follow the maxims (although they usually will), but they can draw upon them as and when required in order to justify their decisions on something more than simply the judge’s personal moral compass.

There are quite a number of equitable maxims and you do not need to know them all by heart. However, it will certainly be useful in your study of the law of trusts to be familiar with the most commonly used of the maxims, and to understand their meanings, which are outlined below. As you will see from the various examples given in the following text, there is no shortage of evidence of the maxims in use. The examples given here are not the only examples you will find within the book, though: keep an eye out for the use of equitable maxims as you read through the rest of the text.

### Equity will not suffer a wrong without a remedy

This first equitable maxim is linked to the very origins of equity. The maxim alludes to the fact that equity was devised specifically with the intention that it should act as a supplementary, or alternative, court of justice where the common law is not able to provide a remedy. So as we shall shortly see in the case of the trust, an invention of equity, the legal owner of the property will be prevented from asserting their rights in respect of that property because they are deemed, in equity, to hold the **beneficial**, or **equitable**, **interest** in the property on trust for the beneficiary.

## He who comes to equity must come with clean hands

This is probably the best known of all the equitable maxims. The idea behind the maxim is that a person who has acted wrongly cannot then seek to rely on the court for assistance in the bringing of a claim. The most extreme and obvious example of this would be in the case of murder, as in *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 QB 147. Here a woman who had murdered her husband was denied the right to claim the payout under a life insurance policy underwritten in her favour, on the basis that she should not be allowed to profit from her crime.

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However, examples can be far more ordinary and involve only a moral, and not necessarily a legal, wrong. Perhaps the most wide-ranging example of the maxim comes in the form of the doctrine of **proprietary estoppel**. The doctrine itself is designed to prevent a legal owner of property from asserting their legal rights against a third party where it would be **unconscionable**, or unjust, for them to do so because they have misled that third party in some way, encouraging them to act to their detriment as a result. An example of this might be the situation where a claimant allows the defendant to build a house on their land but then, once the house is built, makes an application to the court to have the defendant evicted from the house on the basis that the claimant is the strict legal owner of the land. In such a situation the claimant would be viewed by the court as having ‘**unclean hands**’ and their action would fail.

The requirement of clean hands does not mean that someone of generally morally reprehensible character will be barred from using the courts of equity at all, however. The maxim will only apply if there is a genuine link between the claimant’s wrongful act and the rights they wish to enforce. A good example of this is the case of *Tinsley v. Milligan* [1994] 1 AC 340 (HL). The case concerned a couple who had bought a house together but registered it in the name of just one of them so that the other could claim to be a lodger in the house and continue to claim housing benefit. However, when the couple separated the House of Lords nevertheless allowed Miss Milligan’s claim of an interest in the house because her fraudulent behaviour had no bearing on the fact that she had contributed to the purchase of the house. It should be noted that the outcome of this case has been heavily criticised as condoning Miss Milligan’s fraudulent behaviour. For a more detailed insight into this case see Chapter 7, on resulting trusts.

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## He who seeks equity must do equity

This maxim is closely related to the maxim which states that ‘he who comes to equity must come with clean hands’. In essence, it means that, if a person wishes to make a claim in equity, they must be prepared to submit to the judgment of the court in respect of the rights of the other party to the action as well. So a person who wishes to claim the equitable remedy of **specific performance**, for example, thus forcing the defendant to complete the terms of a contract in accordance with their agreement, must also be willing to complete all of their own obligations under that same contract.

## Equity regards as done that which ought to be done

This equitable maxim is significant because it means that two parties contracting to perform certain legal actions will, in the eyes of equity, be considered to have carried out

those actions from the moment of contracting to do them, rather than when the contract is actually performed. The best example of such a situation would be in the context of a house purchase. From the moment of **exchange of contracts** (when the seller and buyer enter into a legally binding contract to sell and purchase the property) the buyer will acquire an equitable interest in the house, albeit that they do not become the legal owners until after the formal legal transfer of the house is completed. This means that if either party fails to go ahead with the sale or purchase, the injured party not only has the option of claiming **damages** at common law for the **breach of contract**, but they also have the option (albeit at the discretion of the court) of claiming the equitable remedy of specific performance, thereby forcing the defaulting party to complete the sale or purchase. This is on the basis that 'equity regards as done that which ought to be done': in this case, the completion of the sale.

## Equity follows the law

As the wording of this maxim suggests, in divining an answer to a problem in equity, the court of equity will always look to the legal position first and, where appropriate, take their lead from the common law. The best example of this might be where two people share ownership of a piece of land. In the absence of a declaration to the contrary, at law the two people will automatically own the property as **joint tenants**, meaning they both hold the property together as one 'joint owner' and have no individual shares in that property. If the two people approach the court of equity for clarification as to their beneficial, or equitable, ownership of that property, the court's starting point will be that they own the property as joint tenants in equity too. It will only be on the provision of evidence from either party that the position should be different in equity that the court will depart from the common law position.

The maxim 'equity follows the law' also serves as confirmation of the fact that equity will not allow a remedy that is contrary to law; in other words, the court of equity will not seek to override the law. The common law is very much the governing body for English law and it is only where the court of equity is met with an issue which the common law rules do not account for that equity will step in. As we have seen from the maxim 'equity will not suffer a wrong without a remedy', therefore, equity's role is to work as a supplement to the common law, and not as an alternative form of justice where the law already exists to cover a particular issue.

equity will not seek to override the law

## Equity will not permit a statute to be used as an instrument of fraud

This equitable maxim serves to prevent a person from relying on the absence of statutory provision if to do so would result in unfairness to a third party. Evidence of this maxim in practice can be seen in the chapters on resulting and constructive trusts. In Chapter 7 on resulting trusts you will see that, under section 37 of the Matrimonial Proceedings and Property Act 1970, where a spouse makes a substantial financial contribution to improve a property they will be treated as having then acquired a share in the beneficial interest of that property, regardless of whether or not they have a legal interest in it. However, the Act

only applies to married couples, and not to cohabitantes. The law of equity has therefore stepped in and provided that, under such circumstances the contributing party may be entitled to an interest in the property under a constructive trust instead. As you can see, this is also an example of equity ‘plugging the gap’ where the law makes no provision for a particular set of circumstances, as opposed to overriding the law as it already exists (‘equity follows the law’). For a more in-depth look at the law relating to constructive trusts as it relates to the rights of cohabitantes, go to Chapter 8.

## Equity looks to substance not form

This maxim describes an important feature of the court of equity, which is that it is able to look beyond the external appearance of any state of affairs that exists between the parties and make its judgment based on the position of the parties as they genuinely intended it. In other words, it will not simply adhere to the strict legal position as might be dictated by the common law, where it is clear from the facts of the case that the real position is actually quite different from the way it is portrayed to the outside world. The most famous example of this comes from the case of *Street v. Mountford* [1985] 1 AC 809, which concerned a licence to occupy land. The written agreement between the parties was given the heading of a ‘licence’, because the landlord wanted to avoid the tenant acquiring a right to remain in the property in accordance with the statutory provisions applicable to residential leases at that time. However, the court saw through the pretence and held that, regardless of what the parties had called the agreement, it was nevertheless a lease and therefore the tenant was entitled to the full protection of the law under the statutory provisions. In giving his judgment in the case, Lord Templeman famously said:

the manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

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## Equity acts *in personam*

This maxim derives from a historical distinction between the two courts of the common law and of equity. During the time in which the court of equity was developing, one important distinction between equity and the common law was that, whereas the courts of the common law made judgments over the property in dispute, an action being brought *in rem* (that is, over ‘the thing’), the court of equity made its judgments *in personam*: in other words, judgment was made against the individual. The practical effect of this was that the courts of the common law had the ability to adjust ownership rights in property, giving all or part of the property in dispute to the claimant. The courts of equity, on the other hand, had the ability instead to require an individual to obey their judgments, in default of which they could take away that person’s liberty (by putting them in prison) or issue fines until such time as they obeyed their edict.

Even today, and despite the **fusion** of the two courts **of common law and equity**, the ability of equity to act *in personam* retains some very specific benefits. For example, in Chapter 16 on remedies, you will come across a type of injunctive remedy called a ‘**freezing injunction**’. The purpose of a freezing injunction is to prevent the defendant from moving property or assets out of the reach of the claimant before the matter gets to court, either by moving them out of

the UK, or from one jurisdiction to another. The making of such an **injunction** is possible because equity acts *in personam*, and therefore the injunction is made by the court against the person, not against their assets. This means that the location of the assets is irrelevant to the proceedings and that the remedy is, effectively, worldwide.

## Equality is equity

The equitable maxim ‘equality is equity’ ensures that, where there is a dispute over property in which more than one party has a beneficial interest, that property will be divided equally, unless there is evidence showing that the property should be divided in some other way. So, in the case of *Midland Bank v. Cooke* [1995] 4 All ER 562, which concerned a dispute between husband and wife over the ownership of a matrimonial home, Lord Justice Waite said that:

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In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did . . . if no such inference can be drawn . . . the court is driven to apply . . . the maxim ‘equality is equity’, and to hold that the beneficial interest belongs to the spouses in equal shares.

You can find the full facts of this case in Chapter 8 on constructive trusts.

## Delay defeats equity

If a person wishes to bring a claim in equity they must do so without delay or otherwise risk their claim being rejected. This means that a person who delays unnecessarily in making a claim in equity could be found guilty of acquiescing to the conduct complained of by their failure to do anything about it. Alternatively, their claim could fail under the **doctrine of laches**, where there has been a delay in bringing an action. The maxim ‘delay defeats equity’ is often not required because of statutory limitations imposed on bringing an action by the Limitation Act 1980. You can find out more about both the Act and the doctrine of laches in Chapter 13 on breach of trust.

