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## An introduction to equity and trusts

### 1.1 What are we doing here?

Those embarking on the study of trusts for the first time face an immediate and apparently significant obstacle: what is a trust? Even before you read your first case or text on, for example, criminal law or contract, you have a basic understanding of what that area of law is (or may be) about. This is important because it gives you a foothold in the subject, a familiarity with the sorts of questions it addresses. It means that when you do start reading about the law, you already have a sense of what you are looking at and what you are looking for. None of this is true with trusts. Most people never encounter the concept of a trust unless and until they find themselves confronted with it as an inescapable part of a law degree. Moreover, unlike, for instance, tort law, this is not an area where familiar ideas are simply obscured by unfamiliar terms. This means we have no choice but to start from scratch. It also means that trusts law is a subject which can feel alien for a while. As a first-time trusts student, you are being asked to understand, learn and apply an often complex body of rules without any clear idea of what these rules are for. The only way you will overcome this fully is with time; the more you read and the more you think about trusts, the more it will make sense and the more you will get a feel for the subject. It helps, however, to be shown the way. Accordingly, the aim of this chapter and the next is to give you a head start, to put in place some of the basic concepts and principles on which trusts law is based. All of these will reappear in the later chapters. Nonetheless it is worth taking some time to introduce them now, since not only do they provide overarching themes and ideas linking the many and diverse applications of trusts law, but they should also make it that much easier for you to get to grips with the details of the cases and statutes when we encounter them later on.

So, we must begin by addressing our initial question: what is a trust? The difficulty in offering a straightforward answer to this is that it seems that there is no single concept of a trust. Instead, there is a collection of related concepts, which are all, at least on occasion, referred to as trusts. In simple terms, trusts come in different shapes and sizes, and with different features. It is this diversity and malleability that helps to make trusts so versatile and explains why they play such an important role in English law.

However, this also contributes to the trust being an idea which is, at first, difficult to grasp.

Given this multiplicity of trusts and trust-related concepts, one option is to frame a definition of trusts which covers all angles and accommodates all cases where the language of trusts is applied. Though such formulations have their place and neatly encapsulate the breadth of trusts law, they tend not to offer a particularly clear or immediate sense of what a trust is. A more informative introduction to trusts can be achieved by identifying what may be regarded as a paradigm example or core case of a trust. Other examples of trusts can then be regarded, and examined, as variants on this basic form. So, in the following section we shall describe what may be considered the central case of a trust. To understand this, however, we must first say something about the law of property.

## 1.2 Property and trusts

Unsurprisingly, the everyday notion that some things – our possessions, belongings – are ‘ours’ is reflected in the law. The law of property describes our legal claims and entitlements to things. (‘Things’ here extends beyond physical, tangible objects to cover forms of intangible property, such as company shares, bank balances and trade marks – the word ‘assets’ gives a more accurate impression.) In relation to your clothes, books, CDs, the money in your pocket, and countless other things, you have what is called *legal title* (‘legal’ meaning here ‘under the common law [on the meaning of which see 1.5] rules of property’ and ‘title’ having the same root as ‘entitlement’). Normally when you have legal title to property you are free to use it for your own benefit and to further your own interests. So, as a general rule – and there are of course exceptions – you can put it to whatever use you see fit, determine and control the use others make of it, sell it, lease it, even destroy it. All these choices are for you, and you alone, to make, and when making them you are free to be entirely self-seeking and self-interested.

Sometimes, however, the law subjects the holder of the legal title to certain obligations, known as *fiduciary obligations*, which require him to hold and deal with the property not for his own benefit and in pursuance of his own interests, but rather for the benefit and in pursuance of the interests of some other person. This person is called a *beneficiary* (or occasionally a *cestui que trust*). The property remains in the hands of the holder of the legal title (in such situations called a *trustee*) and he retains the legal power to deal with the property. But when exercising this power he must do so with a view to furthering the beneficiary’s interests. As a corollary of these fiduciary obligations the trustee owes to the beneficiary, the beneficiary has the right

that the trustee will act solely in his (the beneficiary's) interests when dealing with the property. Moreover, because of both the extent of the rights he has against the trustee and the protection afforded to him against third parties into whose hands the property passes (see 2.4), the beneficiary is regarded as having a proprietary interest in – a title to – the property. This title is not the same one as that held by the trustee – the trustee still has the legal title – rather, the beneficiary has a new and separate title, an *equitable title* ('equitable' meaning 'deriving from the rules of equity'; see further 1.5). In these circumstances, the trustee is said to hold the property 'on trust' for the beneficiary.

### 1.3 The varieties of trusts

It is this combination of (i) separate legal and equitable titles to property, and (ii) fiduciary obligations owed by the trustee to the beneficiary which forms what we may regard as the central instance of the trust. We can usefully note now that there may be more than one trustee and/or beneficiary (in other words, legal and/or equitable title can be shared between more than one person), and that, in such cases, the same person may be both a trustee and a beneficiary. The only limit is that the same person cannot be the sole trustee and sole beneficiary, since it is clearly a nonsense to say that the trustee cannot, *as trustee*, deal with the property for his own benefit but must instead apply it for the benefit of himself *as beneficiary*. Such a 'trust' is no more than conventional legal beneficial ownership.

We may also briefly see how trusts (and related concepts) may differ from this paradigm:

1. The trustee with legal title may hold the property subject to fiduciary obligations as before, but this time there is a class of potential beneficiaries from whom he is to choose who will receive the benefit of the trust property. In such a case, because none of the potential beneficiaries has any fixed or guaranteed entitlement to benefit from the property, the conventional view is there is no separate equitable title to the property (though see 2.5). This is called a *discretionary trust* (see 2.1).
2. The trustee with legal title may hold the property subject to fiduciary obligations as before, but rather than being under an obligation to act in the interests of one or more beneficiaries when dealing with the property, the trustee is required to apply the property towards the achievement of a certain object or purpose. As above, because of the lack of any individual with a fixed entitlement to benefit from the property, there is no equitable title to the property. This is called a *purpose trust* (see Chapter 4).

