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The birth of equity and trusts

Learning objectives

This chapter will help you to:

- understand the origin and meaning of equity
- consider whether equity and common law were 'fused' or simply 'amalgamated' by the Judicature Acts 1873 and 1875
- assess the effects of the Judicature Act of 1873–75
- consider whether equity is of any relevance to modern society
- understand the origin of trusts and their functions.

Introduction

This chapter discusses the origin of equity and trusts as distinctive aspects of the English legal system and the subsequent merger of equity with the common law. In order for students to appreciate how equity functions in the modern society, it is pertinent that they understand the origin of equity, its individual operation before being merged with the common law, as well as the development of trusts which, as will be seen later, took shape in the court of equity. The chapter discusses the effects of the merging of equity and common law—a topic that continues to generate interesting academic and judicial debates—and considers whether equity has any relevance to modern society. It is hoped that this chapter will lay a solid foundation for discussion in the second chapter of the maxims of equity, the main tools through which equity expresses its characters, and the specific topics of subsequent chapters.

1.1 What is equity?

If asked 'what is equity?' the addressee will likely respond that: equity is to do what is fair; it means to do justice; it is to do what is right. The list could continue. If the question is posed after the year 1875—which was the year when the rules of equity became fully developed—the addressee could easily say, as Maitland once said, that 'it is that body of rules which is administered only by those courts which are known as Courts of Equity' (Maitland *Equity* (Cambridge: Cambridge University Press, 1947) at 1). But it would be incorrect to define equity as such today because there are no courts that can now be called courts of equity.

Furthermore, one may also define equity in the years post 1875 as 'that body of rules administered by the English courts of Justice which, were it not for the operation of the Judicature act, would be administered only by those courts known as Courts of Equity' (Maitland at 1). As with the previous definition, this latest one is poor because, despite acknowledging that equity forms a part of the substantive English law, it describes this part and distinguishes it from other aspects of the law by reference to courts that are no longer in existence.

One may even add another drawback to such a handicapped definition of equity as just rendered. In stating that equitable rules, or the rules of equity, are administered by English courts of justice after 1875, we raise certain ambiguities as to what part of equity is *now* administered with common law. As will be seen later, while the Judicature Acts undoubtedly brought equity and common law together within one judicial system, the question remains as to what the exact effect of these Acts are. Did the Acts 'fuse' the rules of equity and common laws—which undoubtedly used to be administered separately by different courts before 1875—or did they simply 'unify' or 'amalgamate' the

previous different administrations of equity and common law and entrust this upon the shoulder of a single court? While this issue will be fully considered later, it is necessary first to consider how other writers have attempted to define equity, marking out essential features of such definitions in italics.

Phillip H Pettit *Equity and the Law of Trusts* (9th edn, London: Butterworths, 2001) at 1:

> If law be regarded in general terms as the rules enforced in the courts for the promotion of justice, equity may be regarded as that part of the law which immediately, *prior* to the coming into force of the Supreme Court of Judicature Acts 1873 and 1875 was enforced *exclusively* in the Court of Chancery, and not at all in the Courts of Common Law—Common Pleas, Exchequer and King's Bench. (Emphasis added.)

Alastair Hudson *Equity and Trusts* (2nd edn, London: Cavendish Publishing Limited, 2001) at 5:

> Equity is the means by which a system of law balances out the need for certainty in rule making on the one hand, with the need for *sufficient judicial discretion* to achieve fairness in individual factual circumstances on the other. (Emphasis added.)

Robert Pearce and John Stevens *The Law of Trusts and Equitable Obligations* (Butterworths Lexis Nexis, 1998) at 3:

> 'Equity' describes a particular body of law, consisting of *rights* and *remedies*, which evolved historically through the Courts of Chancery. (Emphasis added.)

Aristotle *The Nichomachean Ethics* (1955) 198 para 1137a17 x (quoted by Alastair Hudson, at 8:

> For equity, though superior to justice, is still *just* . . . justice and equity coincide, and although they are good, *equity* is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is the rectification of legal justice . . . the explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made . . . so when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.

Gary Watt *Trusts and Equity* (2nd edn, Oxford: Oxford University Press, 2006):

> Equity is a body of principles, doctrines, and rules developed originally by the old Court of Chancery in *constructive* competition with the rules, doctrines, and principles of Common Law Courts but now applied, since the Judicature Acts, 1873–5, by the unified Supreme Court of England and Wales.

Michael Haley and Dr Lara McMurtry *Equity & Trusts* (London: Sweet & Maxwell, 2006) at 1:

> The term 'equity' is, in a general sense, associated with fairness, morality and justice. It is an ethical jurisdiction. On a more legalistic level, however, 'equity' is the branch of law that was administered in the Court of Chancery prior to the Judicature Acts 1873 and 1875.

KEY POINTS

- Before 1875, equity was administered separately from common law.
- Equity balances the rules of law with judicial discretion based on individual factual circumstances.
- Equity consists of rights and remedies.
- Equity is rectificatory.
- Equity was, to some extent, administered jointly with common law after 1875.

1.2 Origin of equity

The origin of equity can be traced back to the existence, in the 13th century reign in England of Edward 1, of three distinct courts, the King's Bench, the Common Bench or Court of Common Pleas, and the Exchequer. These courts operated independently, entitling plaintiffs to a choice from the three. However, predominantly they all administered traditional and statute law, collectively known to the Edwardian lawyer as common law, a collection of legal principles and rules dating back to 1189.

However, of these three courts the Exchequer performed more than just judicial functions and, according to Maitland, it served as a 'government office', a modern day treasury. This court is headed not by a judge, but by a chancellor, a person equivalent to the Chancellor of the Exchequer in the modern day Britain.

As a government official, the chancellor oversees many departmental works such as issuing of writs for the commencement of actions in the courts of law. Even to this day, it is not possible to commence a legal action without issuing a writ of summons or other kinds of writs—depending on the nature of the action—to the defendant. When issued by the chancellor, these writs are sealed with the king's seal. Evidently, the chancellor occupies a very important position. He sits in a court, although he is not a judge, issues writs to other courts (and this places him above the judges), and what is more, he is the only one who can encrypt the writs with the king's seal, a symbol of monarchical authority.

Although the Chancellor issues writs already known to the English legal system, he however could issue writs to cover cases which were not catered for by the existing writs. Yet, not being a learned man himself, he often found such writs quashed by the courts especially as he often would not have had the benefit of the defendant's claim.

The fact that innovative writs issued by the chancellor are subject to being quashed by common law courts must sometimes distress him. However, like a good chess player, the chancellor holds another ace: although the courts of common law dispense justice, there is also room for the king himself to do justice, even if only occasionally. If the courts do not satisfy the claimants, they simply go to the king. But towards the end of the 13th century, these extrajudicial petitions were so many as to involve the chancellor—as the king's prime minister—in the direct administration of these types of cases. And, it must be emphasized, he is involved in the king's council as well. It must be noted that it is in the administration of justice through or under the auspices of the king that the chancellor began to develop his judicial powers.