## Equity will not assist a volunteer

A ‘**volunteer**’ in this context is not the person who helps out on the cake stall at the local village fête. In equity the term ‘volunteer’ has a rather different meaning, which is that a volunteer is someone who receives a benefit without **consideration**; in other words, that person does not give anything in return for the benefit: they are the recipient of a gift. Generally speaking, persons in receipt of gifts of property cannot rely on the court of equity to enforce the promise of that gift because, having done nothing in return for it, the volunteer has nothing to enforce against. Put simply, there is no bargain. To give an example of how this might work, if Sannia were to give her old laptop to Nicola, Nicola cannot then make a claim against Sannia if the laptop runs slowly, or is difficult to use, because it was the subject of a gift.

## Equity will not perfect an imperfect gift

This maxim of equity is closely related to the maxim which states that ‘equity will not assist a volunteer’. If a person makes an ‘**imperfect gift**’, that is a gift which lacks the formalities required at common law, the maxim says that equity will not assist the intended recipient of that gift. This equitable maxim is particularly relevant in cases of gifts of land or shares, which require a process of formal transfer rather than mere physical delivery of the object in question. The courts’ application of this maxim has suffered a significant amount of criticism in recent years, primarily because of a tendency of the courts to waive, or ‘soften’, the rule wherever it would seem equitable on the facts of the case to do so. This is particularly evident since the handing down of the Court of Appeal decision in *Pennington v. Waine (No. 1)* [2002] EWCA Civ 227, in which an aunt’s botched attempt to give 400 shares in a company to her nephew was considered to have been sufficient to transfer the equitable interest across to him. The full facts of this case are discussed in Chapter 2, on formalities.

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It should also be noted that an alleged exception to the maxim is the rule in *Strong v. Bird* (1874) LR 18 Eq 315. The rule says that if a person appoints the intended recipient of a gift as the executor of their will, on that person’s death the gift will be perfected. However, the facts of the case applied to the cancellation of a debt and, although the rule has subsequently been applied to outright gifts, it has never been tested in the context of transfers of trust property. This issue is discussed in more detail in Chapter 2.

## Equity abhors a vacuum

The idea behind this maxim is that it goes against the principle of the court of equity for a piece of property to be left with no beneficial owner. This maxim is most commonly seen in the context of resulting trusts. As we shall see in Chapter 7, one of the scenarios in which a resulting trust will arise is where property has not been properly disposed of. This might be because a trust has failed due to the identity of the beneficiaries not being ascertainable, or in situations where there is surplus property left over after the trust has come to an end. In such circumstances, the trustees are unable to keep the property for their own benefit, and so the property in the trust ‘results’ or returns (in most cases) to the original owner of the property, leaving the trustees holding the property on trust for them. This solves the problem of the property being left with no one to benefit from it. A further example might be seen in the case of a charitable gift which has failed because the charity has ceased to exist before the gift to that charity was completed. In such circumstances, the doctrine of **cy près** will be applied, and the property will go to another charity with similar aims. We will be looking in more detail at the equitable doctrine of **cy près** in Chapter 5, on charities.

## Equity will not want for a trustee

The court of equity will not allow a trust to fail simply because the person creating the trust has failed to appoint a trustee or, in the case of a trust created by will, if the trustee has died before the testator (that is, the person writing the will). The court of equity therefore has the power to appoint a trustee where there is no valid trustee appointed. It should be

noted that in many circumstances statutory provision has been made for the appointment of trustees and so there will be no need for the court to have to rely on their general power to appoint. To read more about the appointment of trustees, go to Chapter 9.

## Equity imputes an intention to fulfil an obligation

This maxim dictates that, where a person is under an obligation to do one thing but they do something slightly different instead, their actions may be treated as a close enough approximation of the required act to have fulfilled that person's obligation in equity. This is better explained by way of an example. The case in which the maxim was first set out is that of *Sowden v. Sowden* (1785) 1 Bro CC 582, which concerned a **marriage settlement**. A marriage settlement is a legally binding agreement made between the parties to the marriage under which the husband and wife agree to put certain property, including property acquired after the marriage, into trust for the benefit of themselves and any children they might have. In *Sowden v. Sowden* a husband, as part of his marriage settlement, had promised to pay the trustees under the settlement a total sum of £2,000 with which they were to buy property to provide an income for his wife in the event of his death. The money was never paid to the trustees but, shortly after his marriage, the husband bought a property in Devon called 'Pound', for £2,150. The husband subsequently died and the wife sought to claim the property as part of the marriage settlement. The court of equity found in her favour, on the basis that the husband was assumed to have bought the property in the performance of his obligations under the marriage settlement.

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A more modern example of how this maxim might work would be the example of a person who owed money to a creditor. Say Alec owes £100 to Rani. Alec dies without paying his debt to Rani, but he leaves Rani a gift in his will of £100. The £100 will be construed by the court as representing the payment of Alec's debt and Rani will therefore achieve the repayment of the debt. Of course, this would also prevent Rani from making a separate claim for the debt under the rules of the common law.

## Where the equities are equal the law prevails

This equitable maxim overlaps with the maxim 'equity follows the law' which was mentioned previously. The meaning of the maxim simply is that the person in possession of the legal estate will get priority over any prior or subsequent equitable interests. So when both parties in a dispute are equally entitled to obtain help from courts of equity because their equitable rights are equal, the party who has the law in his favour will succeed. In essence, therefore, this maxim provides confirmation of the fact that an equitable interest is not as strong as a legal interest. Thus, according to the maxim, 'the law shall prevail'.

## Where the equities are equal the first in time prevails

This final maxim simply states what may seem obvious, which is that in the case of competing equitable interests the interest which was created first will take precedence

over the others. The best example of this in practice is in the case of someone who takes out second and third mortgages over their house. It is only possible for the first mortgage over a property to be legal; therefore any subsequent mortgage will be an equitable mortgage. In deciding which equitable mortgage has priority over the others, the one which was entered into first will take priority. Thus, the 'first in time prevails'. Further discussion of mortgages is outside the scope of this book.

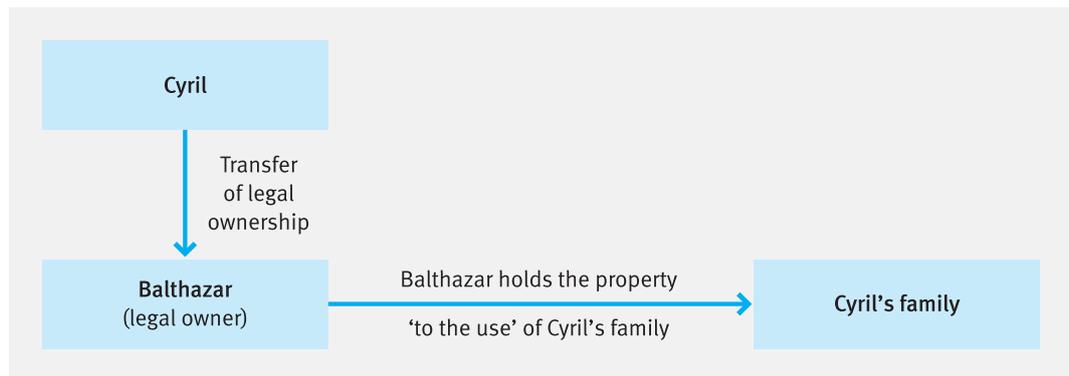
## The development of the trust

We have so far looked at the development of the court of equity and at some of the equitable maxims by which the court is guided. Now it is time to turn our attention to one of the greatest creations of equity: the trust. The development of the trust as a basic concept began during the time of the Crusades, which were a series of holy wars spanning two centuries between 1095 and 1291. The wars were waged by much of Christian Europe, including England, against the Muslim-occupied countries of the near East including the city of Jerusalem, which the Crusaders had the goal of recapturing and restoring to Christian rule. The long series of protracted military campaigns overseas meant that English households were frequently deprived of their male heads for years, and in some cases even decades. In order to facilitate the management of their land in their absence, knights going away to battle would frequently transfer the ownership of their property into the hands of a trusted relative or friend so that they could act in their place, managing the estate until their return. To do this was a risky business, however. Under the strict rules of the common law once the knight had transferred the legal ownership of his property to a third party, all his rights in that property ceased. There was therefore no *legal* way for the knight to protect his family from an unscrupulous friend or family member. This left the knight completely at the mercy of the friend or relative; he had no other choice than to rely on the honour and good conscience of the person he trusted to do the right thing by his family. Unfortunately, it was too often the case that crusaders would return from abroad to find their wife and family gone and their fortune dissipated. Something clearly had to be done to protect such persons; what was needed was a new concept.

he had to rely on the honour and good conscience of the person he trusted

Equity came to the rescue. In response to the crusaders' plight, a new concept began to be formulated. This concept, unique to English law, was the 'use'. Put in basic terms, the use was the earliest and most primitive form of what we today call the trust. Its effect was that one person owned the land under the common law, but a second person had a right to use the land under the law of equity. Thus, two separate rights in one property could now exist at the same time. In the case of our knight, let us call him Cyril, this meant that Cyril would be able to transfer his land 'to the use' of a third party, let us call him Balthazar, for the duration of his absence abroad. Under the terms of the use, Cyril could do this safe in the knowledge that he had an equitable remedy if Balthazar did not manage the land in accordance with his wishes. Whilst technically the legal ownership would still be with Balthazar, under the terms of the use equity would be able to step in and enforce Cyril's equitable rights, forcing Balthazar to act in accordance with the terms of his promise. This ensured that whilst Cyril's family, for whom his property had been left to benefit, had no *legal* claim on his lands once they had been given over into 'use', they nevertheless had the force of equity behind them. In equity's eyes, Balthazar would be the

**Figure 1.1** Property ownership under the ‘use’



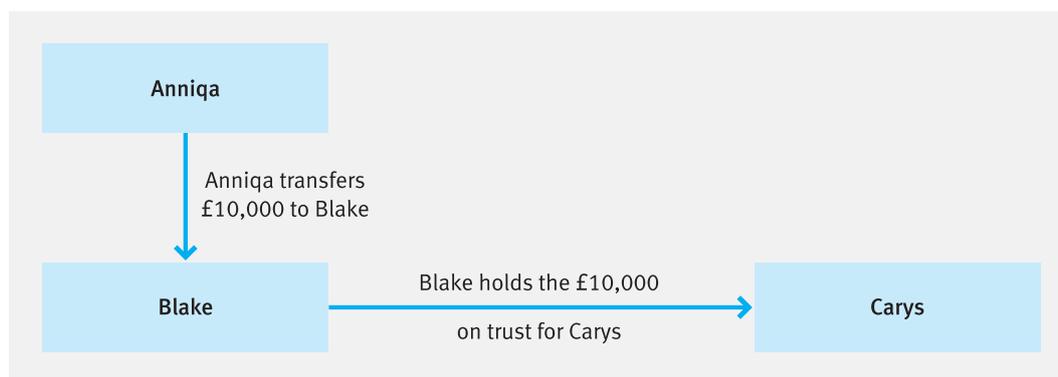
legal owner of the property in name and nothing more. The right to benefit from the property belonged to Cyril’s family. Diagrammatically, the use might look as shown in Figure 1.1 above.