3. The trustee may hold property subject to fiduciary obligations for the benefit of a beneficiary but the trustee himself has only an equitable title to the property, whether because he himself is a beneficiary of a trust of that property (in which case there will be what is called a *sub-trust*) or because it is a type of property only recognised by equitable property rules (see e.g. s. 1(3) of the Law of Property Act 1925). In such cases both the trustee and the beneficiary will have (distinct) equitable interests.
4. The trustee may hold property to which he has legal title and in relation to which there is a beneficiary who has equitable title, but the trustee owes no fiduciary obligations to the beneficiary in relation to his dealings with the property and instead only a duty to hand over the asset to the beneficiary when he demands it (see further 9.11).
5. The 'trustee' (or more commonly here *fiduciary*) owes fiduciary obligations to another party (generally in such instances called a *principal*) but has no legal title to any relevant property, either because the obligations do not refer to dealings with property (e.g. a solicitor giving legal advice to a client) or because the principal holds the legal title to the property to which the obligations relate (e.g. an agent handling his principal's goods) (see further 9.12).

The bulk of this book constitutes an examination of when a trust (of whatever sort) arises and the precise combination of rights and duties, powers and liabilities each sort of trust involves. Hence, we shall start out by looking at the rules of trust formation – what needs to happen for a trust to arise? From there we shall look at the rules on trustees' duties – what exactly does a trustee have to do, and correspondingly what rights does a beneficiary under a trust have? Finally, we shall examine breaches of trust – what happens when the trustee does not do what he was meant to do?

All this lies ahead of us. It is, however, worth noting now that there exists a basic and important divide in the law of trusts, that is between trusts which arise because this is what the parties wanted and trusts which arise for some other reason and on some other basis. More fully, some trusts arise precisely because this is what the property owner (i.e. the holder of legal beneficial title) intended. These trusts are traditionally called *express* trusts (though, as we shall see, there is a good argument that there are intended trusts which have not been classified as express trusts). By contrast, other trusts are recognised by law irrespective of the owner's intentions. These trusts can, roughly, be said to be *imposed* rather than intended, though this is somewhat misleading as such trusts may happen to coincide with the owner's intentions. (A more precise definition would be to identify these as trusts which arise for reasons other than a desire to give effect to an owner's intentions. Of course, so defined, this category is

not particularly revealing. It tells us what these trusts are not – intended trusts – but not what they are.) The traditional classification of trusts assigns these to two classes, *resulting* and *constructive* trusts, which is similarly unrevealing. When and why the law imposes trusts on owners who have not consented to this will be examined in detail in the later chapters. The key point to note now is simply that some trusts arise because this is what the parties want and that some trusts arise even though the parties may not want this.

This distinction is important for a number of reasons. The rules of trust formation of course differ between intended and imposed trusts. This distinction also bears on the duties that the trustee will be under in handling and dealing with the trust property (see in particular Chapter 9). More generally it is because trusts can be used *both* by property owners, as a way of arranging their affairs and using their property for the benefit of those around them, *and* by the courts, to redirect property when they consider that the current allocation of entitlements gives rise to injustice, that makes trusts so versatile and so important in English law (see generally 1.8).

We may usefully introduce at this stage some basic terminology. In the case of intended trusts, the trust arises precisely because some property owner decides that this is what he wants to do with his property. He may decide to create a trust while he is alive, in which case the trust is described as *inter vivos* ('among the living'), or he may decide to create a trust to take effect on his death, in which case we call this a *testamentary* trust (see further 6.10). In the case of inter vivos trusts, we call the creator of the trust a *settlor* (similarly, trusts are sometimes referred to as *settlements*). Where the trust is to take effect on death (i.e. is created by a will), we tend instead to refer to the creator (if male) as a *testator* or (if female) a *testatrix*.

We may also note here that, when deciding to set up a trust, the settlor can choose to take on the role of trustee himself, in which case we have what we call a self-declaration of trust. Alternatively, he can appoint someone else, or a number of other people, or a company to act as trustee(s) (see further 6.2). The settlor, of course, gets to choose who are to be the beneficiaries of the trust. The settlor himself can be the, or a, beneficiary of the trust, subject to the standard limitation that he cannot be both sole trustee and sole beneficiary.

## 1.4 Equity and trusts

In describing the typical trust, we saw that one feature is the separation of legal and equitable title to the relevant property. We also noted at the time that 'legal' and 'equitable' are here the adjectival forms of 'common law' and 'equity' respectively. We have as yet, however, said nothing as to what

common law and equity mean in this context. On one view, if our concern is with understanding the law of trusts *as it is*, as opposed to its historical development, no more need be said about this. 'Legal' and 'equitable' are as such no more than convenient labels for the different titles held by the trustee and beneficiary. Others, however, argue that trusts cannot properly be understood without an appreciation of the nature of equity and its relationship with the common law. Because of this lack of consensus, and because it is important that you make up your own minds on this, it is necessary to say a little now about common law and equity, and why some think it matters that we keep in mind the role of equity in the law of trusts. Accordingly, though this is a book about contemporary trusts law and not a historical overview of the development of trusts, we must make a brief excursus into legal history.

## 1.5

## Equity and the common law

It is not unusual for a legal system to separate the administration of different branches of the law. So, for example, many legal systems, including our own, have separate courts for criminal trials and civil trials. Other jurisdictions divide constitutional or public law cases from the rest of the law. What is far more unusual is for a legal system to have more than one set of courts to deal with disputes of the same kind. Even more unusual, and even more baffling, than this is to have separate sets of courts applying different sets of rules in cases of the same kind. Nonetheless, this is exactly what English law did for a number of centuries.