In the *Earl of Oxford* case (1615) 1 Rep Ch 1 at 6, Lord Ellesmere summarized the rationale for the chancery thus:

> [M]en's actions are so diverse and infinite that it is impossible to make any general rule which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trusts, wrongs and oppressions of what nature so ever they be, and to soften and mollify the extremity of law.

Lord Ellesmere's justification of equity, as a response to the inadequacy of the common law, was theatrically espoused in the MGM classic, *The Magnificent Seven* (John Sturges (dir), Metro Golden Mayer, 1960, quoted by Gary Watt at 15), where two characters, Chris and Vin, played by Yul Bryner and Steve McQueen converse thus:

Chris: 'We took a contract.'

Vin: 'It's not the kind any court would enforce.'

Chris: 'That's just the kind you gotta get.'

The chancellor's judicial powers are divided into two: the common law sides and an equity side. How do these work?

1.2.1 The common law side of the chancellor

How is it that the chancellor can administer common law? After all, we have said he is not a judge.

As the chancellor began to operate justice through the king, a division between two forms of justice ensued as noted above. In the first category, several people petitioned to and against the king. It must be pointed out that some of the kings at this time were great wrongdoers. They were notorious for seizing people's lands without apparent justification and they did this because they knew their subjects could not seek writs against them in any court let alone before the kings themselves. So what the chancellor did was to devise a means by which, if a case involved the king, and a plaintiff from whom land is seized petitions the king, the chancellor sends the case down to the King's Bench for trial and should there arise a need for the plaintiff to prove facts of ownership of the land, a jury is assembled to deal with the case. It must be borne in mind, however, that

this particular form of action deals essentially with legal issues as between two parties one of which is appearing before the king because he is not satisfied by the court, or as between one party who petitions against the king for the latter's own wrongdoing. It was not until the 1854 Common Law Procedure Act (CLPA) that common law courts were granted limited powers to award injunctions, while the 1858 Chancery Amendment Act (popularly called Lord Cairns's Act) would empower the Chancery to award damages. It was the CLPA that also abolished the writ system.

1.2.2 The equitable side of the chancellor. 'For the Love of God and in the way of Charity'

In that great age of poverty, ignorance, bribery and corruption, not many litigants could afford to seek remedies in courts of law. They are sometimes old, and pitched against the rich and famous, the powerful and the celebrities of the day. So, such plaintiffs would rather send their petitions to the king, through his chancellor to do what is right, as the saying goes, *for the love of God and in the way of Charity*. Due to the number of these piteous petitions, petitioners began to send them directly to the chancellor himself.

The original response of the chancellor—again, now wanting to circumvent the courts of the lands, the common law courts, was to issue special writs to such claimants to go to the courts. These writs, need it be mentioned, would mirror the particular circumstances of the litigants. But as is well known, by this time in the 14th century, the common law courts were so conservative that any such writs, which deviated from the laws and practices of the day, were regularly quashed. So one may be poor and his poverty written on the writs or old and the age inscribed therein, this did not sway the common law court. The dictum of common law, it must always be remembered, is let justice be done even if heavens must fall! The common law at this time, one could say, was a slave to formality.

However, the chancellor had an alternative. Instead of sending a piteous plaintiff to the regular courts—where his writ might be quashed—he could, after listening to the plaintiff's complaint order the defendant to appear before him. He does this by issuing a *subpoena*, which orders the defendant to appear before him or forfeit a sum of money. Now, while subpoenas are issued just as ordinary writs to make a person appear before the chancellor, they are in fact distinguishable from writs. Whilst writs merely inform a defendant as to what action is against him in the court, a subpoena forces him to appear and respond to a plaintiff's claim, and this he must do *upon oath*, unlike with writs.

Indeed, the whole process of subpoena, the oath, makes the procedure before the chancellor more like the ecclesiastical procedure rather than mirroring the day's English judicial process although, as some have observed, if the chancellor were to be asked about his intentions, he would likely deny that he deliberately set out to adopt a different judicial process from the ordinary courts of the land. This might be true if it is remembered that the complaints that come before the chancellor are normal issues tried by the courts.

1.2.3 So the next question is how does the chancellor begin to go it alone despite his lack of intention to do so? Mr Chancellor, Go and Fly Your Kite!

The extraordinary justice dispensed by the chancellor began to attract bitter and rabid criticism from lawyers. Parliament was angry. The courts were irritated. The chancellor was giving justice to the poor and the indolent, as common law courts would regard these people, and at the same time the king was dispensing controversial justice to criminals. This double 'assault', shall we say, on the common law courts and the law of the land (Parliament) would soon result in the common law courts forbidding the chancellor to deal with common law cases! With regard to the chancellor coming near common law jurisdiction, they told him: *Go and Fly Your Kite!* Luckily, by the time the chancellor was rebuffed by the common law courts, he had already begun to enforce breaches of trusts, a system which he carried over from the ecclesiastical church, which would normally punish breaches of such trusts by spiritual censures such as excommunication. We shall say more about the development of 'trust' later in this chapter.

The common law courts, with their difficult and conservative procedures could still not deal with 'fraud, accident, and breach of confidence'. The chancellor stepped in even deeper, strengthening his hold on power with no one being able to set any limit to his ever-growing powers. So by the end of the 15th century, the chancellor would demonstrate clearly that, when it comes to inventing rules to cover cases that would not normally be covered by common law courts the *highest kite you can fly is your imagination*!

1.2.4 From love of God and charity to the rules of equity and good conscience: 16th century

Not much is today known about how chancellors developed their practice in the course of the 14th and 15th centuries. But we do know—thanks to reports in chancery dating back to 1557—that by the 16th century, his rules were known as 'rules of equity and good conscience'. The second part of the 16th century witnessed a more settled chancellor's rules of engagement. No more the ecclesiast. The chancellor had consolidated his jurisdiction by issuing what are called 'common injunctions'. The chancellor issued common injunctions to restrain the parties from continuing their action in common law courts or, where these have been concluded, from enforcing the judgement obtained. Underlining these common injunctions is the need for the chancellor to be able to enforce his new powers of trusts against the rich and powerful who could buy the court, but not the equity. Hence, if despite breaching trusts, a defendant obtains judgement, the chancellor does not controvert the judgement; he does not annul it; he does not question the legal validity of the judgement. All he does is to appeal to the party's conscience against enforcing the judgement against the party appearing before him. Of course, this is a threat more like: If you enforce your judgement, you shall go to jail.