To put the use into a modern context, we can look at the example of our soldier, Alec, from the beginning of the chapter. If you think about the story of Cyril, it is remarkably similar to the story of Alec going off on his tour of duty in Afghanistan. The only difference is that, in the original scenario, the soldier in question is a knight and the war he would have been leaving his family behind for would have been the Crusades. We will be considering the modern uses of the trust in more detail later in the chapter.

Whilst the use was created very much with equity, or fairness, in mind, by the sixteenth century a very different application had been found for the concept which was not nearly so noble. This was as a method of tax avoidance. Under the laws of the time, by transferring the legal ownership of property to the use of a third party the original property owner could avoid the payment of feudal dues (or taxes). In an attempt to quash such practices, Henry VIII enacted the Statute of Uses in 1535. The Act effectively ignored the legal owner of the property and, for taxation purposes, recognised only the beneficial owner of the land. However, lawyers soon got around this by creating the ‘double use’. Land would be given to Harold ‘to the use’ of Jakob ‘to the use’ of Charlotte. The Statute recognised only the first use, and so the second use remained untaxed. Over a period of time the terminology shifted so that Harold was seen to be giving the property ‘to the use’ of Jakob ‘on trust’ for Charlotte, and the modern trust was born.

## What is a trust?

You should already have an idea of how the modern trust is formulated from our look at its ancestor the use, above. Let us take some time to look at the anatomy of the modern trust in a little more detail, however. A good place to start might be by defining, in legal terms, exactly what is meant by a ‘trust’. Lawyers and academics have striven over several centuries to come up with a clear definition of the legal term ‘trust’, some with rather less success than others. However, the simple fact of the matter is that it is easier to explain how a trust works or, one might say, what a trust looks like, than to give it a definitive explanation. Put in its simplest terms, as with its ancestor the use, a trust is where one

**Figure 1.2** Format of a basic trust

person transfers the legal ownership of property to another to hold that property for the benefit of somebody else. Historically the property transferred was usually land, but in the modern trust such property can take the form of money, land, jewellery or other personal items. So, using cash as an example, in the most basic form of our modern trust a woman, Annika, might give £10,000 to her brother, Blake, to hold for the benefit of her daughter, Carys.

Diagrammatically, the situation might look as shown in Figure 1.2 above. And so we have the anatomy of a basic trust: Annika transferring property to Blake to hold on trust for Carys. The effect of this ‘trust’ is that, in legal terms, Blake becomes the owner of the property: we might say that Blake holds the ‘legal title’ to the property. In the eyes of the law, Blake has the right to use that property or dispose of it as anyone with absolute ownership of property could do. However, because in giving the property to Blake to hold for the benefit of Carys Annika has created a trust, whilst Blake is technically the legal owner it is Carys who is actually entitled to the benefit of that property: she is the beneficial, or equitable, owner and has the benefit in equity. It is this separation of the legal or formal ‘paper’ ownership of property, and the beneficial or equitable ownership of the same which is fundamental to the anatomy of any trust; without it, trusts could not exist.

But why is there a need for Annika to give the property to Blake to hold on behalf of Carys in the first place? Why does not Annika just give the property directly to Carys? Of course, times have changed dramatically since the eleventh century, and the use of trusts is far more wide-ranging in a modern context, as we shall see later on in the chapter. But the concept of the trust as an instrument of equity remains the same. Its function is to allow a person to give their property over to another for the benefit of a third party and yet still to protect that third party, the beneficiary of the trust, from abuse by the legal owner. It is a simple method of protection and control, enabling the person creating the trust to hand property over for someone else’s benefit, whilst still retaining control of that property through the medium of the trustees.

You should now have some idea of what trusts are and why they exist, and of the historical development of equity and its maxims. For the rest of this chapter we will be taking a look at some of the terminology used in the law of trusts and which we will be using throughout the remainder of the text; and we will also be looking at the different types of trusts and exploring some of the other modern uses of the trust. This should help to deepen your understanding of the concept and crystallise the idea of the trust in your mind.

# The terminology of trusts

First of all, let us think about the terminology of trusts. You can use this part of the chapter to refer back to until you are completely comfortable with the terms referred to or, alternatively, you may prefer once you have read this to use the glossary which you will find at the back of the book as a quick reference guide.

The description was given earlier in the chapter of a trust being created by Annika transferring property to Blake to hold on behalf of Carys. In legal terminology, the process of creating this trust and all the persons involved in it are given their own labels, and these are as follows:

The person transferring their property over for the benefit of the third party is known as the **‘settlor’**. The settlor, in our example Annika, can be described as ‘settling’ her property on Blake, for the benefit of Carys. She can also be described as ‘giving her property over into trust’.

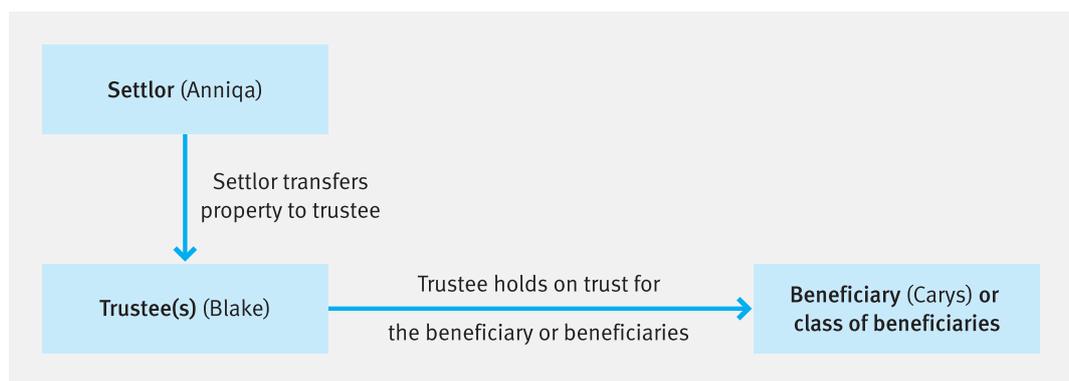
The person in receipt of the property, in our scenario Blake, is the person to whom the settlor, Annika, entrusts the property. He is known as the **‘trustee’**. So the trustee (Blake) is the person the settlor (Annika) trusts to look after the property for the benefit of Carys. The trustee is the *legal* owner of the property. It is worth noting here that there is usually more than one trustee appointed by the settlor for administrative reasons (for further explanation see Chapter 9 on the appointment and retirement of trustees).

The person whom the property is to benefit, Carys in our scenario, is known as the **‘beneficiary’**. The beneficiary holds the beneficial, or equitable, title to the property. The beneficiary can be an individual who will be identified by name, as in our example, or by description: for example ‘my daughter’. Alternatively the beneficiary can be a specified group of persons, such as ‘children’, ‘nephews’ or ‘relatives’. It might also include the settlor’s **‘heirs’**, meaning anyone who is entitled to inherit on the settlor’s death, or **‘issue’**, meaning any descendants of the settlor. These groups of persons are often referred to as a **‘class of beneficiaries’**. The beneficiary (or class of beneficiaries) is commonly described as the **‘object’** of the trust because he or she is the object of the settlor’s wishes: the person the settlor intends to benefit.

So if we were to revisit our earlier diagram it will now look as shown in Figure 1.3. The three parties to the trust will be referred to throughout the remainder of the book as the settlor, trustees and beneficiaries.

The trustee is the legal owner of the property

**Figure 1.3** Parties to the trust



The beneficiary's interest under the trust can be vested or contingent. A **'vested interest'** means that the beneficiary has an interest which is either already in the hands of the beneficiary, or will definitely come to them in the future. If the beneficiary's interest is dependent on the happening of a future event, that event must be certain to happen: for example, the death of another person. The fact that no one can say when the death will occur is irrelevant. This will be the scenario where someone is the ultimate beneficiary under a **'lifetime trust'**, where property is put into trust for the benefit of one person for the duration of their life, and is then given to a third party on their death. If, on the other hand, the interest of the beneficiary is dependent on an event which is *not* certain to occur, the beneficiary's interest will be a **'contingent interest'**, and not a vested one. Such a contingent event might be the beneficiary reaching the age of 25 or 30. In this scenario, the beneficiary might die before reaching the required age and there is therefore no certainty in them attaining their interest. This is in contrast to the vested interest, which is dependent on the death of another person: as everyone dies sooner or later, the beneficiary's interest in that event is based on a certainty, not a contingency.

The final part of the trust which needs to be considered is the actual content of the trust; that is the property given over into trust by the settlor. This can be referred to simply as the 'trust property' or, alternatively, as the **'subject matter'** of the trust. As mentioned above, the subject matter of the trust is often land or property, but it may also consist of money, stocks and shares, or any other kind of personal property.