With the demise of the feudal system and its reliance on local courts applying local rules in resolving essentially local disputes, a national and centralised set of courts was established by the King to apply a single, common set of rules to all relevant disputes between his subjects. This common law gave us (eventually) much of the law of contract, almost all the law of torts and the basics of the law of property.

(It is worth noting at this stage that the phrase 'common law' carries a number of different meanings. At its broadest, it identifies a system in which there exists no comprehensive statutory legal code, with courts having on occasion to frame and develop rules for themselves. Here the contrast is between common law and civil law jurisdictions. A second sense of 'common law' identifies *all* judge-made law within such systems. Here the contrast is between common law and statute law. Finally we have the sense of 'common law' we are concerned with now, and which contrasts with equity: the judge-made law deriving from one particular sets of courts, namely the King's courts or courts of common law.)

Problems arose, since the common law, as initially developed, was

deficient both in its procedure and its substance, leading, at times, to instances of arbitrariness and injustice. Claimants who had got a raw deal from the common law courts started to petition the King to ask him to dispense the justice the courts had failed to administer. And the King would do so, at least on occasion. In time, as the number of such petitions grew, the King passed on the job of dispensing justice to his Chancellor, and ultimately, as one pair of hands was not enough to deal with the influx of petitions, a separate court system developed to deal with them. These were the courts of Chancery. Unsurprisingly, as certain complaints from petitioners tended to recur, and because no judge worth his salt sets out to treat like cases differently, the courts of Chancery developed their own set of rules for the administration of justice. This set of rules became known as *equity*. This then meant that 'the law' in fact constituted two distinct sets of rules, administered by two distinct sets of courts: the rules set down and applied by the common law courts, and the supplementary rules added and applied by the courts of Chancery.

To see how this worked, let us take an example from contract law. Perhaps the principal focus of the law of contract is to identify the circumstances in which promises are legally binding. The common law identified two such circumstances: first, where the promise was embodied in a formal document, known as a deed; and, secondly, where the promisor asked for (and got) something in return for the promise he made, in which case there is said to be 'consideration' for the promise. The implication of this is that promises made in other circumstances, and so which do not meet these requirements, have no legal effect under the common law rules. However, this seemed to do injustice on occasion. The problem arose where A made a promise to B, and B, believing entirely reasonably that that promise would be kept, proceeded to conduct his affairs on that basis. If A then broke his promise, B could suffer as a result of his reliance on it. However, unless the promise had been made by deed, or unless A had requested B to act in this way, the common law afforded B no protection. To remedy this injustice, the courts of Chancery developed the doctrine of promissory estoppel, which provided claims to (some) promisees who, in the absence of consideration, had relied reasonably and to their detriment on the promise being kept. This then meant that to know when promises had legal effect, you had to look to both the common law and equity. The common law identified two such situations, promises made by deed and promises supported by consideration, while equity provided a third, (certain) promises which have been detrimentally relied upon. This also necessarily meant that looking at either the common law or equity in isolation gave an incomplete answer to the relevant question of when promises are legally binding.

A similar story underlies the development of the law of trusts. The

common law of property identified the basic situations in which individuals became beneficially entitled to particular items of property. As we have noted, in those situations, the individual was said to have legal title to the asset. However, at times, the common law rules determining the location of beneficial entitlement to property worked injustice. There were circumstances in which, because of some undertaking he had made, or by reason of the circumstances in which he got his hands on the property, it would have been unfair to allow the legal title holder to keep the property for himself and to use it in whatever way he saw fit, but to which the common law rules offered no solution. In such circumstances, the courts of Chancery stepped in and ruled that the property must be held by the legal title holder not for his own benefit but for the benefit of someone else, thus resulting in the creation of fiduciary obligations. Moreover, that other person was ultimately regarded by equity as having an entitlement to the property itself, thereby giving rise to the notion of equitable title. This then gave us the trust as we know it today. So, just as the law of estoppel can be seen as a supplement to the common law of contract, the law of trusts is a supplement to and refinement of the common law rules on beneficial entitlement to property. The common law set down a list of circumstances in which an individual, through the allocation of legal title, became exclusively entitled to the benefits of a given item of property. Equity then intervened by adding to that list through the imposition of a separate equitable title where the rules on legal title left the right to benefit from the property in the 'wrong' hands.

Two important points follow from this. First, equity's intervention was needed only where the common law was inadequate. If the common law on a particular issue was perfectly fair and just then equity had nothing more to add. Accordingly, the notion of equitable title was needed, and hence was recognised, only where the location of legal title, if left unqualified, was thought to lead to unfairness. It is because of this that in circumstances where there is no trust, and hence where the common law rules on title are perfectly adequate, no equitable title exists at all, the owner having simply a legal beneficial title (see further 2.6). Secondly, as a matter of form, equity intervened not by repealing the relevant common law rules but by supplementing them. So, where it was considered that the rules on legal title left the wrong person to benefit from the property, equity intervened not by stripping that person of his legal title but by granting a separate equitable title to the individual who it was deemed should be entitled to its benefit. As such, the common law remained intact, but many of its unfair consequences were reversed through the additions and qualifications supplied by equity. It is because of this that equity is often said to be a 'gloss' on the common law.

So we can see that through the development of common law and equity we ended up with two sets of rules which only when combined gave a full and accurate representation of 'the law'. However, this created a number of problems. First, as should be clear, the rules of common law and equity necessarily differed. That, of course, was not all bad. The very point of equity was to be different. Many of the injustices perpetrated by the common law were remedied. But equally it was not an ideal solution. One problem was that unwitting claimants would be put to the expense and inconvenience of having to bring two separate claims if they did not know from the outset that the common law would leave them high and dry. Even though it was accepted at least by 1616 that equity's rules were indeed to be treated as trumping the common law where the two were in conflict, so that it was clear that the common law alone did not give the full picture of a claimant's legal rights and duties, still the common law judges would deny claims they knew would succeed in equity. In effect (though of course not expressly) they would be saying that, on the application of only half the relevant rules, you lose, but that if you want the rest of the rules applied – those rules which would enable your claim to succeed – you have to go elsewhere, starting again from scratch. This was manifestly unsatisfactory and the problem was finally solved by the Judicature Acts 1873–5, which led to the creation of a single court system applying the full set of rules, encompassing both those deriving from common law and those arising from equity.