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The tension between the chancery and the common law courts was animated by Lord Ellesmere, the Lord Chancellor, and Chief Justice Coke, the head of the common law courts, both of whom wanted the question of validity or invalidity of common injunctions to be decided once and for all. In the *Earl of Oxford* case, the common law court had awarded judgement against a defendant to an action. The defendant petitioned the chancery on the basis that the judgement was obtained by fraud, an occurrence not uncommon in those days. The essence of the petition was to prevent an enforcement of the judgement against the defendant. Chief Justice Coke immediately indicted the defendant, but Lord Ellesmere issued an injunction to restrain the plaintiff from enforcing the judgement. Common law and the chancery clashed. Upon recourse to the monarch, it was all too easy for King James—forever wanting to overshadow his courts—and upon the advice of Francis Bacon, the Attorney General, and other eminent lawyers of the day, to decree in favour of the chancery.

From this period of victory over common law courts, the court of equity became an extremely busy court with Bacon claiming that as many as 16,000 causes were pending before it at a time. It began to fall into arrears. Many called for its abolition. But it survived with restoration. The King's Seal, as was recorded was always guided by eminent lawyers. By the 19th century equity made it to the textbooks, the first—and by then regarded, as the greatest of which is—*Blackstone's Commentaries*.

Thus equity was born. But its growth began to pose threats to the indolence of the common law system. Surely, if tension between two distinct but often dovetailed and intermingling things is not properly managed, an explosion is inevitable. The *Earl of Oxford* case was the theatre of the conflict between equity and the common law. All that follows from this moment was a triumphant operation of equity until 1873 when the first of the Acts that would further establish its rules—and subject its development to a much stricter regulation—emerged.

thinking points

- *Do you think the decision in the* Earl of Oxford *was fair to common law?*
- *What is the rationale for the chancellor, a non-lawyer, meddling in its administration of justice?*
- *Do you agree with Aristotle's explanation that the legislator would have given the same judgement as equity did were he present in the court, and would have made a similar equitable enactment were he aware of the circumstances?*

1.3 What became of the chancery jurisdiction after Earl of Oxford but before Judicature Act?

Before we come to the Judicature Acts, let us consider briefly what became of the chancery jurisdiction after the *Earl of Oxford* case. After all, before that case, in the famous dictum of Selden (see the 'Table Talks of John Selden' (1927)), equity was:

> . . . a roguish thing. For [common law] we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is longer or narrower so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot.'

This dictum is nowadays best expressed as: 'equity is as wide as the chancellor's foot' which, in plain language, means: equity had no systematic rules; equity does not follow or recognize precedents; equity was unpredictable just as the strides of individual chancellors; or, for equity, one could say, anything goes!

However, after the *Earl of Oxford* case, but before the Judicature Acts, equitable rules were thought to become more systematized, rigid and, in fact, cases of equity began to be reported. Phillip Pettit captioned well this new status of equity:

> This state of affairs [the loose nature of equity] began to be less true in the later 17th century as the principles of equity began to become more fixed. Cases in the Chancery began to be reported around the middle of the century and were increasingly cited, relied on and followed in subsequent cases. The Chancellor began to say that although they had a discretion it should be exercised not according to conscience but in accordance with precedent. Lawyers rather than ecclesiastics became appointed as Chancellors, the last of the non-legal Chancellors being Lord Shaftesbury, who held office during 1672–73. With his successor, Lord Nottingham (1673–82) often called the father of modern equity, the development of a settled system of equity really began, to be continued under succeeding Chancellors, notably Lord Hardwicke (1736–56), and completed in the early 19th century under Lord Eldon (1801–06 and 1807–27). The result of their work was to transform Equity into a system of law almost as fixed and rigid as the rules of the common Law.

In *Gee v Pritchard* (1818) 2 Swans 402 at 414, Lord Eldon strongly rebuffed thoughts that equitable rules have remained loose, whimsical and as varied as the chancellor's foot:

> Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot . . .

In *Re Telescriptor Syndicate Ltd*, Buckley J declared that 'This Court is not a Court of Conscience' and in *Re National Funds Assurance Co* (1878) 10 ChD 118, Jessel MR also stated that the Chancery Division of the High Court (one of the new divisions that the Judicature Acts divided the new High Court into, see below) 'is not, as I have often said, a Court of Conscience, but a Court of Law'.

The maturation of the rules of equity, from a bundle of inconsistent, flexible and unregulated rules, into a full, systematic body of rules, was recognized by the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297 thus:

> Of course the grant or refusal of specific performance remains a matter for the judge's discretion. There are no binding rules, but this does not mean that there cannot be settled principles, founded on practical considerations . . . which do not have to be re-examined in every case, but which the courts will apply in all but exceptional circumstances.

But it should not be assumed that victory for equity led to a clear-cut relationship between it and the common law. Far from it. Equity had become a victim of its own success. On the one hand, equity rules became more systematized. On the other hand, equity's relationship with the common law became even less clear. There was an endless chain of actions and reactions as regards cases between these courts. The nature of this relationship was brilliantly captured by Charles Dickens's *Bleak House* (first instalment published in 1850) that:

> Equity sends questions to Law, Law sends to questions back to Equity; Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything, without this solicitor instructing and this counsel appearing . . .

KEY POINTS

- Equity developed through activities of the chancellor.
- Equity was supplementary to common law and afforded remedies where common law was inadequate or rigid.
- The *Earl of Oxford* case gave prevalence to equity over common law.
- The Chancellor never disregarded common law judgment, he only appealed to conscience of common law victors.

1.4 The reform of the Court of Equity

Due to the situation described above, steps were taken by the 18th century to reform the chancery. Gary Watt (at 7) summarized the process thus:

> The appointment in 1729 of the Master of the Rolls (the chief Chancery Master) to sit as a second judge in certain cases had done little to reduce the burden on the

Chancellor, because any decision of the Master of the Rolls could still be appealed to the Chancellor. It was not until 1833 that the Master of the Rolls had a true concurrent jurisdiction. In 1813 a Vice Chancellor was appointed to assist the Chancellor and the Master of the Rolls. Yet when, in 1816, Sir Launcelot Shadwell VC was asked by a Commission of Inquiry whether the three judges could cope, he is said to have replied 'No: not three angels.' The Chancery judges were indeed overworked, and increasingly unable to cope with the demands made upon them. In 1616 the supremacy of equity had been established as a means of escaping the common law jurisdiction, but by the 19th century, because of the backlog of administration in the Court of Chancery, escape was often sought in other directions. Even as late as 1852 it appears that claimants were attempting to avoid the queue to the Chancellor's door by asserting concurrent Common Law rights arising out of facts that ought to have been the exclusive concern of the court of Chancery. Thus in *Edwards v Lowndes* Lord Campbell CJ had to remind litigants that a trustee is accountable to the beneficiaries of his trust in equity but not at common law: 'no action at law for money had and received can be maintained against him, though he has money in his hands and under the terms of the trust he ought to pay over to the cestuis que trust'.