## The terminology of wills

It would be sensible as we consider the terminology of trusts also to give some thought to the terminology of wills. The reason for this is that, as we shall see later on in the text, many trusts are created by will. The following 'whistle-stop' tour of will terminology should therefore be helpful as you progress through the book:

In a will, the person writing the will, that is the person whose last wishes the will portrays, is known as the **'testator'** (masculine) or **'testatrix'** (feminine). As testators and testatrixes often create trusts within their wills you will frequently see the settlor referred to in context as a testator or testatrix. This is particularly the case when the facts of cases are being described, as many of these came about because of an ambiguity or dispute over a will. Throughout the course of the text, therefore, when you see reference to a testator or testatrix you should be aware that this refers not only to the person creating the will, but also in most cases the settlor as well, settlor and testator/testatrix usually being one and the same person. So, for example, you may read the following:

A testator gave £100,000 to his trustees to hold on trust for his children until they reach the age of 18.

It is clear to see that the testator in this instance was also the settlor of the trust.

Another term you will come across relating to wills is **'executor'** (masculine) or **'executrix'** (feminine). The executors of a will are the person or persons who are in charge of carrying out the testator's wishes. On the death of the testator, they will gather together his possessions, pay any debts of the testator and be responsible for the division of his assets. The executors named in a will are often also named as the trustees of any trusts which may be created under it and so take on a dual role as executors and trustees under the will.

These are the people you will come across when we look at wills. In terms of the subject matter of the will, this is given its own special label as well, depending on what part of the testator's property is being referred to.

The assets of the testator as a whole are collectively referred to as his '**estate**'. So the testator's estate will include everything he owns, including money, personal possessions and land or property.

A gift of a personal possession of the testator or a share in the testator's estate made to a specific person in the will is termed a '**legacy**' or '**bequest**'. Legacies or bequests can be made either of money or of personal, moveable property, or '**chattels**'. An example of a legacy or bequest of a chattel might be a gift of a treasured piece of jewellery made by a testatrix to her favourite niece, or a more substantial gift such as the family home, to be shared between the testatrix's children. Gifts of money are known as '**pecuniary legacies**'. You should note that legacies or bequests need not necessarily be made to individuals; a charitable donation of £10,000 to a testator's favoured charity would also come under this heading.

Once all of the testator's debts and funeral expenses have been paid by the executors and any legacies have been given out, whatever is left in the testator's estate is termed the '**residue**' or '**remainder**'. It is usual for the testator to specify to whom he wishes the residue to be given. This may be to friends or family members or to a named charity. In many cases the residue is divided into shares and given to a mixture of two or more persons or charities.

A person who dies without leaving a will is referred to as dying '**intestate**'. The person who administers the deceased's estate on intestacy is called the '**administrator**' (masculine) or '**administratrix**' (feminine).

The excerpt in Documenting the law from the will of a very famous testatrix, the late Diana, Princess of Wales, shows much of this terminology in use. It can be seen from the terms of the will that the Princess of Wales appointed two executors to administer her estate: her mother and her personal private secretary, Commander Patrick Jephson. The main beneficiaries under the will were her two children, the Princes William and Henry (Prince 'Harry'). The money comprised in the estate (totalling in excess of £21 million) was held on trust for them until they inherited at the age of 25.

## Documenting the law

### Excerpt from the will of Diana, Princess of Wales

I DIANA PRINCESS OF WALES of Kensington Palace London W8 HEREBY REVOKE all former Wills and testamentary dispositions made by me AND DECLARE this to be my last Will which I make this first day of June one thousand nine hundred and ninety-three

1. I APPOINT my mother THE HONOURABLE MRS FRANCES RUTH SHAND KYDD of . . . and COMMANDER PATRICK DESMOND CHRISTIAN JEREMY JEPHSON of . . . to be the Executors and Trustees of this my Will
2. I WISH to be buried
3. SHOULD any child of mine be under age at the date of the death of the survivor of myself and my husband I APPOINT my mother and my brother EARL SPENCER to be the guardians of that child and I express the wish that

should I predecease my husband he will consult with my mother with regard to the upbringing in education and welfare of our children

4. (a) I GIVE free of inheritance tax all my chattels to my Executors jointly (or if only one of them shall prove my Will to her or him) (b) I DESIRE them (or if only one shall prove her or him) (i) To give effect as soon as possible but not later than two years following my death to any written memorandum or notes of wishes of mine with regard to any of my chattels (ii) Subject to any such wishes to hold my chattels (or the balance thereof) in accordance with Clause 5 of this my Will . . .

5. SUBJECT to the payment or discharge of my funeral testamentary and administration expenses and debts and other liabilities I GIVE all my property and assets of every kind and wherever situate to my Executors and Trustees upon trust either to retain (if they think fit without being liable for loss) all or any part in the same state as they are at the time of my death or to sell whatever and wherever they decide with power when they consider it proper to invest trust monies and to vary investments in accordance with the powers contained in the Schedule to this my Will and to hold the same UPON TRUST for such of my children PRINCE WILLIAM and PRINCE HENRY as are living three months after my death and attain the age of twenty five years if more than one in equal share PROVIDED THAT if either child of mine dies before me or within three months after my death and issue of the child are living three months after my death and attain the age of twenty one years such issue shall take by substitution if more than one in equal shares *per stirpes*\* and the share that the deceased child of mine would have taken had he been living three months after my death but so that no issue shall take whose parent is then living and so capable of taking

...

IN WITNESS whereof I have hereunto set my hand the day and year first above written

SIGNED by HER ROYAL HIGHNESS in our joint presence and then by us in her presence

[Source: <http://edition.cnn.com/WORLD/9803/04/diana.will/index.html>. See also news article <http://news.bbc.co.uk/1/hi/uk/61285.stm> for further detail.]

\*Note: *Per stirpes* is a Latin legal term meaning that the children of the deceased princes would take the amount representing their father's share of the estate between them in equal shares.

## Types of trust

There are many different types of trust, all of which you will come across throughout the course of this book, and which the following section aims briefly to introduce you to. As with the section above on the terminology of trusts, you may wish to use this section as a quick reference guide as you navigate your way around the text, or you may prefer instead to use the glossary at the back of the book, which contains brief definitions of all the terms described here, as well as many more.

### Private and public trusts

We have discussed the scenario of a basic trust whereby a settlor gives money or property to their trustees to hold on trust for their beneficiaries. This most basic type of trust,

where money is given over into trust for the benefit of one or more named individuals, is a '**private trust**'. In other words, the trust has been created by the settlor for the benefit of a private individual or individuals. In such a scenario these private individuals are likely to be close family members or friends, or people who have some kind of personal relationship with the settlor.

A '**public trust**', on the other hand, is a trust in which the settlor has given money or property over to their trustees to be used for some public use or benefit. All charitable trusts would therefore come under this heading.

## You be the judge

**Q:** Which of the following are public trusts?

- (a) £10,000 towards the education of the nephews and nieces of Mathilda and Edward Jones.
- (b) £10,000 towards the education of the children of employees of Leeds Metropolitan University.
- (c) £10,000 towards the education of children from impoverished backgrounds in the county of North Yorkshire.

**A:** Only (c) is a public trust, being directed at a section of the public. The others are all private trusts, being for the benefit only of a private group of people, albeit a potentially large group in the case of the university.

## Fixed and discretionary trusts

The terms of a trust may be either fixed or discretionary. If the terms of a trust are fixed, this means that the trustees are given very specific instructions as to how and to whom the subject matter of the trust is to be distributed; the trustees do not have any power to vary the amounts given to the different beneficiaries named, or to decide whether or not to benefit one particular beneficiary over the others. A **fixed trust** might look as follows:

I give £10,000 to my trustees to divide equally between my children, Jacob and Frances.

You will see here that the trustees have no discretion as to how to divide the £10,000: they must divide the money equally. Neither are the trustees given any discretion as to whom the money is to be given. The settlor is clear that the money is to be divided equally between Jacob and Frances; they are each to be given a half-share of the money and so will each receive the sum of £5,000. To give a further example of a fixed trust, the following would also come within this category:

I give £10,000 to my trustees to hold for my children, Jacob and Frances.

Despite the fact that there is no express stipulation as to how the money is to be divided, the trust will still be fixed. In the absence of a direction as to how the trustees are to divide the money, the equitable maxim 'equity is equality' will apply, and the money will be divided equally between the two children, as with the first example.

With a **discretionary trust**, on the other hand, the trustees are given discretion, either to decide the shares into which the trust fund will be divided, or to decide who will benefit under the terms of the trust, or sometimes both. A discretionary trust might look like this:

I give £10,000 to my trustees to divide between those of my children they consider most deserving in their absolute discretion.

In this scenario, the trustees have discretion as to how the money is divided. They also have discretion as to whom the money is given. The settlor has allowed them to choose which of the children they consider most deserving and divide the money between them. No shares are specified and so the trustees are free to decide in what proportions the money is to be divided. Thus, the trustees could decide to split the money between Jacob and Frances, £7,000 to Jacob and the remaining £3,000 to Frances. Alternatively, if they considered Jacob undeserving of a share of the trust fund, they could decide to benefit Frances with the whole £10,000. Such is the nature of their discretion. The Writing and drafting exercise will help you to test your understanding of the nature of fixed and discretionary trusts.

trustees are free to decide in what proportions the money is to be divided

## Writing and drafting

You are Nasreen Aqeel, a trainee solicitor at the firm of Irash & Co. Solicitors. You are dealing with the estate of the late Mrs Elda Myers. The following is a section of her will:

I make the following bequests:

- (a) I give my collection of vintage port to be shared between my friends Danyl Shah and Enid Carlton at the Carleon Amateur Dramatics Association in memory of all the good times we had together.
- (b) I give £10,000 to be divided between the following charities:
  - (i) St Luke's Hospice
  - (ii) Candlelighters, the children's charity
  - (iii) Rainbow Days Donkey Sanctuary
 in such shares as my trustees shall in their wisdom determine.
- (c) I leave the residue of my estate to be divided equally between those of my grandchildren as my trustees shall consider deserving.