### 1.6 The fusion of common law and equity

So now there is just one court system applying both the rules which were formulated and, prior to 1873, applied only in the common law courts and the rules which were formulated and, pre-1873, applied only in the courts of Chancery. This is undeniably a good thing. But whether it has solved all the problems to which the common law–equity dualism gave rise is an altogether more controversial matter. On one view the problems ran deeper. This is why.

#### The case for substantive 'fusion'

The common law and equity necessarily dealt with many of the same fact situations, and necessarily (because this was the point of equity) they devised different rules to deal with them. This was, and is, fine where the equitable rule purported to trump the common law's view of the situation; in such cases the common law rule was to all intents and purposes no longer 'the law'. Notwithstanding the misleading maxim 'equity follows the law', equitable relief always effectively reverses some common law rule. In

other words, wherever equity intervened, it reached a different solution, and applied a different rule, from the common law, which, to that extent, no longer resolved such cases. But there was still plenty of the common law left untouched by equity and which equity never purported to touch. This created the potential for inconsistency. There would often be arbitrary gaps in the common law, that is situations where the common law refused a claim despite allowing claims in other situations which were materially indistinguishable. Equity would then fill in the gap, so that now there would be a claim on such facts where previously there was none. But equity might fill in the gap differently from the common law rules which applied in the other, materially indistinguishable situations. The gap is filled but arbitrariness and inconsistency remain, only in a different form.

Take the following example (and see generally Birks, 1996a, Burrows, 2002 and Worthington, 2006). The common law set down a series of rules defining when a defendant would be liable for infringing the claimant's interests. This body of rules makes up the law of torts. These rules protected, amongst other things, individuals' interests in their bodily integrity and mental health, in their property and in their reputation. However, there were certain interests which the common law did not protect. These included rights to intellectual property and confidential information. Accordingly, the early rules prohibiting interference with intellectual property rights and breach of confidence derived from equity. So here equity was filling a gap left by the common law of torts. However, in filling this gap, the courts of Chancery developed their own rules for what remedies were available where such a duty was breached, and these rules differed in certain important respects from the equivalent rules set down by the common law. For instance, at common law a breach of duty would generally only give rise to a claim for compensatory damages. In equity, however, in addition to the possibility of claiming compensation, the courts showed a greater willingness to allow claims for the recovery of gains made by the defendant. This meant that common law wrongs (torts) were remedied differently from equitable wrongs. So, for instance, if A profited from publishing material which was defamatory of B, B could only recover in respect of the loss he had suffered; whereas if A had made a profit by disclosing confidential information in breach of a duty to B, then B would have the option of stripping A of this gain.

This difference in response does not, however, appear to be attributable to some distinctive factual feature unique to cases of equitable wrongs. The arguments for allowing the claimant to recover the defendant's gains seem to apply equally strongly to common law wrongs. The different responses of the common law and equity to wrongful conduct appear simply to be referable to the fact that the respective rules were developed by different

people at different times, rather than due to a considered application of the relevant principles. As such, though equity filled in a gap left by the common law, it did so in such a way that an (arguably) arbitrary distinction remained.

Another example can be taken from the law of property. Imagine that property to which I have legal beneficial title is stolen from me and the thief then makes a gift of that property to a third party, who is completely unaware of the fact that the property he is receiving is stolen. In this case, though I have lost possession of the property, I retain title to it since I never intended to give my title away. So, though the innocent third party has physical possession of the property, I am the one who is legally and beneficially entitled to it. As such I have a claim against him. However, the law's response, save in exceptional cases, is not to return the property to me but instead to allow me to recover a sum of money from the third party, reflecting the value of the property and any other losses I have suffered as a result of being deprived of it. Compare this with the situation where the stolen property is an asset to which I have *equitable* beneficial title. Here the law allows me to recover the property itself, rather than compelling me to make do with its money value. By contrast, however, I have here no claim for compensatory damages for any other losses I have suffered by being without the asset for a period of time. So here common law and equity have very different rules to deal with what looks like the same problem. In each case property to which the claimant is beneficially entitled has been stolen, and in each case it ends up in the hands of an innocent donee. The only difference between the two cases is that in the first the claimant's was a legal title and in the second the title was equitable.

Now, it is clear, as we shall see in more detail in the following chapter (at 2.5–2.6), that legal and equitable title are different concepts and work in different ways, so we should not automatically assume that they should be subject to matching rules. However, it is far from clear whether, even taking into account the differences between them, we can justify the different responses of common law and equity in our example. For instance, equitable title is generally considered to be weaker than legal title, and yet equitable title seems to be better protected in the event that the property ends up in the wrong hands, since the claimant can recover the asset itself. Once again it appears that common law and equity have devised different and inconsistent solutions to the same basic problem.

The probability of this happening is increased by the dual court system. Despite the traditional language of equity supplementing or acting as a gloss on the common law, the reality is that equity is in the business of contradicting the common law – the common law says the legal position is one thing, equity says it is another. As such, we can hardly expect Chancery

judges to have been either striving for or achieving consistency with the common law when formulating new rules. The fusing of the administration of common law and equity within a single court system therefore provides the opportunity to identify and weed out these inconsistencies. This requires, when necessary to achieve consistency of treatment, the application of equitable rules to situations to which, prior to 1873, only the common law rules applied and, conversely, common law rules to situations which, prior to 1873, were governed by equity. So, for instance, if we really do believe that deliberate wrongdoers should not be able to profit from their wrongdoing, we have good reason to extend to the common law tort of defamation the rule derived (largely) from equity that the claimant should be able to recover the defendant's gains, rather than simply seek compensation for his own loss.