The Court of Chancery Act 1850 and the Court of Chancery Procedure Act 1852 were early attempts to wrestle with the procedural problems in the Court of Chancery. However, the the major step towards expediting the procedure of chancery did not come until Lord Chancellor Selborne introduced the Judicature Act 1873 into Parliament. Ironically, it was due to administrative delays that the statute did not come into force until 1875, when it was re-enacted with amendments. We now refer collectively to the Judicature Acts 1873–75. By these enactments the Supreme Court of Judicature was established with concurrent jurisdiction to administer the rules of equity and law within uniform procedural code.

1.5 The Supreme Court of Judicature Acts 1873–5: Fusion of rules or amalgamation of administration?

The 1873–75 Judicature Acts established a Supreme Court in replacement of the previously existing Courts of Chancery, King's Bench, Common Pleas, Exchequer, Admiralty, Probate and the London Court of Bankruptcy. The Judicature Acts divided the Supreme Court into the High Court and the Court of Appeal. The High Court, which is to sit as the court of first instance, was divided into the Chancery Division, King's Bench Division, Common Pleas Division, Exchequer Division, and the Probate, Divorce and Admiralty Division. Each of these divisions is headed by a judge who, by virtue of Article 24 of the 1873 Act, must recognize and give effect to both legal and equitable rights, claims, defences and remedies.

However, since 1875, the exact effect of the Judicature Acts has been very controversial. The single most important question about the Acts that continues to divide writers and judges is: What did the Judicature Acts do? Did they fuse the rules of equity and common law so that they now become one, or did they simply amalgamate the rules of equity and common laws so that the rules still retain their individual identity but are administered by a single court?

Opinions are sharply divided on this matter. Some writers and judges believe that the rules of equity and common law are now fused and it is no longer sensible to talk about the two distinct rules of equity and common law. Others think that the effect of the Judicature Acts is purely procedural so that only the administrations, and not the rules, are fused. This latter view is partly based on the provision of section 49 of the Supreme Court Act 1981 which provides that:

> (1) Subject to the provisions of this or any other Act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

It is proposed to consider the contending positions on the effect of the Judicature Acts.

1.5.1 A fusion of administration not rules

In 1954, Ashburner (Principles of Equity 2nd edn at 18) famously set the orthodox view about the effect of Judicature Acts thus:

> . . . the two streams of jurisdiction, though they run in the same channel run side by side and do not mingle their waters.

According to eminent English Legal historian, Professor JH Barker (*Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986)) at 132–3, cited by Watt at 12–13:

> If, for reasons of history, equity had become the law peculiar to Court of Chancery, nevertheless in broad theory equity was an approach to justice which gave more weight than did the law to particular circumstances and hard case.

Gary Watt also observes that there remain a functional distinction between equity and common law and that 'it is because equity is functionally distinct from the common law that both approaches of law survived the Judicature Acts, which brought about the physical and jurisdictional unification of the old Court of Chancery with the courts of common law'. He describes the functional distinction in the following terms:

> The function of common law is to establish rules to govern the generality of cases, the effect of those rules being to recognize that certain persons will acquire certain legal rights and powers in certain circumstances. Legal rules allow the holders of legal rights and powers to exercise them in confidence that they are entitled

> to do so. The function of equity is to restrain or restrict the exercise of legal rights and powers in particular cases, whenever it would be unconscionable for them to be exercised to the full. It is also said that equity 'supplements' the shortcoming of the common law, but if that is correct it is nevertheless the case that equity only supplements the common law when by doing so it can prevent unconscionable reliance on the shortcomings of the common law . . . It may be true, as Millett LJ suggested in *Jones & Sons (a firm) v Jones* that the common law itself had sometimes had regard for considerations of conscience, but if the common law has ever prevented a person from placing unconscionable reliance upon a legal rule or right or power, it was then performing an equitable function.

(2nd edn, Oxford: Oxford University Press, 2006 at 13.)

Some judicial authorities have lent much support to the view that despite the Judicature Acts, the rules of equity and common law retained their separate identities and that the effect of the Acts was simply procedural, that is to fuse the administration of the two and not the rules.

In *Salt v Cooper* (1880) 16 ChD 544 at 549, Jessel MR pronounced that:

> . . . the main object of the Act was to assimilate the transaction of Equity business and Common Law business by different Courts of Judicature. It has been sometimes inaccurately called 'the fusion of Law and Equity'; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal of the administration of Law and Equity in every cause, action or dispute which should come before that tribunal.

In *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA) at 691 Mummery LJ stated that the Judicature Acts:

> [w]ere intended to achieve procedural improvements in the administration of law and equity in all law courts, not to transform equitable interests into legal titles or to sweep away altogether the rules of the common law, such as the rule that a plaintiff in an action for conversion must have possession or a right to immediate possession of the good.

Writing extrajudicially (see Anthony Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law' (1994) 110 LQR 238 at 239) on the issue of whether equity always follows the law, the Australian Chief Justice, Sir Anthony Mason, states that:

> By providing for the *administration* of the two systems of law by one supreme court and by prescribing the paramountcy of equity, the Judicature Acts freed equity from its position on the coat-tails of the common law and positioned it for advances beyond its old frontiers.

1.5.2 A fusion of rules, not just administration

On the other divide to the above views are those who believe that the Judicature Acts did not merely fuse the administration of equity and the common law, but that the Acts

also fused the substantive rules of those jurisdictions. Not only have judges supported this view in judicial pronouncements but they have also written in favour of it.

In *Errington* v *Errington and Woods* [1952] 1 KB 290 at 298, Lord Denning stated that 'law and equity have been fused for nearly eighty years now'. In *Boyer v Warbey* [1953] 1 QB 234, his Lordship would further clarify what he actually meant by 'fuse' when, while pronouncing on the common law principle of privity of estate and equitable leases, he stated that:

> I know that before the Judicature Act 1873 it was said that the doctrine of covenants running with the land only applied to covenants under seal and not to agreements under hand . . . But since the fusion of law and equity the position is different. The distinction between agreements under hand and covenants under seal has largely been obliterated.

Whereas, in the terse and brisk statement in *Errington* it may be difficult to decipher what Lord Denning meant by 'fusion', his pronouncement in *Boyer* can hardly be understood to mean any more than that the 'fusion' is of rules of common law and equity. For, in referring to the 'fusion of law and equity', in the context of leases, there is little doubt that he meant the fusion of the substantive rules governing obligations that run with covenants in lands and not *how* matters arise from claims originating from the application of the rules.