Mrs Myers's trustees are coming in to see your training principal this afternoon. They would like advice on what discretion they have (if any) in distributing the various gifts listed in the will. Your training principal, Mr Irash, is out of the office all morning and will not have time to look through the file. He has asked you to write him a memo detailing what the trustees are allowed to do under the terms of the will. Your memo should be no more than one side of an A4 sheet in length so you will need to be succinct. You have another appointment in 40 minutes so you have until then to complete the memo.

◆ **Handy tip:** Look at each clause of the will separately. What are the trustees allowed to do? Are they given discretion as to how to divide the fund or who to give it to? If so, how wide is that discretion?

## Reflective practice

How did you find explaining the difference between fixed and discretionary trusts? When you read back through what you have written have you explained the difference between the two clearly? Do you think you would be able to write your own discretionary trusts now? Is there any way you could improve on what you have written?

Remember that this is a practical exercise as well as an academic one, so the layout of your memo is important. The training principal will not be impressed if, as a trainee in a law firm, you hand him a hastily-scribbled answer on a scrap of paper! Did you find out how to set out a business memorandum before starting this exercise? Would you know how to write one in the future?

◆ **Handy tip:** It may be helpful to keep a template business memorandum for your future use. You can download a free example of a standard office memo on the web at: <http://www.8ov.org/memo.htm>.

For a more in-depth look at fixed and discretionary trusts, go to Chapter 3 on certainties.

## Purpose trusts

**Purpose trusts** are trusts which are set up by the settlor to carry out an abstract purpose, rather than to benefit a specific person. Purpose trusts can be private or public. All charitable trusts are **public purpose trusts**, because they are trusts which have been put into effect for a purpose which benefits the public. An example of a **private purpose trust**, on the other hand, would be a trust set up to build a tomb or monument in memory of the settlor after their death. Subject to a couple of exceptions, private purpose trusts are not a valid form of trust in English law. We will be looking at the topic of private purpose trusts in detail in Chapter 4.

## Charitable trusts

As outlined above, charitable trusts are public trusts which are set up for charitable purposes as opposed to purely private purposes. Charitable trusts are the biggest exception to the 'no purpose trusts' rule. Chapter 5 examines the role of charitable trusts and how they work in detail.

## Express trusts

The majority of trusts are **express trusts**. These are trusts which the settlor has specifically and purposefully taken steps to create, either by way of a verbal declaration that they wish to form a trust or, as is the case in most instances, by some form of writing. The formalities required for the creation of express trusts are discussed in Chapter 2.

## Resulting and constructive trusts

Unlike express trusts, resulting and constructive trusts are created without the need for any express declaration of trust or writing of any kind. They are therefore completely informal in their creation. A **resulting trust** will arise in one of two situations:

1. Where the settlor has tried to create a trust but has, for one reason or another, failed to transfer the beneficial interest in the property effectively. This is an ‘**automatic resulting trust**’.
2. Where contributions are made to the purchase price of property by more than one person but the legal title is held by one of the parties only, in which case the intention of the settlor is presumed to have been that they intended to create a trust. This is a ‘**presumed resulting trust**’.

A **constructive trust**, on the other hand, will be imposed by the court in any situation where the conduct of one party is so unconscionable, or morally reprehensible, that to allow any other outcome would be unjust, or inequitable. With a resulting trust therefore (regardless of type), the intentions of the parties to the trust are implied. With a constructive trust, on the other hand, the intentions of the parties to the trust are irrelevant and the constructive trust is said to be imposed by operation of the law.

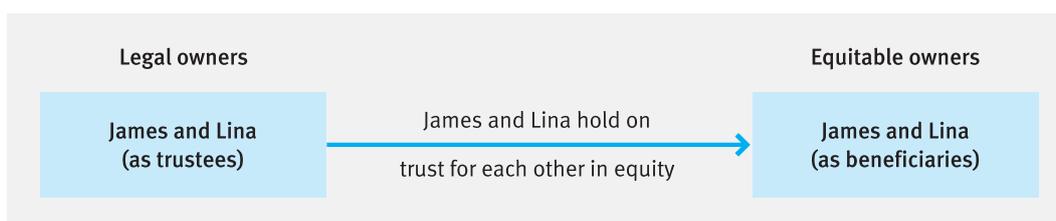
The law relating to resulting and constructive trusts is discussed in detail in Chapters 7 and 8.

## Statutory trusts

Unlike express trusts, which are created by individuals, **statutory trusts** are created or implied under the provisions of a statute. There are many examples of statutory trusts, one of the most common being the trust which is imposed on any person who purchases property jointly with another under sections 34(2) and 36 of the Law of Property Act 1925 (as amended by Schedule 2 of the Trusts of Land and Appointment of Trustees Act 1996). The sections state that where land is owned by two or more people, it will be held on a trust, each party holding the beneficial, or equitable, interest in the land on trust for the other. This creates a rather unusual trust situation because it means that the property owners become both trustees and beneficiaries of the land. Figure 1.4 may help to explain.

You should note that there is no need to understand the concept of **co-ownership** any more fully for the purposes of this book, although you may have already come across this example of a statutory trust in your study of land law.

**Figure 1.4** Division of legal and equitable ownership of property



Perhaps a rather simpler example is that of the statutory trust imposed under section 46 of the Administration of Estates Act 1925, in respect of intestacy. When a person dies intestate (you will remember this means without leaving a will) leaving a widow and children, a statutory trust is imposed on that person's assets wherever their assets exceed a fixed sum set by statute (currently £125,000). The widow is entitled to the fixed sum outright. Half of the remainder of the estate is then held on trust for the widow's lifetime, during which the widow receives the income from the trust. After her death this sum goes to her children, unless they have not yet reached the age of 18, in which case the money will be held on trust until they do so. The other half of the remainder is held on trust for the children until they reach the age of 18, or on marriage if that is earlier.

## Lifetime trusts

A lifetime trust is a trust created to benefit one person during that person's lifetime, and another person or persons after their death. So, for example, Victor might leave in his will his house at 1 Ingfield Avenue on trust for his wife, Jenny, during her lifetime, and then to his son, Jonathan, after Jenny's death. In this scenario, Jenny would be described as having a **'life interest'** in 1 Ingfield Avenue and would be termed a **'life tenant'** of the property. As we saw earlier in our terminology of trusts, Jonathan would have a vested interest in the house, because Jenny's death is a certainty, albeit that we do not know when she is going to die. He would be termed the **'remainderman'**, because he is entitled to the remainder of the interest after his mother's death. The function of such lifetime trusts is usually to ensure that a spouse is provided for during their lifetime, but that the children of the marriage are the ultimate beneficiaries of the trust property. Such a provision would, for example, prevent Jenny cutting Jonathan out of her will in the event of her remarriage.

## Trusts compared with other concepts

We have taken some time to get to grips with the meaning of trusts and the terminology which surrounds them. However, there may be situations in which a trust may appear, on the face of it, to be very similar to another legal concept. As a final consolidation of your understanding of the meaning of the trust, let us now consider the trust as compared with a selection of other legal devices.

### Trusts and contract

Trusts are often cited as being virtually synonymous with contracts, but the differences between them are in fact quite marked. If you have studied the law of contract before, you will know that the fundamental requirement for any contract is that of consideration: put simply, a bargain must be struck between the parties, one party giving consideration for something provided by the other. With trusts there is no consideration, and there is no bargain or agreement. The creation of a trust is a unilateral event, the settlor transferring

property to another for the benefit of a third party and gaining nothing in return. One could argue that a contract made for the benefit of a third party would have the same result. This may be so, but the two concepts would still be founded on an entirely different basis: the trustee having given no consideration for the transfer, whereas in a contract to provide services for a third party, the contracting party would be given consideration for their services. An additional difference between the creation of a trust and a contract is that, with a trust, the settlor has no power to enforce the trust once it has been created. The beneficiaries will have the power to do so, of course, but not the settlor. With a contract the person transferring their property under the contract would have a contractual right, on the basis of the consideration paid by them for the service rendered or goods supplied, to seek redress if the other party to the contract did not keep to their side of the bargain.

One final, fundamental difference between the two concepts lies in their origin: whereas a contract is a creation of the common law, the trust is an invention of equity. The remedies available to the two concepts are therefore different. In the case of a breach of contract, the injured party will be entitled to the remedy of damages at common law, their remedy being a **personal remedy** against the party in breach. If the trustee is bankrupt, therefore, the party to the contract who is making the claim may end up with nothing. In the case of a breach of trust, on the other hand, the beneficiaries will be entitled to a **proprietary remedy** as against the trustees, meaning that they can claim the return of the trust property to the trust, in priority over and above any other claim which may exist against the trustees' assets. For a more detailed explanation of personal and proprietary remedies, see Chapter 16 on remedies.

## Trusts and agency

Again, the trust relationship is often described as being indistinguishable from that of agency. However, this is far from being the case. Although there are similarities between the two concepts, they act very differently from one another on a practical, as well as a legal level. In thinking about the concept of agency, it may be helpful to bear in mind the role of an estate agent. The respective roles of the estate agent and the trustee are similar in that both carry with them a fiduciary duty: in other words, they require the trustee or agent to act in good faith in the best interests either of the beneficiaries, in the case of a trustee or, in the case of an **agent**, of their **principal**. But here already we can see a difference between the two because, whereas an agent acts on behalf of their principal as the person who instructed them, a trustee acts on behalf of the beneficiaries and not on behalf of the settlor who sets up the trust. The basis of the relationship between principal and agent and settlor and trustee is also different. If you think about our estate agent, he will be instructed to act on behalf of the seller of a property, the principal, and the two will enter into a contract for the agent's services, in return for an agency fee. As we have already seen, a settlor receives nothing in return for their transfer of the property to the trustees, not even a right to enforce the terms of the trust.