This process whereby we look to achieve harmonisation between the rules of common law and the rules of equity is often referred to as *fusion* (or substantive fusion to distinguish it from the administrative fusion of common law and equity brought about by the Judicature Acts). The overall aim is to ensure that like cases are treated alike, and that we are not tied to inconsistency, and hence injustice, for no reason other than that this was the position before the Judicature Acts.

### Anti-fusion arguments

This may all sound perfectly reasonable, and indeed it is, but not everyone agrees. Some believe that we should not attempt or allow any such cross-fertilisation of common law and equitable principles. Rather, they believe that while the administration of common law and equity has been fused, the substantive rules are, and should continue to be regarded as, distinct. This sees the common law–equity distinction as being of more than historical significance, and hence to be maintained. Why do they think this? One reason is essentially historical. The Judicature Acts were designed only to fuse the administration of the two bodies of law. They were not designed to alter the substantive law, that is, the actual results of cases. Accordingly, it is contended that those who are arguing for the substantive fusion of common law and equity have misunderstood the purpose of the Judicature Acts and that the legislation provides no support for the greater integration of common law and equity on a substantive level. As such, those arguing for such a substantive change have been accused of making a 'fusion fallacy' (see Meagher, Heydon and Leeming, 2002, pp. 52–4).

This is right, but it does not take us very far. It is true that the Judicature Acts were not intended to affect the substantive law, and so they do not in themselves provide a good reason for a change of result on a given set of

facts. But this does not answer the point made by the advocates of substantive fusion, which we set out in the previous paragraph. The argument there was not that the Judicature Acts justified substantive changes in the law. Rather, the justification for such changes is the need to eradicate inconsistency and arbitrariness in the law so as to ensure that like cases are treated alike. The significance of the Judicature Acts is only that now both the common law and the equitable rules are applied by the same courts, judges have the opportunity to examine the full, combined set of rules and can excise any inconsistencies to which the existence of dual systems gave rise. In short, the fusion fallacy objection is not incorrect; it just misses the point.

There is, however, a second argument in favour of continuing to maintain a distinction between common law and equity of which it is less easy to dispose. This posits that equity is by its very nature different from the common law, such that you cannot hope to compare, let alone integrate, legal ('legal' here being the adjectival form of 'common law') and equitable rules and principles because this would not be comparing like with like. Quite what this difference is, however, is a lot harder to pin down.

The standard version of this argument paints the common law as a system of general rules, promoting clarity and certainty, but capable of leading to injustice in occasional cases because of this generality. Equity, by contrast, is viewed as a more flexible, more context-sensitive set of principles, designed to mitigate the occasional injustices of the common law's general rules. Equity accordingly gives the common law a much needed injection of morality. But if it is to be able to do this job, equity must have, and retain, its own distinct logic and identity. This argument tends to be supported by reference to the notion of 'conscience', equity operating to prevent conduct which is 'against conscience' or 'unconscionable'. Such language is of course vague and imprecise, but this is necessary if it is to be capable of being applied across a range of cases where the common law's rules require equitable supplementation. This need to retain flexibility means that the application of equitable concepts involves the exercise of judicial discretion in a way that the application of the clear but rigid rules of the common law does not. The sum effect of all this is that equity is to be viewed as ideologically distinct, and attempted integration of the substance of the common law and equity is to be avoided.

This account has historical resonance given the origins of equity. However, we may doubt whether this gives us reason to reject the argument for the substantive integration of the common law and equity. First, it is far from clear that this dichotomy between, on the one hand, clear but inflexible general rules and, on the other, more sensitive but also more vague or abstract moral principles is in fact an accurate representation of the law. It

may well be true that broadly-framed general rules are never going to achieve morally desirable results across the board. The world is simply too complex and the spectrum of possible eventualities too broad. Accordingly any legal system needs the capacity to deviate from these rules where justice demands. This was the role of equity in the period before the Judicature Acts. However, consider what happens when a court exercises this power to deviate from the existing rules to avoid injustice. Rather than this leaving the rule standing as before, untouched by the decision of the court, we rightly tend to regard the court's decision as a supplement or exception to the rule, replacing the old imperfect rule with a new and improved version. This is because, if we are to treat like cases alike, the 'deviation' must apply not just in the case in which it was first recognised, but also in all materially similar future cases. So, applying this equitable power to deviate from the common law does not give rise to a dichotomy between the common law's general, occasionally unjust rules and a series of equitable ad hoc exceptions or deviations from these rules. Rather, it leads to a single, increasingly complex and sophisticated, but also (it is hoped) fairer, body of rules.

So, though an inherent feature of equity was this 'discretion' to depart from the common law rules, once it did make such a departure, this left us with a new (equitable) rule which was just as binding as the common law rule it replaced or supplemented. As such, though equitable rules may be sourced in the exercise of some judicial discretion, it does not mean that the courts then have a continuing discretion when it comes to their application (on the different types and meanings of discretion, see 8.19). That being the case, there is no reason to view the substantive rules of equity as being any different in nature from the substantive rules of the common law, and so we have no reason to think that they cannot and should not be harmonised.

Secondly, it is plain that this important job of developing or changing the existing legal rules has historically been performed by both the common law and equity. Though plenty of important legal developments were made by the courts of Chancery, the common law rules did not remain unchanged over the centuries. Rather, while the dual system was in existence, English law happened to have two judicial sources of legal change: sometimes the common law would change itself, sometimes it would be changed by equity. Again, therefore, this gives us no reason to think that the common law and equity are somehow different in kind or nature.