A little over two decades later in *United Scientific Holdings Ltd v Burnley Borough Council* [1977] 2 All ER 62 at 68, Lord Diplock would forcefully make the case for the fusion of the rules of equity and law. His Lordship began by offering what he understood the context of Ashburner's metaphor of 'two streams running side by side' to mean:

> . . . by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservation of English lawyers made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by the Courts of Law and Courts of Chancery . . . were fused. As at the confluence of the Rhône and Saone, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now . . .
>
> My Lords, if by 'rules of equity' is meant that body of substantive and adjectival law, that prior to 1875, was administered by the Court of Chancery but not by courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak similarly of the Statutes of Uses or of Quia Emptores. Historically all three in their time have played an important part in the development of the corpus juris into what it is today; but to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conductive to erroneous view conclusions as to the ways in which the law of England has developed in the last 100 years.

More recently, judicial opinions in English courts have tended to favour the 'fusion of rules' approach. In *Tinsley v Milligan* [1993] 3 All ER 65, Lord Browne-Wilkinson had to decide whether a plaintiff who had acted illegally could assert a claim to an equitable

interest in land through resulting trust. As will be seen in Chapter 2, one of the strongest maxims of equity is that he who comes to equity must come with clean hands, meaning if one wants to seek an equitable remedy, a claimant must not have done anything as to tarnish his or her conduct. In the instant case, the claimant had tarnished her conduct by acting illegally (see Chapter 2 for a fuller analysis). At common law, the approach is that anyone who wishes to assert ownership of property the acquisition of which was tainted by illegal conduct can do so in so far as the claimant does not rely on the illegal conduct. Rejecting such distinction of the approaches of the two systems, Lord Browne-Wilkinson states that:

> . . . to draw a distinction between property rights enforceable at law and those which require the intervention of equity would be surprising. More than 100 years has elapsed since the fusion of the administration of law and equity. The reality of the matter is that, in 1993, English law has one single law of property made up of legal and equitable interests. Although for historical reasons legal estates and equitable estates have differing incidents, the person owing either type of estate has a right of property, a right in rem not merely a right in personam. If the law is that a party is entitled to enforce a proprietary right acquired under an illegal transaction, in my judgment the same rule ought to apply to any property right so acquired, whether such right is legal or equitable.

In *Lord Napier and Ettrick v Hunter* [1993] 1 All ER 385 at 401, Lord Goff stated that:

> No doubt our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole; but for my part I cannot see why this amalgamation should lead to the rejection of equitable proprietary right . . .

thinking point

Do you think it makes any sense to deny a party a remedy in one court only to entitle him or her to one in another court? In other words, why should the common law court blind its eye to an illegal conduct in respect of a proprietary interest just because the party does not rely on the illegal conduct in making its claims?

1.5.3 The Commonwealth approach to the Judicature Act

Judicial approach in most commonwealth jurisdictions concerning the effect of the Judicature Acts has leaned more preponderantly towards asserting that the Judicature Acts fused equity and common law rules and not just their administration. But it must be noted that, although they are of persuasive effect, decisions from commonwealth jurisdictions do not prevail over decisions of English courts.

In *Aquaculture Corpn New Zealand v Green Mussel Co Ltd*, the New Zealand Appeal Court had to deal with issues concerning whether damages, which had traditionally been a common law remedy, should be made available for breach of trust, which, clearly,

is an equitable duty. The court (Cook P) pronounced that:

> For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originate in common law, equity or statute.

In *Mouat v Clark Boyce* [1992] 3 NZLR 299, a New Zealand court held that breach of an equitable duty can lead to an award of exemplary damages or damages for mental distress. Traditionally, this remedy was only available in common law courts. (See also Pearce and Stevens at 14.)

Canadian courts have generally echoed the principle laid down by Lord Diplock in the *United Scientific Holdings* case. In *Le Mesurier v Andrus* (1986) 54 OR (2d) 1 and in *Canson Enterprises Ltd v Broughton & Co* (1991) 85 DLR (4th) 129, the common law principle of remoteness of damage was held applicable to an equitable claim for damages for breach of fiduciary duty (see also Pearce and Stevens at 15). The main difference between the approach of Canada and the rest of the commonwealth (especially New Zealand) was that whereas Canada followed the general trend of regarding the fusion as one of the rules of law and equity, it recognizes that in some cases, however, there may yet be a need to retain a distinction. As La Forest J put it:

> There might be room for concern if one were indiscriminately attempting to meld the whole of the two systems. Equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules.

Academic analysis of the effects of the Judicature Acts has tended to focus more on the actual construction of the relevant provisions of the Judicature Acts as well as the preservation of the rationale for the existence of the different proprietary rights which, in proponents' views, justify the continued distinction between equity and common law rules which the likes of Lord Goff want abolished. We consider the two issues now.

As Phillip Pettit notes (at 10):

> It is respectfully submitted that these propositions (that the rules of equity and common law are fused) cannot be accepted. Baker has pointed out that no one thinks that the rules of equity have remained unchanged since 1875—they have developed in the same way as the rule of common law. As to the comparison with *Quia Emptores* (which Lord Diplock made in justification of the 'fusion of rules' proposition), Baker observes that this is still in force today and is said to be 'one of the pillars of the law of property' (Megarry and Wade *The Law of Real Property* 6th edn at 29). Most importantly, it is a complete misapprehension to think that it was a purpose of the Judicature Acts to do away with the dichotomy between rules of equity and rules of common law. Introducing the second reading of the bill the Attorney General (Hansard 3rd Series vol 216 at 644, 645) said in terms that 'The Bill was not one of the fusion of law and equity' and he went on to explain what the purpose of the bill was:

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> The defect of our legal system was, not that Law and Equity existed, but that if a man went for relief to a Court of law, and an equitable claim or an equitable defence arose, he must go to some other Court and begin afresh. Law and Equity therefore would remain if the Bill passed, but they would be administered concurrently, and no one would be sent to get in one Court the relief which another Court has refused to give . . . Great authorities had no doubt declared that law and equity might be fused by enactment; but in his opinion, to do so would be to decline to grapple with the real difficulty of the case. If an Act were passed doing no more than fuse law and Equity, it would take 20 years of decisions and hecatombs of suitors to make out what Parliament meant and had not taken the trouble to define. It was more philosophical to admit the innate distinction between Law and Equity, which you could not get rid of by Act of Parliament, and to say not that the distinction should not exist, but that the Courts should administer relief according to legal principles when these applied, or else according to equitable principles. That was what the Bill proposed, with the addition that, whenever the principles of Law and Equity conflicted, equitable principles should prevail.

The authors of Hanbury and Martin *Modern Equity* (16th edn, London: Sweet & Maxwell 2001 at 21, citing P Baker explained in (1977) 93 LQR 529 at 530) attempted to create a balance between these contending views on the effect of the Judicature Acts on equity and common law. First, they argue that a separation exists between the two despite the Judicature Acts. Accordingly, they reason that, if by fusion of equity and common law it is meant there is now no distinction or difference between legal rights and remedies and equitable rights and remedies, this cannot be supported:

> It is still clear that legal ownership is different from equitable ownership; all the provisions of legislation of 1925, dealing with unregistered land, are based on that assumption. Again, the law of trusts assumes a distinction between legal and equitable rights. The equitable nature of the duties of a mortgage has recently been emphasised [see *Medforth v Blake* [2000] Ch 86 at 102], although Sir Richard Scott VC has said: 'I do not, for my part, think that it matters one jot whether the duty is expressed as a common law duty or as a duty in equity. The result is the same'.