One final difference between agency and trusteeship is in the ownership of the property concerned. In an agency agreement, whilst the agent may have physical control of the property they are dealing with they do not have legal ownership of it: this remains at all times with the principal. All the agent is doing is brokering, or dealing with, the property on their principal's behalf. A trustee, on the other hand, will always be the legal owner of the property, the transfer of the legal title to the property into the trustees' hands being fundamental to the creation of the trust.

## Trusts and bailment

**Bailment** is an agreement under which the legal owner of the property (the '**bailor**'), usually under contract and for the payment of a fee, places property under the physical control (and usually possession) of another, in return for which the holder of the property ('**bailee**') assumes responsibility for the property's safe keeping and return. Examples of bailment are safety deposit boxes and storage facilities (but not 'lock ups', as the goods must be under the actual physical control of the bailee, not the bailor), automobile garaging services and animal boarding kennels. There are instances of bailment in which there is no contract or payment involved, such as when a person finds a diamond ring in the street and takes it to the local police station for their safe keeping, pending finding the real owner. This is perhaps what causes difficulty in distinguishing between the concepts of bailment and trusts. But there always remains a fundamental difference between the two, which is the issue of legal ownership. Whilst a bailee will be in physical control of the subject matter of the bailment for a limited period of time, and may even take physical possession of it, they never take legal ownership of the goods. As we know with a trust, on the other hand, the trustees will always be the legal owners of the trust property.

## Trusts and powers

A **power** is a form of official authority, given by the owner of property, or '**donor**', to a second person, or '**donee**', to deal with property, usually on behalf of a third person. As such, the power is the concept which most closely resembles that of the trust and it is therefore the distinction between trusts and powers which is perhaps the most difficult to make. There are two types of power: those which give the donee power to dispose of property, which are known as **powers of appointment**, and those which give the donee a more limited power to deal with property. You will most often come across the power to deal with property in the context of trusts, trustees being given powers to invest trust property, or the power of maintenance and advancement. For a further insight into what these powers entail, go to Chapters 11 and 12 of this book.

However, there are instances of powers to deal with property outside of the trust arena, such as a power of attorney, which gives the donee power to sell the donor's property, sign legal papers on the donor's behalf or otherwise carry out their affairs whilst the donor is perhaps out of the country, or during a period of illness.

It is powers of appointment, however, that bear the greatest resemblance to the trust. To make matters more complicated, powers of appointment will often be found mixed in with trusts created under the same document or will. Take a look at the following clauses from a will:

1. I give £200,000 to my niece Ursula on trust for life with remainder to whomsoever she shall appoint.
2. I give £200,000 to my niece Ursula on trust for life with remainder to my grandson Eric.
3. I give £200,000 to my niece Ursula on trust for life with remainder to her children in such shares as my trustees shall in their discretion decide.

How do you tell the difference between the clauses? Which are trusts and which are powers? It would seem on the face of it to be impossible, but in actual fact there is a

fundamental difference between a power and a trust which clearly distinguishes them, and this is the element of choice. Whereas a power gives the donee of the power discretion as to whether or not they use the power they are given, a trustee has no choice in carrying out their duties. The trustee may be given a choice as to *how* they are to carry out their duties as trustees (for a reminder of this, see fixed and discretionary trusts, above), but they have no discretion as to whether or not they wish to carry out those duties. The creation of a trust carries with it an imperative element: the trustees are required by the settlor to carry out their duties as trustees; they are not given a choice as to whether to do so or not. The only way in which a trustee could refrain from carrying out their duties would be by retiring from the trust, thereby ending their trusteeship. A donee under a power, on the other hand, could simply choose to do nothing with their power and they would not be accountable to the donor for their lack of action.

Taking another look at the three will clauses above, then, we can see that clause 1 is a power, whereas the other two are trusts. In clause 1, there is a life interest in favour of Ursula with a power given to her to give the remainder to ‘whomsoever she shall appoint’. Ursula is therefore under no duty to transfer the property to a specific person: rather she has the power to appoint any person of her choosing to receive the property in the event of her death. Clauses 2 and 3 are trusts because, in both cases, the trustees are instructed to distribute the trust property to a specific beneficiary, or class of beneficiaries, on Ursula’s death. The fact that the trustees are given discretion in clause 3 as to how the money is to be divided is irrelevant: their discretion relates only to the division of the money; their obligation to distribute is absolute. To give another slightly different example of a trust and a power of appointment together, take a look at the following:

4. I give £5,000 to my good friend Sadiq to distribute between his children as he shall decide.
5. I give £5,000 to my good friend Sadiq to distribute between his children if he shall decide.

Clauses 4 and 5 are almost identical, save for one small word, but the word makes all the difference. In clause 4, Sadiq is given money to distribute between his children ‘*as* he shall decide’. This is a trust, because the discretion is as to the method of distribution: the instruction to distribute itself is imperative. In the case of clause 5, however, the wording is that Sadiq should distribute the money between his children ‘*if* he shall decide’. There is therefore no imperative here: Sadiq can choose whether he wishes to distribute the money between his children or not. This is clearly a power of appointment. It can be seen, then, that the difference between powers of appointment and trusts can rest on a simple matter of construction. The difference, however, is quite significant.

One last point to mention about powers of appointment is that they can be put into three sub-categories. These are:

- ◆ **general powers;**
- ◆ **special powers;** and
- ◆ **hybrid powers.**

With a general power, the donee is not subject to any restrictions as to who they exercise their power in favour of. An example of a general power would be clause 1, above. Here, Ursula is given the power to appoint to whomsoever she chooses, including herself theoretically (although in this particular instance this would be pointless as the money would simply go into Ursula’s estate on her death). In a different example, this would

result in the donor having made, to all intents and purposes, an outright gift to the donee: it would be like saying ‘I am giving you my CD collection; do with it whatever you want.’

A special power is more restrictive in that it limits the donee to distributing the subject matter of the power between a specified class of persons. An example of a special power would be clause 5, above, where Sadiq is given the power to distribute amongst any of his children.

A hybrid power is similar to a special power, except that it works exclusively, meaning that, using our example of Sadiq above, he would be able to distribute the money amongst anyone *except for* a specified class of beneficiaries: in this case, say, his children.

## Modern uses for trusts

We looked earlier in the chapter at the historical reasons for the creation of the trust by the court of equity. However, the use of the trust in modern times has expanded far beyond protecting the families of absentee landowners, and the modern trust now covers a whole range of different situations. The following is intended to give you a flavour of just some of the uses of the modern-day trust. By way of introduction, take a look at what solicitor Duncan Milwain has to say, in the People in the law feature, about how he uses trusts on a day-to-day basis.

### People in the law

**Name and position:** Duncan Milwain, Director and Head of Trusts, Wills & Probate Department, Lupton Fawcett, Leeds.

**What is your role?** To advise clients on estate planning matters including on wills, inheritance tax and planning through the use of trusts.

**How long have you been working as a wills and probate lawyer?** I started my articles [or what would now be termed ‘training contract’] in March 1993, qualified in mid-1995 and have been practising since then.

**What made you choose this area of the law?** I would like to say that I always had a keen desire to be a private client lawyer from an early age. This would, however, be untrue. I was fortunate to obtain a training contract at one of the Magic Circle firms in London and was even more fortunate that they, unusually, continued to do private client work. My seat in that department was sufficient for me to realise this was what I most enjoyed.



Source: Duncan Milwain, Lupton Fawcett Solicitors (text and photo)

**How much do trusts feature in your work on a day-to-day basis?** Trusts in all their guises form a central part of the work which I carry out. This may be advising on the establishment of new trusts or the administration of pre-existing

trusts. The latter may be trusts either created during a person's lifetime or established under a will.

**How important are trusts to your work as a lawyer?** Trusts are a fundamental part of the work of a private client lawyer. They are a time-proven effective means of protecting and preserving assets over several generations. There are nuances to trusts over time, primarily as tax legislation changes, but the underlying theme of asset preservation remains unchanged.

**What are the most common uses of trusts in your business?** There has been a concerted attack on the use of trusts by the former Labour administration over recent years. This has undermined the ability of families to use trusts as a means of preserving wealth. This attack has arisen based on a mistaken assumption that trusts are solely the preserve of the rich and used only for tax avoidance. Neither of these assumptions is correct and it is to be hoped that some of the recent legislative changes are repealed or amended in due course.

Many of my clients are the owners of family businesses. A common and increasingly used purpose for trusts is for business assets (usually company shares) to be transferred to a trust. Such business assets should attract inheritance tax relief so that the transfer into trust can be achieved without triggering inheritance tax charges. The assets are then in a trust environment where they can be used to provide for the following generation or generations. This is a classic use of trusts.

**Would you be able to do your job without them?** In short, probably no. However, the law and lawyers are nothing if not inventive and alternative structures to trusts have been proposed over the last few years, most notably the use of limited partnerships for family assets. Whilst these have gained some small degree of popularity the associated costs are for the most part prohibitive. More importantly, partnerships do not have the natural fit that trusts have with asset preservation. Ultimately, notwithstanding the recent attack on them, trusts will continue to survive and flourish. [A limited partnership is a special kind of partnership in which the partners' liability extends only to the amount of their original investment to the partnership. For more information about limited liability partnerships go to: <http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>.]

**What is the most unusual or interesting trust you have ever come across?** There are at least three different ways of looking at this: to the interesting and unusual technical aspects of trusts, to the assets held by the trust and to the people who have settled or are trustees of the trust. I am fortunate to have noteworthy representatives of each. Some of the most interesting deals which I have been involved with have included a transfer of a large country estate down to the next generation of the family, and dealing with the trust aspects of a re-categorisation of shares in a business held by a series of family trusts. From one extreme to the other: I have on two occasions been involved with establishing trusts to make provision for a family pet!