Thirdly, even if, contrary to what we have just said, it were true that the law is made up of a combination of clear but inflexible rules and broad, open-ended principles, it is impossible to maintain that this dichotomy mirrors the common law–equity distinction. Much of equity, as we shall see, is as inflexible as anything the common law has to offer. Conversely, there are aspects of the common law which seem to involve the same application

of flexible but vague standards which are meant to be the hallmark of equity. A good example of this is the duty of care in the law of tort, where the courts have significant leeway to determine whether a defendant should be held to owe the claimant such a duty. It may well be that historically equity has played up its flexibility and discretion, and that the common law has played these down, but we should be able to look beyond the language used by the courts to see the reality of what they are doing. Similarly, it is impossible to argue that equity is any more concerned with morality or fairness than the common law. Again the development of the tort of negligence is a good example of common law courts developing the law by express reference to moral principles; see *Donaghue v. Stevenson* [1932] AC 562. Contrast this with the rules the courts of Chancery developed in relation to, for example, the certainty requirements for express trusts or purpose trusts, which seem to have no inherent moral aspect.

Indeed, there are even examples of equity framing rules which work *injustice* on the facts of individual cases. As we have noted already, one of equity's most important contributions to the law has been the recognition of fiduciary obligations. As we shall see later, these duties are so strict that a defendant may be held to have breached them, and so be subjected to legal liability, even where we consider that the defendant acted with exemplary motives and did no harm whatsoever to those around him: see in particular *Boardman v. Phipps* [1967] 2 AC 46 (9.6). Here, it is common to find lawyers explaining that these rules may create occasional injustice but that this is necessary in order to further the broader policy of encouraging the highest standards of conduct from fiduciaries. This may (or may not) be a legitimate approach for the law to take. What is clear, though, is that, in light of such rules, we simply cannot argue that equity has any monopoly on or an unwavering commitment to morality, fairness or individualised justice.

All in all, the argument that the common law and equity are engaged in fundamentally different pursuits looks decidedly weak. Of course none of this is intended to suggest that equity has not developed its own distinctive practices, which can be regarded as distinctive features which set it apart from the common law. It clearly has (on which see Smith, 2005). The point, however, is that we must always ask whether any such continuing distinction can be supported on the basis of principle. If we can account for these differences only by recourse to history then we should be ready to develop and modify the common law and equity so that they form a single body of law which is principled, coherent and fair.

Of course the crucial but difficult question is when differences in approach between the common law and equity are to be regarded as principled responses to (perhaps subtly) different sorts of problem, in which case such differences should be maintained, and when, by contrast, they are

alternative and inconsistent responses to the same basic problem, and so require harmonisation. For example, as we have noted and as we shall see in the following chapter (at 2.9), proprietary interests recognised by the common law typically function differently from those recognised in equity. This is most evident when the property ends up in someone else's hands. Whereas legal proprietary interests, as a general rule, bind everyone, equitable proprietary interests usually bind only those who know (or should have known) of their existence and those who acquired the property free of charge. As such, there is a divergence of approach between the common law and equity with regard to the treatment of third parties who get their hands on the property in which the claimant has an interest.

However, it does not follow that this difference cannot be justified. The law may, and indeed almost certainly does, have good reason to have two (or more) types or tiers of proprietary interest, one stronger and more durable than the other. If so, we should maintain this distinction between the operation of legal and equitable proprietary interests (though it may be that we should find labels more illustrative of their respective content than 'legal' and 'equitable'). However, we must also ask whether the situations in which proprietary interests have been recognised in equity correspond to the situations in which the claimant merits only the weaker variety of proprietary interest. This is more doubtful. Therefore, though we should keep the distinction between legal/strong and equitable/weak proprietary rights, we may need to reconsider which examples of proprietary interests we allocate to each category.

Finally, we may note one further, very bad argument against the substantive integration of common law and equity, which is still occasionally trotted out on the misplaced assumption that it deals a knockout blow to pro-fusionists. This is most famously encapsulated in a quote from Lord Selborne LC:

*'It may be asked . . . why not abolish at once all distinction between law and equity? I can best answer that by asking another question – Do you wish to abolish trusts? If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate.'*

The answer to this should be obvious. The fusion argument does not call on us to pick between common law and equity, with the other then condemned to the scrapheap. Rather it simply asks us to ensure that our combined set of common law and equitable rules forms a single, coherent, principled body of law. The only substantive changes it advocates are where the interplay of common law and equity has led to rules which are contradictory or inconsistent. Only then do we need to make changes to the rules we have, and then only in so far as is necessary to ensure consistency and fairness. In the many cases where common law and equity work

happily side by side, without contradiction or inconsistency, nothing would change. This would be the case with trusts. Nobody suggests that trusts are inherently contradictory or unprincipled. They are not, by their very nature, unjust. The division between legal and equitable title, on which the trust rests, may at first glance appear to involve such a conflict (the common law saying that the trustee owns the property, equity saying it is owned by the beneficiary). However, the trust in fact works as a special type of property arrangement whereby the usual rights and powers of 'ownership' are split between two people. So, rather than having conflicting claims to the trust property, the trustee and beneficiary in fact have complimentary interests; the trustee having custody of and the power to deal with the property, the beneficiary having the right to whatever benefits may flow from such dealings. In short, nobody advocates the abolition of the trust, and substantive fusion certainly would not force this upon us. The issue is simply whether we should allow historical divisions to impede our pursuit of justice. The answer is plain: we should not.

### 1.7 The maxims of equity

One of the more unusual features of equitable jurisprudence is what have become known as the 'maxims of equity'. These are a series of (purported) truisms concerning the functions and workings of equity. They are thought to be significant because, as with other statements of legal principle, they both tell us about the law as it is and offer guidance in resolving disputes where the law is uncertain. However, the maxims of equity do not resemble the sort of principles you will find elsewhere in the law. So while in the law of contract you will find references to the principle that agreements must be performed (commonly in its Latin form, *pacta sunt servanda*) and in tort we have Lord Atkin's famous neighbourhood principle, that we must take reasonable care not to harm those whom it is reasonably foreseeable may be harmed by our actions (see *Donoghue v. Stevenson* [1932] AC 562), in equity we are told, amongst other things, that 'equity abhors a vacuum', 'equity regards as done that which ought to be done', and that 'equity will not assist a volunteer'. The problem with such statements is not only that their meaning is far from clear, but that, unlike their common law counterparts, they carry no obvious moral weight. So even once you understand what is meant by a 'volunteer' (it is someone who has not given anything in exchange for a promise or transfer of property), it is far from apparent why such a person does not, at least on occasion, merit 'assistance'. Moreover, when you actually look at the cases, you find that there are in fact plenty of occasions when equity *does* assist volunteers. As such, the maxim would be more accurately stated as 'equity sometimes does not assist a volunteer' or

‘equity will not assist a volunteer except where it does’. This makes its redundancy plain.