However, they also reject the other extreme view that both equity and common law are so separately administered after 1875 as to banish any relationship between them. Thus:

> Nor is it true, at the other extreme, to say that rights exercisable in the High Court today are the same as those existing in 1875; nor that the application of equitable doctrines in the court has not had the effect of refining and developing common law rules. Both legal and equitable doctrines have developed since 1873; and the development of legal rules has sometimes been influenced by established equitable doctrine, with the effect that a situation which would at one time have been treated differently at law and equity is now treated in the same manner. If that is what is meant by fusion, there is evidence of it . . . it is a healthy and welcome development; and there are other situations which might be candidates for the future.

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thinking point

To what extent do you think the above represent a better approach to reconcile the divergent views on the effect of Judicature Acts?

1.6 The modern relevance of equity

1.6.1 Equity after Judicature Acts: Has it gone past child bearing?

Whether one believes that the Judicature Acts fused the rules of common law and equity or fused only the administrations alone, there is a general consensus that the rules of equity became more formal and rigid after the Acts. This new perception of equity has led to concern about whether, in the modern society, equity is still capable of inventing new principles; after all, equity derives its pedigree from its ability to respond, and provide alternatives, to the rigidity of the common law. So, the relevant question to ask is whether equity has now passed the age of child bearing.

Commenting on this issue, Pettit writes that 'though there is no fiction in equity as there has been said to be at common law that the rules have been established from time immemorial, and though "it is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. In many cases we know the names of the Chancellors who invented them", yet, it is in principle doubtful whether a new right can now be created' (at 5).

In 1952 ((1952) 5 CLP 8), Lord Denning wrote that 'the Courts of Chancery are no longer courts of equity . . . they are as fixed and immutable as the courts of law ever were'. In 1953 ((1953) 6 CLP 11 at 12), Lord Evershed stated that the Judicature Acts halted or, at least, severely restricted the inventive faculties of future chancery judges. In *Re Diplock* [1948] 2 All ER 204 at 218, the English Court of Appeal held that if a claim in equity exists:

> It must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time.

In their work, *Equity, Doctrines and Remedies* (2nd edn, Sydney: Butterworths, 1984 at 68–9) Meagher, Gummow and Lehane write that equity's naked power of improvisation had long been spent. In *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 at 218 CA, Megaw LJ stated that 'the creation of new rights and remedies is a matter for Parliament, not judges'.

Statutory development in the law of equity and trusts has also been perceived as affecting the extent to which equity can generate new principles in the contemporary society. Pettit observes that as far as equitable interest in land is concerned:

> Section 4(1) of the Law of Property Act 1925 provides that after 1925 such an interest is only capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been created before 1926. In principle, it is very doubtful, therefore, whether new equitable interests can any longer be created, except through the extension and development of existing equitable interests by exactly the same process as extension and development may take place at law.

In *Allen v Synder* [1977] 2 NSWLR 685 at 689, an Australian judge, Glass JA, commenting on the issue of creating new rules, stated that:

> It is inevitable that judge made law will alter to meet the changing conditions of society. That is the way it has always evolved. But it is essential that new rules should be related to fundamental doctrines. If the foundations of accepted doctrine be submerged under new principles, without regard to the interaction between the two, there will be high uncertainty as to the state of the law, both old and new.

Clearly, Judge Glass does not specifically rule out the possibility of equity (or judges) developing new principles in the present society, contrary to what his statement has been taken to mean by some writers (Pettit at 6). All the judge did was to premise the basis for judge-made rules on fundamental doctrines so as to avoid a situation whereby a doctrine is submerged by a new principle.

However, Bagnall J, as with several other judges, was of the opinion that equity is now measured and can no longer behave purely on the basis of the chancellor's discretion, but that does not mean that the adaptability of equity is now dead. As his Lordship stated, measuring the chancellor's feet does not mean that 'equity is past child-bearing; simply that its progeny must be legitimate—by precedent out of principle' (*Cowcher v Cowcher*, cited above, at 948).

This moderate view is shared by Bagnall J who, in *Cowcher v Cowcher* [1972] 1 All ER 943 at 948, proclaimed:

> I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child bearing; simply that its progeny must be legitimate—by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.

As will be seen in the next chapter, rather than its ability to invent new principles, the modern relevance of equity has emerged more in the form of the application of its many

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principles—generally embodied by maxims—to various kinds of transactions. Maybe equity is still as fertile as ever; but instead of producing new offspring itself, unwittingly making its breed susceptible to the birds of prey, it has ingenuously and generously decided to donate its eggs to surrogates. If that be the case, then equity would, undoubtedly indirectly, father many more children than it ever did in the obscurity of its evolution; and who can question the paternity of equity children in those circumstances except, of course, the uninitiated and unperceptive?

1.7 Trusts

In narrating the history of equity, we indicated briefly that the chancellor began to exercise certain powers over trusts. Thus, since it was through the activities of the chancellor that equity evolved, it is correct to describe trusts as a creation of equity. According to Maitland in *Equity* (Cambridge: Cambridge University Press, 1947 at 23):

> Of all the exploits of Equity the largest and the most important is the invention and development of the Trust . . . it is the most distinctive achievement of English Lawyers . . . It is an 'institute' of great elasticity; as elastic, as general as contract.

But this effusion does not tell us what trust is. Does the term mean to 'trust' people as in people trusting each other to act in a particular given way within certain contexts? Or is 'trust' the kind of trust that a master has in his or her servant to carry out his or her instructions in accordance to his or her wishes?

'Trust', as a concept, does not mean to 'trust' someone as in daily use. In fact, 'trust' can be set up and commissioned to an untrusted character and it would still be called trust! It is the operation of the law that makes a trust a trust not the content or the character of who administers it. Trust is an interesting but complex concept. It is an institution that defies easy definition. It is a concept but at the same time a process. Trust is an enigma; no wonder authors do not generally define it. Instead, they speak of trusts in various terms:

> It is a unique way of owning property under which assets are held by a trustee for the benefit of another person, or for certain purposes, in accordance with special equitable obligations (Gary Watt, 2nd edn, Oxford: Oxford University Press, 2006 at 36).