## Trusts for the family

As we saw from Duncan Milwain's interview in the People in the law feature, a large proportion of trusts are still dedicated to the protection of the family and its assets. A prime example is where a settlor wishes to ensure that both their spouse and their children are adequately provided for in the event of their death. In such a scenario, the settlor might create a lifetime trust, giving their spouse the right to live out their days in the family home and thus ensuring a roof over their head for the remainder of their lifetime, whilst at the same time ensuring that the house will go to their children on the death of the spouse. In doing this, the settlor would prevent the spouse from cutting the children out of their will, say, in the event of their remarriage, and thus depriving the children of their inheritance. This use of a trust to restrict the spouse's use of the property is not something which the testator would be able to do if the house was made to the spouse as an outright gift.

Another family situation in which a trust might be used is where a parent or guardian wishes to set up a trust to provide for the specific needs of one or more of their children. Such needs might include the children's education or perhaps the maintenance of a child with disabilities. Alternatively, a settlor may wish, in the event of their death, to put inheritance money into the hands of trustees to prevent an immature or irresponsible child from needlessly dissipating the fund. The Law in action feature gives an interesting insight into some of the problems child trust funds can be used to solve.

## Law in action Child actors: protected by their trust funds?

Many people envy the glamorous life of the child actor: travelling the world and working with famous actors; and then, of course, there is the money. But is it as good as it sounds? There have been many stories told over the years, of the fortunes of child actors being squandered by unscrupulous parents and guardians. So what can be done to protect them?

The status of child actors has led to a whole raft of recent controversy over the protection of the children who starred in British director Danny Boyle's Oscar-winning movie, *Slumdog Millionaire*. The controversy stems from the alleged underpayment of the child stars, Rubina Ali and Azharuddin Ismail, who were taken from the slums of Mumbai in India in order to lend authenticity to the film, which was set in the area. The children initially received under £2,500 between them for a whole year's work. Despite claims by the film-makers that the children were well paid for their roles in the film, earning three times the average annual salary for their work, the public outcry forced them to re-evaluate the plight of the slum actors. However, film director Boyle soon realised that further cash payments would not be the best way to serve the children's interests in the long term. Boyle therefore set up trust funds for the children's education, with a lump sum payable on completion of their studies.

This still did not relieve the children from the immediate poverty they faced living in their makeshift homes in the slums of Mumbai though. Amid further criticism of the film-makers, stemming from the publication of photographs showing the continuation of the children's squalid existence, Boyle has vowed to take further action, this time providing better housing for the children's families. Each child has been bought a flat on the outskirts of the area in which they live, which has



Source: Photodisc/Photolink

been put into trust until the children turn 18. 'It would have been pointless giving them the flats outright,' said Boyle, 'because their families would have sold them.' This way the children will have better homes to live in, with electricity and running water, whilst still remaining within their own community, close to friends and extended family.

Reportedly, the film's investors and distributors have also set up a fund for the slum and street children of Mumbai, setting an initial £500,000 aside for the task. Have the film-makers done enough for the stars of a film that has grossed over £70 million worldwide? That is a question which remains to be answered.

For a more detailed look at the story of the Mumbai child actors, go to: <http://www.dailymail.co.uk/tvshowbiz/article-1154667/Boyle-takes-Slumdog-children-film-bosses-pledge-buy-poverty-stricken-families-new-homes.html>.

Another way in which the vehicle of a trust was used until recently within a family setting was in inheritance tax planning. By putting certain assets of the family into trust, parents were able to save their children from a large proportion of their inheritance tax bill in the event of their death. In brief, the idea behind a basic inheritance tax-saving scheme was as follows: one parent acting as settlor put a sum of money, say £100,000, into trust. The trust was a discretionary trust, allowing the trustees to pay some or all of the fund to one or more of the settlor's spouse or children. The trustees were given complete discretion as to who was to be paid out of the trust fund. The theory was that, because the trust was discretionary, the spouse contained in the list of beneficiaries had no actual *right* to the fund (they would have no entitlement until they were actually chosen by the trustees to become a beneficiary of it). This meant that the fund could not be classed as an asset of the spouse's estate when they died and as a consequence of this the money held in trust would not be included in any inheritance tax calculation, thus significantly reducing or even negating the children's inheritance tax bill, which would usually be payable at 40 per cent over and above assets amounting to £325,000. Since October 2007, however, the surviving spouse can now carry forward the deceased spouse's unused nil rate band and hence the discretionary trust does not have the same inheritance tax-saving effect that it used to have. The Key stats feature provides a useful overview of the current inheritance tax position in the UK.

## Key stats **Increases in inheritance tax liability set to continue**

The payment of inheritance tax by homeowners is on the increase and a move by the government to freeze the inheritance threshold until 2014 is estimated to raise in excess of £254 billion for the Treasury over the next four years. But exactly how can a freeze on the tax threshold amount to such a huge source of additional revenue for the government? It all comes down to inflation. Take a look at the figures.

Inheritance tax is calculated at 40 per cent on the value of a person's total assets, including their family home, after the deduction of a tax-free allowance which is currently set at £325,000. This means that on an estate totalling £425,000 the tax liability would be £40,000: that is 40 per cent of the taxable £100,000.

The inheritance tax threshold usually rises in line with inflation, meaning that at current inflation rates, which stand at over 3 per cent, the £325,000 threshold should have been increased to about £350,000 by 2014.

But even if a rise in line with inflation were instigated, this still goes nowhere near the level of increase in house prices in the UK, which has seen the cost of property rising by an incredible 89 per cent in the last decade. Keeping the inheritance tax threshold in line with the increase in house prices would mean that the threshold should actually now stand at over £500,000: significantly more than the current tax threshold.

According to a recent Office of National Statistics report called *Wealth in Great Britain*, because of the rise in house prices around one in five households in the UK now has a net worth of over £325,000, making their owners liable to inheritance tax.

The effect is that more than 4 million people in the UK face having to pay an extra £10,000 in death taxes, making the total potential liability under the tax in excess of £250 billion.

During the 2010 electoral campaign the Conservatives pledged to scrap the levy for anyone leaving less than £1 million, but in the emergency budget of 22 June 2010, no further changes to the inheritance tax

threshold were unveiled. It would appear that trust lawyers countrywide are going to be kept busy drafting and implementing tax avoidance schemes for some while to come.

To see the Office of National Statistics report in full, go to: [http://www.statistics.gov.uk/downloads/theme\\_economy/wealth-assets-2006-2008/Wealth\\_in\\_GB\\_2006\\_2008.pdf](http://www.statistics.gov.uk/downloads/theme_economy/wealth-assets-2006-2008/Wealth_in_GB_2006_2008.pdf). A full copy of the 2010 Budget can be viewed at: [http://www.hm-treasury.gov.uk/d/junebudget\\_complete.pdf](http://www.hm-treasury.gov.uk/d/junebudget_complete.pdf).]

A more detailed discussion of inheritance tax is outside the scope of this book.

## Trusts for the protection of creditors

We have seen trusts used to protect vulnerable children or family members either from others or from themselves. Another common use of the trust as a scheme for the protection of the more vulnerable can be seen in its use as a vehicle for the protection of people to whom money is owed: in particular customers of an ailing business. When an individual is made bankrupt or a company goes into liquidation a **trustee in bankruptcy** (or, in the case of a company, an administrator) is appointed. (The trustee in bankruptcy should not be confused with the trustees we have come across so far in the context of an ordinary trust. The trustee in bankruptcy is simply the name given to the person who is appointed by the court to administer the bankrupt's assets. They are in no way similar to trustees of an ordinary trust as we would understand them in the context of this book.)

The trustee in bankruptcy then takes over the management of the bankrupt's affairs, using the remaining assets of the bankrupt to pay off the creditors in order of priority. Priority will depend on a number of factors, including the age of the debt, and whether the debt was secured against any property of the debtor. In such circumstances, if the debtor is aware that they are in financial difficulty before their bankruptcy is declared, they can set up a trust account into which customer money is placed pending their orders being dispatched. In this way, the customers' money is protected from being claimed by the trustee in bankruptcy in the event of the debtor being declared bankrupt before the customers' orders have been processed. This was what happened in the case of *Re Kayford Ltd* [1975] 1 WLR 279, the full facts of which appear in Chapter 3 on certainties. The process of creating a trust account to protect customers of an ailing business in this manner is known as 'ring-fencing' assets.

### Case Summary

Another similar, but subtly different, method of using trusts to protect the assets of creditors is by the creation of what is known as a '**Quistclose trust**'. This type of trust takes its name from the leading case in the area, *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 HL. In this case, a company in trouble, Rolls-Razor, approached a loan company, Quistclose Investments, for money to make payments to its shareholders. Aware that the company was in trouble, Quistclose gave Rolls-Razor the money, but on specific instructions that the money was only to be used for the purpose of paying the shareholders. The money was placed in a designated bank account and separated from the general funds of the company. Rolls-Razor subsequently went into liquidation and the court held that Quistclose, in directing the money be used only for a specific purpose, had successfully created a trust, with the ailing company as trustee, and the shareholders as its beneficiaries.

### Case Summary

When Rolls-Razor went under, the purpose of the trust had been frustrated and so the monies were returned to the settlor (Quistclose) on a resulting trust. The issue of resulting trusts is dealt with in detail at Chapter 7. The subtle difference between a Quistclose trust and a *Re Kayford* type trust is that, in *Re Kayford*, the monies were received from customers

and subsequently set aside by the company in an attempt to protect them from creditors, whereas in *Quistclose*, the trust was created, not by the struggling company but by the creditor prior to the money being handed over. In *Quistclose*, therefore, the company was never the legal owner of the property – it was only ever the trustee of the money. Conversely in *Re Kayford*, it was the company who acted as settlor, setting money aside in trust for its creditors.

There is an interesting article showing the practical implications of using trusts to protect creditors in the Law in action feature in Chapter 3.

## Trusts as property-holding vehicles

Whilst trusts can be used as a method of keeping property safe from a spendthrift beneficiary or even from the trustee in bankruptcy, they can also be used as a method of holding property on behalf of those who, through no fault of their own, do not have the required capacity to hold property by themselves. Obvious examples of this might be children under the age of 18, who do not have the legal capacity to own land and therefore would need to do so under the protection of a trust, and those who do not have the required mental capacity to hold property. We will be exploring the issue of capacity further in Chapter 2.