Here, then, we have a proposition which is not only obscure and has no obvious moral basis, but which is also misleading since it applies only intermittently. Many of the other maxims of equity are similarly problematic. For instance, take the maxim ‘equity acts in personam’. This appears to suggest, and has been used to support the view, that equity provides only personal rights and claims, and does not grant or recognise proprietary rights and claims (for the distinction between personal and proprietary rights, see 13.2). However, as we shall see (2.5), whatever the position may once have been, trusts law has so developed that a beneficiary is plainly treated as having a proprietary right or interest, namely equitable title, in the trust assets. Moreover, equity has created a range of proprietary interests outside the law of trusts. However, one still finds judges and commentators referring to the maxim as though it nonetheless embodies an important truth about the operation of equity.

Of course there are other equitable maxims which pose fewer problems. For instance, ‘equity looks to intent, not to form’ is both clear and, largely, accurate. However, the basic point still stands. The maxims of equity are unreliable. Though rarely completely meaningless or false, they have a tendency to obscure and mislead, and to stand in the way of analysis of the real principles and policies which shape the law. They are not the keys to unlock equity and the law of trusts, and, though they cannot be ignored entirely, simply because judges persist in using and abusing them (for a good example, see *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324, discussed at 8.17), they should be treated with suspicion. (For a fuller run down of the maxims, see Martin, 2005, pp. 27–32.)

## 1.8 The uses of trusts

Thus far, we have been dealing with the question of what a trust is. However, we have yet to see what trusts are *for*. Throughout the book, through our examination of the cases, you will get to see many of the diverse applications of trusts. However, it may help to provide some context at the outset for the discussion of the rules and principles to follow.

Here it is useful to return to the fundamental division we introduced earlier (1.3), between *intended* and *imposed* trusts. For present purposes, the significance of this division is that it reflects different uses of trusts in practice. When we look at intentionally created trusts, the reason for the law giving effect to such trusts is plain. The property owner wants a trust, and the law generally enables individuals to make whatever dispositions of their property they desire. The interesting question here is why someone

would choose to create a trust. By contrast, when we are looking at trusts which arise for other reasons, the important question is why the law would want to impose a trust against, or irrespective of, the owner's wishes.

So, first, why do people choose to create trusts? The (express) trust is a facilitative institution, which means that it is a device supplied by law which people can then make use of in order to arrange their affairs in whatever manner best suits their purposes. In this way, the trust ranks alongside contract and much of the rest of the law of property. The simple reason for choosing to create a trust, then, is that it suits your purposes, and does so better than the other facilitative institutions the law makes available. What, then, do trusts have to offer that these other devices lack? Trusts are principally a mechanism for benefiting people through the disposition of one's property. That is to say, trusts are a means of transferring to others the benefit of the property we have at our disposal. Of course, you do not need a trust to do this. If you have property – money, a book, some shares – which you would like someone else to enjoy and benefit from, the simplest and most common option is to transfer the property to them outright, or in other words to make a gift of it. The effect of such a transfer is that the recipient takes over from you as 'owner' and holder of the property. A variant on this is to transfer the property to a number of people who will then become co-owners (though this possibility is more limited in relation to land; see s. 1(6) of the Law of Property Act 1925 and s. 34 of the Trustee Act 1925). It may also be possible to grant a lease, which gives the other a right to use the property for a fixed period of time. However, these cases aside, the common law gives few options.

For most purposes these choices will be enough. However, on occasion, you may want to do something different, to use your property to benefit another in some other way or in some other form. One possibility then is contract. You can, through the law of contract, give others legal rights to use and to benefit from your property. Moreover, because there is still general freedom of contract, you are given pretty much free rein to mould these rights to suit your ends. In this way, contract offers a flexibility which the common law of property lacks. However, the big weakness of contractual rights is that they, as a general rule, bind only the parties to the contract. As such, they are effective only so long as the initial owner and contracting party retains the property. So, for example, if your concern is where your property goes after your death, contract is of little use. Moreover, contractual rights offer little protection if the owner becomes bankrupt, since then the relevant property will be sold and its proceeds used to pay off the owner's various creditors (see further 2.4, 7.11). If you want to give someone a right to benefit from property which is not so easily defeated then you need to give that person a right or interest *in* the property.

This is where trusts come in. Trusts in essence allow you to divide up ownership, and to confer beneficial rights to property, in different and more complex ways. For instance, trusts allow for the creation of *successive* rights to property. So, if, for example, you want to leave some property to your partner for life, then to your child for his or her life, and thereafter to your grandchildren, you will need to create a trust. Trusts also enable you to create different forms of *concurrent* interests in property. Whereas common law co-ownership gives all co-owners concurrent shares in *all* aspects of the property and the benefits it brings, under a trust you can, for instance, arrange for the income to go to one person and the capital to go to someone else. Trusts are also useful if you want property to be used for someone else's benefit but without giving them control over it. As we have seen, the distinctive feature of the trust is that while the beneficiary is entitled to any benefits the property has to offer, it is the trustee who has custody of the trust property and the power to determine how it is to be applied. This may be a more attractive option when the person you want to benefit is unable, because of age or mental incapacity, to make these decisions for himself, or where, because of impulsiveness or stupidity, you do not trust him to exercise these powers responsibly. Similarly, the divorcing of control from beneficial entitlement which trusts entail may be desirable if you want to benefit one person while taking advantage of another's investment acumen. Trusts can also be used if you want to make an immediate disposition of your property while at the same time leaving some flexibility to accommodate changing circumstances. As we shall see later on (2.1), it is possible to set up a trust but leave it to the trustee to decide exactly who benefits from the trust property and by how much.