Hanbury and Martin (16th edn, Sweet & Maxwell, 2001 at 47) describe trust as 'a relationship recognized by equity which arises where property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other persons called *cestuis que trust* or beneficiaries'. JG Ridall describes trusts as 'an arrangement recognised by law under which one person holds property for the benefit of another' (*The Law of Trusts*, London: Butterworths, 2002 at 1). For Alastair Hudson, 'a trust is created where the absolute owner of property (the settlor) passes the legal title in that property to a person (the trustees) to hold that property on trust for the benefit of another person (the beneficiary) in accordance with the terms set out by the settlor'.

However, some of these descriptions are somewhat misleading. For, while a trust indeed is applied to ownership of property, the property is not necessarily owned by someone for the benefit of *another* person. The person holding the property in trust could him or herself be a beneficiary. Additionally, although usually it is the owner of the property who dictates the terms upon which his or her property is to be held by another in trust, there are occasions when the law does intervene to set such terms.

We have seen various terms and descriptions, but these do not explain how the concept of trust emerged. A good historical account of the evolution of trust is found in Phillip Pettit's book. According to this author:

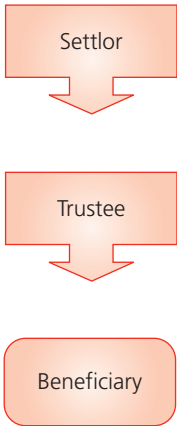
> . . . [e]ven before the Conquest (of 1066) cases have been found of land being conveyed to one man to be held by him on behalf of or 'to the use of' another, but for a considerable time this seems to have been done for a limited time and a limited purpose, such as for the grantor's family while he went away on a crusade. From the early 13th century the practice grew up of conveying land in a general way for more permanent purposes. For various reasons a landowner might convey land by ordinary common law conveyance to persons called 'feoffees to uses' directing them to hold the land for the benefit of persons, the cestuis que use, who might indeed or include the feoffor himself. After early doubts the common law refused to take any account of uses, i.e. the direction given to the feoffees to uses, who, though they were bound in honour, could not be sued either by the feoffor or the cestuis que use.
>
> It was clearly highly unsatisfactory that feoffees to uses should be able to disregard the dictates of good faith, honour and justice with impunity, and from the end of the 14th or the early 15th century, the Chancellor began to intervene and compel the feoffees to uses to carry out the directions given to them as to how they should deal with the land. The Chancellor never, however, denied that the feoffees to uses were the legal owners of the land. He merely ordered the feoffees to uses to carry out the directions given to them, and failure to carry out the order would be a contempt of court which would render the feoffees liable to imprisonment until they were prepared to comply.
>
> The device of the use was adopted for various purposes. It enabled a landowner, for example, to evade some of the feudal dues which fell on the person seised of land; to dispose of his land by his will; to evade mortmain statutes; and more effectively to settle his land. The use developed considerably during the 15th and early 16th centuries, so much so that it was said in 1500 that the greater part of the land in England was held in use (YB Mich 15 Hen VII 13 pl (Frowike CJ)), and the rights of the cestuis que use were so extensive that it became recognised that there was duality of ownership. One person, the feoffees to use, was the legal owner according to the common law—a title not disputed by the Chancellor. But the feoffees to uses had only the bare legal title; beneficial ownership was in the equitable owner, the cestuis que use. A stop was put to the development of uses in 1535, however, when, largely because the King was losing so many feudal dues by the device of the use, the Statute of Uses was passed to put an end to uses, or at least severely limit them. In cases where the Act applied the use was 'executed'

that is to say, on the one hand the feoffees to uses were deprived of their seisin of the land—indeed they commonly dropped out of the picture altogether—and on the other hand the equitable estates of the cestuis que use were turned into equivalent legal estates carrying seisin. Although the Act executed the vast majority of uses there were cases to which it did not apply—and thus the use never became completely obsolete.

One special case which should be mentioned was the use upon use, as where the land is limited to A and his heirs to the use of B and his heirs to the use of C and his heirs. It was decided in 1535 that C took nothing in such a case: A had the legal fee simple, but the limitation to C was repugnant to B's interest and accordingly void. After the Statute of Uses the second use was still held to be void, though the first use was executed so as to give B the legal fee simple and leave A, like C, with nothing at all. Eventually, however, by steps which are not very clear, the Chancellor, at about the middle of the 17th century, or perhaps earlier, began to enforce this second use and it had become a well-established practice by the end of the century. As a matter of terminology the second use thus enforced became called a trust, and as a matter of drafting the basic formula was 'unto and to the use of B and his heirs in trust for C and his heirs'. B took the legal fees simple at common law, but the use in his favour prevented the second use form being executed by the Statue of uses, leaving it to be enforced in equity as trust. The result was to restore duality of ownership, B being the legal and C the equitable owner. The use was in effect resuscitated under the name of trusts....

From the above exposé, it is clear there are generally three parties to a standard trust transaction: the 'feoffor'—who is today called the settlor, the 'feoffee for use'—the modern day trustee, and the 'cestuis que trusts', called nowadays the beneficiaries. Now, let us discard the ancient terms and speak with a modern tongue. A trust takes place when A (the settlor) puts property, real or personal, into the care of B, the trustee to hold in trust for the benefit or use of C, the beneficiary. But note that a settlor is one whose trust is executed during his lifetime, but where the instrument is executed (i.e. when it comes into effect) after his death, then the settlor is referred to as the 'testator' or, if a woman, the 'testatrix'.

Diagram 1.1
Diagram of settlor/ trustee/beneficiary



thinking point

Is it possible for a trustee to be a beneficiary or must a trustee at all times hold the property for persons other than himself or herself?

Settlor—One who intends to part with his or her property and leave it for the benefit of others by an instrument executed when he—the settlor—is still alive.

Testator/Testatrix—One who intends to part with his or her property and leave it for the benefit of others by an instrument executed when he—the settlor—is dead.

Trustee—The middle person, the bridge between a settlor and the person whom the property is to benefit. It is the trustee that the property is 'vested' in, in trust for another.

Beneficiary—The ultimate person who would enjoy the property. Beneficiaries could include a trustee.

Trust—An arrangement created for the purpose of transferring property to the beneficiary via the trustee. It usually states the conditions of the trust with regard to the time of its maturity, termination, variation and so on. A trust arrangement can either be made in writing through a legal instrument or orally.

1.8 Types of trusts

There are various forms of trusts, depending on how and for what purpose they are created (as will be seen in subsequent chapters). Trusts can be express, implied, resulting or constructive. Under these general forms are subsumed several sub-categories such as bare trusts, fixed trusts, executed and executory trusts, discretionary trusts, public, secret and statutory trusts, employee, pensions and protective trusts. All these are sub-categories of express trusts (see Haley and McMurtry, London: Sweet & Maxwell, 2006 at 16–21). See Chapter 3 for a discussion of types of trusts.