There are other equally common situations in which the use of a trust is necessary in the holding of property. Whilst a company which has been formally **incorporated** has its own legal identity and is therefore able to hold company funds and land in its own right, **unincorporated** bodies which are not organised and maintained as a legal corporation, such as clubs, societies and political parties, do not share the same privilege and are therefore unable to hold property of any kind in their own name. In order to get around this, these unincorporated bodies have to nominate trustees who will safeguard their funds and property on their behalf. This scenario would also apply to unincorporated business partnerships, such as solicitors' practices or accountancy firms. It should be noted that the holding of property on behalf of unincorporated associations can raise particular difficulties. This will form the subject of further discussion in Chapter 4.

## Trusts to carry out a purpose

As has already been described in the section of this chapter concerning the terminology of trusts, it is possible for trusts to be used for the carrying out of a particular purpose as opposed to for the benefit of a person. Examples of this might be a trust set up to ensure a pet was looked after in the event of the owner's death, or a trust set up to carry out some abstract purpose such as to help the employees of a company suffering financial hardship or to provide scholarships or financial assistance towards tuition fees at a school or university. As previously mentioned, there are difficulties incumbent with trust funds set up for private purposes such as these (as opposed to trusts for public purposes, such as charitable trusts). These will be explored in further detail in Chapter 4.

## Pension schemes and investment trusts

The final example of uses to which a trust can be put is that of money held on trust as part of an investment or savings strategy. With both pension schemes and investment trusts,

money is paid into a fund which is then managed by trustees on behalf of the investor or persons nominated by them with a view to achieving an increase in value in the fund that is to be paid out to the beneficiaries at some future point in time. The responsibility of trustees to invest such funds responsibly and, in particular, not to lose that money, is a notable point of interest and one which will be discussed in further detail in Chapter 12 on trustee powers of investment.

## Out and about

You have been given many examples of trusts in practice. But how many different types of trusts can you find which affect the daily life of you or your family? You may not be lucky enough to have your own trust fund, but what other trusts do you come across as part of your daily life? Take some time to think about it. Consider all of the daily activities of you and your family. You will be surprised to find how many trusts you come across.

You should take no longer than 40 minutes on this task.

◆ **Handy tip:** Are you a member of a college or university? What trusts can you find there?

## Summary

- ◆ The Court of Chancery developed equity as an alternative form of justice to the harsh unbending rules of the common law.
- ◆ The administration of equity and the common law was fused together in the Judicature Acts of the 1870s.
- ◆ The Court of Chancery developed a series of equitable maxims, which served as a set of guidelines or standards in deciding cases which came before them.
- ◆ The trust derives from the 'use', which allowed two separate rights in one property to exist at the same time, one in law and one in equity.
- ◆ A trust is where one person (the settlor) gives property to another (the trustee) to look after for a third person (the beneficiary).
- ◆ The trustees are the legal owners of the trust property. The beneficial, or equitable, interest belongs to the beneficiaries.
- ◆ When trusts are created by will, the person writing the will is called the testator or testatrix, and the people who administer the will are known as the executors. The executors are often also named as the trustees of any trust created by the will.
- ◆ There are many different types of trust. Trusts can be created expressly, or implied by law or statute; they can be fixed in nature, so that the trustees have no say as to how the trust fund is administered, or discretionary, giving the trustees the ability to decide who to benefit and in what amounts.
- ◆ Trusts share similarities with other concepts, including contract, agency and bailment. However, they are fundamentally different from all of them in nature.

- ◆ Trusts and powers can be seen as sharing the most in common, a power being an authority given by the owner of property to a second person to deal with property on behalf of a third. However, whereas a trust carries with it an imperative element, the use of a power is discretionary.
- ◆ Trusts were originally created by the court of equity to protect the families of absentee landowners. However, their use has been expanded to cover a wide variety of situations.
- ◆ Examples of uses for modern-day trusts include provision for the family, tax planning, the protection of creditors, as a vehicle to hold property on behalf of charities, clubs, societies and partnerships, and in pension schemes and investment trusts.

## Question and answer\*

**Problem:** Take a look at the following scenarios. In each case, say which equitable maxim or maxims you think would apply, giving reasons for your answer:

1. Jude transfers his house into the name of his brother, Xavier, in order fraudulently to gain Xavier access to the country under immigration law. Jude then seeks to evict Xavier on the basis that Jude has bought and paid for the house, but Xavier claims legal ownership of the property.
2. Lola and Zidi buy a house together in their joint names. They both pay equal amounts towards the purchase of the property, but Lola uses an inheritance to build a substantial extension to the property, doubling its value. Lola's money also pays for the house to be rewired and a new central heating system to be put in. When the couple later separate and the house is sold, Zidi claims that the proceeds of sale of the house should be split equally between them, but Lola does not agree. Lola and Zidi are not married.
3. Hayley wins a hot air balloon flight across the Yorkshire Dales in a crossword competition. Unfortunately, on the day the flight is due to take place, the weather conditions are not favourable and they are unable to take off. Hayley demands that the balloon company take her on another day instead.
4. Chester is the beneficiary under a large trust fund to which he will become entitled when he is 30. For the last 10 years one of the trustees has been 'borrowing' money from the trust fund. Chester was aware of this, but chose to do nothing about it as the sums were small and 'he could spare the money anyway'. However, after a furious row with the trustee, Chester is now threatening to take the trustee to court to demand the return of the money to the fund.

You should allow yourself no more than 40 minutes to complete this task.

**Essay:** If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea.

(F.W. Maitland, *Selected Essays* (Cambridge University Press, 1936), p. 129.)

Discuss the use of trusts today with reference to this statement.

This question should be answered in 40 minutes.

\* Answer guidance is provided at the end of the chapter.

## Further reading

**Baker, J.H. (2002) *An Introduction to English Legal History*, 3rd edn, London: Butterworths.**

Whilst the present book has, for the sake of conciseness, skipped over much of the more detailed historical background relating to the development of the trust, those of you who are interested in the historical development of the law in this area should find a wealth of information on both the development of equity (including trusts) and the courts of equity in any good textbook on legal history. Baker's is one such book although, of course, there are others.

**Groves, C. and Tee, C. (2009) 'Where there's a will', *Legal Week* 11(2), 32, 34.**

A useful article discussing the use of trusts for inheritance tax planning, dealing with funds held on trust for children, lifetime trusts and discretionary trusts.

**Hayton, D. (2006) 'Pension trusts and traditional trusts: dramatically different species of trusts', *Conv* 229.**

This article gives a thorough and in-depth analysis of the practical workings of a pension trust in contrast to ordinary trusts and gives arguments for reform of the law in this area.

**Leech, T. (2001) 'The use of trusts and constructive trusts in lawyers' claims', 20 October, <http://www.maitlandchambers.com/articles>.**

This is an excellent article written by a barrister specialising in trust law, which talks through the various different uses for trusts by lawyers. Brilliantly practical and really puts the area of trust law into context.

**Martin, J.E. (1994) 'Fusion, fallacy and confusion: a comparative study', *Conv* 13.**

This article provides an intelligent and in-depth analysis of the modern effects of the fusion of the courts of law and equity in England, in contrast with other Commonwealth systems.

**Pettit, P.H. (1990) 'He who comes to equity must come with clean hands', *Conv* 416.**

This article provides an interesting discussion on the continued relevance of the maxim in the modern law of equity.

**Yeo, T.M. and Tjio, H. (2003) 'The Quistclose trust', 119 *LQR* 8–13.**

A short article which gives a thorough analysis and explanation of the working of the Quistclose trust, in the light of Lord Millett's judgment in the House of Lords case of *Twinsectra v. Yardley* [2002] 2 AC 164.

## Question and answer guidance

### Problem:

1. 'He who comes to equity must come with clean hands.' Jude has transferred the property into his brother's name to allow him to enter the country illegally. He should not therefore expect the court to recognise his beneficial interest in the property under the rules of equity.
2. 'Equity will not permit a statute to be used as an instrument of fraud.' Lola has no entitlement to be compensated for the work she has carried out at the property under the Matrimonial Homes Act 1970 because the couple were not married. However, she should be entitled to make a claim under the rules of constructive trusts, based on the size of her contribution.

3. '*Equity will not assist a volunteer.*' Hayley won the balloon flight in a competition and did not therefore pay for it. She is not in a position to demand a second flight when the first is unsuccessful.
4. '*Delay defeats equity.*' Chester has had 10 years to take action against the rogue trustee, but has chosen not to do so. He is therefore unlikely to be allowed to bring a claim in equity for the lost money.

**Essay:** A good answer to this question would introduce the reader to the concept of the trust, perhaps with a little historical context, and then take them briefly through all the modern uses of trusts today, with comment on the adaptability of the trust to modern uses over the course of the centuries, in accordance with the quotation. Modern uses would include:

- ◆ trusts for the protection of family assets;
- ◆ trusts to make provision for family members and other dependants;
- ◆ trusts for inheritance tax-planning purposes;
- ◆ trusts for the protection of creditors;
- ◆ trusts as a method of holding property;
- ◆ private and public purpose trusts;
- ◆ trusts for pensions and investments.

Reference could be made to Duncan Milwain's article which gives some really useful comment on the use of trusts in day-to-day practice and would give the essay currency.

Your conclusion should agree or disagree with the quotation, summarising the usefulness of the trust in the modern context and confirming its necessity in legal practice today.

Visit [www.mylawchamber.co.uk/warner-reed](http://www.mylawchamber.co.uk/warner-reed) to access study support resources including practice exam questions with guidance, interactive 'You be the judge' multiple choice questions, annotated weblinks, glossary and key case flashcards and audio legal updates all linked to the **Pearson eText** version of *Equity and Trusts* which you can **search**, **highlight** and **personalise** with your **own notes** and **bookmarks**.