These features have seen trusts used, for instance, by those with dynastic ambitions as a way of ensuring that property is kept in the family line. Trusts also form the basis for many occupational pension and other investment schemes. As we shall see in Chapter 5, trusts are one of the principal mechanisms by which property is donated to and held by charitable organisations. The division of control and benefit, as well as the fact that trusts can usually be created without writing (see Chapter 6), has also seen trusts play a significant role in schemes to avoid or minimise tax liability. Over recent years trusts have also been used increasingly in commercial transactions to provide a form of security in the event of a debtor's insolvency (see e.g. the discussion of *Quistclose* trusts at 7.12 and *Re Kayford Ltd* [1975] 1 WLR 279).

Turning to trusts which arise for reasons other than an owner's intentions, in the majority of cases the aim and effect of imposing a trust is to remove property from one person and give it instead to someone else. Such trusts can, therefore, be understood as a means of redistributing property where

an unqualified application of the common law rules of title would lead to injustice. One common example of this is where property has been acquired through wrongdoing. In a number of such instances, the law will impose a trust over that property to strip the wrongdoer of his ill-gotten gains and divert them to his victim (8.16–8.17). Another, though controversial, example is provided by cases of defective property transfers (see 7.10, 8.15). If I transfer property to you on the basis of some mistaken belief or as a result of coercion, the common law will usually leave you with title to the property, while I have merely a personal claim to recover its value. At least on occasion, however, a trust will arise to enable me to recover the property on the basis that I never properly intended to give it away in the first place. The third principal situation in which trusts are imposed to reallocate property occurs in the context of home sharing. Here the courts have, through the law of trusts, granted cohabitants interests in their home on the basis of their contributions to its acquisition and (it seems) to the partnership more generally (see 8.10–8.14). Indeed, in recent years it has been argued that the courts should have a general power to impose trusts, and hence to effect a redistribution of property, wherever they consider that this is what justice demands (8.18–8.19).

Even without going this far, you can see how versatile trusts are and why, as unfamiliar and awkward as they may appear, they play such an important role in English law (see further Moffat, 2005, pp. 5–12, 31–32; Oakley, 2003, pp. 6–12). Trusts provide a mechanism which offers extensive freedom and flexibility to owners to dispose of their property in a manner which best suits their objectives, while at the same time providing a means for courts to redirect property where they consider it unjust for a defendant to keep it for himself. Trusts can be used to further the aims of family members and commercial parties alike, and trusts law plays a role in resolving problems ranging from relationship breakdown to corporate insolvency. In short, there are very few areas of law and society in which trusts law does not play some role.

## Summary

1. The term “trust” describes a particular form (or forms) of property holding. In contrast to standard absolute ownership, where the owner (holder of legal beneficial title) is free to use the property howsoever he wishes, where there is a trust, the legal title holder must apply the property exclusively for the benefit of someone else.
2. In such a case, the person holding the property is called a *trustee*, and the person for whose benefit he holds it is called a *beneficiary*. The person (if any) who set up the trust is usually referred to as a *settlor*.

## Summary cont'd

3. In the typical trust, the beneficiary not only has rights against the trustee that the property be applied solely for his benefit, but also his own, equitable title to the trust property. It is this combination of (fiduciary) obligations owed by the trustee to the beneficiary and the split between legal title and equitable title to the property which describes the core case of a trust.
4. Some trusts arise because this is what the owner wanted to do with his property. These are typically called express trusts. Others trusts are imposed by the law, irrespective of the owner's wishes. These are traditionally allocated to the categories of resulting and constructive trusts.
5. For a long time English law had two separate court systems, applying two distinct sets of rules. The common law was applied by the King's courts, while equity was applied by the courts of Chancery. The origins of the law of trusts lie in this divide.
6. The administration of common law and equity has been fused since 1875. However, it is strongly arguable that more needs to be done to ensure that the substantive rules of common law and equity form a coherent and principled whole. None of this would jeopardise the law of trusts.
7. Trusts are an extremely versatile legal device. Settlers may use them both to provide for family members and to secure their commercial interests. The law imposes trusts to ensure a just division of the family home upon relationship breakdown, to strip gains from wrongdoers, and to return misapplied property. It is for this reason that trusts play such a central role in English law.

## Exercises

1. How does holding property on trust differ from owning it outright?
2. What is meant by the 'fusion' of law and equity? What reasons have been given for it? What reasons have been given for rejecting it?
3. What would English law lose if it did not recognise the trust?

## Further reading

For more on equity and its origins, have a look at the following:

Maitland, *Equity: a course of lectures* (Cambridge University Press, rev edn 1936)

Holdsworth, *A History of English Law: volume 1* (Methuen, 7th edn 1976), pp. 395–476

Baker, *An introduction to English legal history* (Butterworths, 4th edn 2002), pp. 97–115

Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths, 4th edn 2002), especially pp. 3–121

### Further reading cont'd

For more on fusion and the relationship between common law and equity, see:

Birks, 'Equity, conscience and unjust enrichment' (1999) 23 *Melbourne University Law Review* 1, pp. 17–22

Burrows, 'We do this at common law but that in equity' (2002) 22 *Oxford Journal of Legal Studies* 1

Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths, 4th edn 2002), pp. 52–54, 78–83

Smith, 'Fusion and tradition', in Degeling and Edelman (eds), *Equity in Commercial Law* (Thompson, 2005)

Worthington, *Equity* (OUP, 2nd edn 2006)

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