1.9 Nature of trusts

The fact that a trust involves transactions concerning several persons having different but distinguishable rights and obligations under the arrangement has led to some confusion as to the exact nature of trusts. Some have conceived of trusts as a contractual arrangement or something that fits perfectly into a contractarian idea, while others have construed it as an agency between principal and agent. The following section briefly considers some of the most common concepts with which trust has been compared.

1.9.1 Trust and contract

According to Langbein, a trust is 'functionally indistinguishable from the modern third-party beneficiary contract' ('Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625 at 627). This is to say that trusts are, to a large extent, synonymous with contracts.

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Several writers have challenged this view. The learned authors of Hanbury and Martin (at 27), emphasizing the basic features of contract, in contradistinctiction from trusts, have noted that:

> . . . [t]here is a historical distinction that contract was developed by the common law courts while trusts was a creature of equity. In general the purposes are different: a contract usually represents a bargain between the contracting parties giving each some advantage, while the beneficiary under a trust is commonly a volunteer, and the trustee himself usually obtains no benefit at all. It is of the essence of a contract that the agreement is supported by consideration, but in the case of trust there is no need for consideration to have been given in order to be enforceable. This distinction is blurred by the fact that a contract by deed is enforceable at law without value having been given.

Alastair Hudson (at 39) observes that:

> A contract is a bilateral agreement (resulting from an offer, an acceptance, and consideration passing between parties). An express trust arises from the unilateral act of settlor in declaring a trust. There is no contract between settlor and trustee necessarily. It might be that, if a professional trustee is appointed (perhaps a bank or a solicitor), the trustees may require payment from the settlor to act as a trustee. In such circumstances there will be a trust and also a contract between settlor and trustee. However, the contract does not form part of the trust—rather, it is collateral to it.

As laid down in *Saunders v Vautier* (1841) 4 Beav 115, 'beneficiaries who are absolutely entitled to the trust property, and acting *sui generis*, are empowered to direct the trustees to deliver the trust property to them' (Alastair Hudson at 39).

In an even more elaborate exposé, Gary Watt (at 37–8) successfully lays out some crucial distinctions between trusts and contracts:

> [t]here are a number of reasons . . . why it does not make sense to regard that arrangement entered into between settlor and trustees as being contractual in nature. For one thing, whereas a contracting party always has the right to enforce his contractual rights against the other party, the power of enforcing trusts lies with the beneficiaries of the trust, so the settlor of the trust has no power to enforce it against the trustees unless he happens to nominate himself to be a beneficiary or becomes a beneficiary under a resulting trust. Otherwise the settlor of a trusts drops out of the picture just as the donor of an absolute gift drops out of the picture when he has made a gift. Of course many settlement trusts do not come into effect until the death of the testator, so the testator patently 'drops out' of the picture in those cases . . . the most significant distinction between a trust and a contract, even a trust for the benefit of a third party, is the nature of the beneficiary's rights. In some ways the beneficiary's rights resemble contractual rights, in that they are enforceable against the trustees personally but the beneficiary's right is not merely a personal right against the trustee; it is also a proprietary right in the property itself. This is the feature that most clearly distinguishes

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the English trust from concepts that perform similar functions in other jurisdictions. The significance of the proprietary status of the beneficiary's right under the trust is essentially two fold. First, the beneficiary's right under the trust can be enforced not only against the trustees, but also against the trustee's successors in title. This is useful where the trustee has wrongfully transferred trust property into the hands of a third party, and particularly useful if a trustee dies or becomes insolvent. At no time does the beneficiary's property become part of the trustee's personal estate, so when a trustee dies the beneficiary's proprietary right in the trust asset is binding on the trustee's personal representatives and when a trustee becomes insolvent the beneficiary's right is binding on the 'trustees in bankruptcy' or, if the trustee was corporate (as many trustees are), on its successor in insolvency. Second, the proprietary status of the beneficiary's right under the trust means that the beneficiary is free to alienate the property wholly (say by selling it or giving it away) or partially (say by leasing it or subjecting it to a charge such as a mortgage). It is even possible for a beneficiary to declare a trust of her equitable interest, thereby creating a sub-trust, although that possibility is somewhat controversial.

The crucial issue is often whether in given circumstances a trustee can be regarded as having been contracted by a settlor to hold property for the beneficiary in the same sense as obtains under the common law concept of contract. The situation is not normally easy to ascertain. Thus, problems have commonly arisen whether a settlor can order a specific performance of a contract and whether the trustee can generally be treated as a contractual party.

● ***In Re Schebsman*** [1944] Ch 83 (CA)

The debtor was employed by a Swiss company and its subsidiary, an English company. On 31 March 1940 his employment ended and, on 20 September 1940, he entered into an agreement with the companies, by clause 2 of which: 'In consideration of the agreement which has already been made between the parties hereto the English company also agree to pay by way of compensation for loss of the debtor's employment a sum of 5,500l. to be paid to the persons at the dates in the amounts and subject to the conditions more particularly specified in the schedule hereto'. The schedule began with a list of six sums totalling 5,500l. to be paid to the debtor, the first for the year ending 31 March 1941, and the others for the years ending on the five succeeding anniversaries of that date. By paras (a) to (f) of the schedule, if the debtor died before the completion of the payments to him, provision was made for payments to his widow of sums varying in amount according to the date of the debtor's death, such sums amounting, with those which would already have been paid to the debtor, in some cases to less, in some cases to more, than 5,500l., while the period of payment, in certain events, was to continue to 31 March 1950 . . . On 5 March 1942, the debtor was adjudicated bankrupt. On 12 May 1942 he died. By this motion the official receiver, as his trustee in bankruptcy, asked for a declaration that all sums payable under the agreement to the widow and, possibly, to the daughter, after the receiving order, formed part of the estate of the debtor, on the grounds inter alia that, although the sums were, by the agreement, to be paid to the

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widow or the daughter, the debtor always had the right to intercept them, which right was at the date of the motion in the trustee.

Uthwatt J held that the contract did not create a trust in favour of the widow or daughter and that Schebsman had not been contracted as trustee. Nevertheless, the court was content to allow the wife and the daughter to take priority over the trustee in bankruptcy since the latter's right could not have been greater than those of Schebsman were he alive. While there is no doubt that by fresh agreement with his ex-employer Schebsman could have deprived his wife and daughter of their benefits had he so chosen, he could not have done so unilaterally without breaching the contract.

On the issue of whether a trust constitute a contract, Lord Greene MR states that:

> [a]n examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character, but in the present case I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists, although it may not always be easy to determine where it is to be drawn. In the present case I find no difficulty.

On the same question about the status of the agreement, du Parcq LJ notes thus:

> It now remains to consider the question whether, and if so to what extent, the principles of equity affect the position of the parties. It was argued by Mr Denning that one effect of the agreement of 20 September 1940, was that a trust was thereby created, and that the debtor constituted himself trustee for Mrs Schebsman of the benefit of the covenant under which payments were to be made to her. Uthwatt J rejected this contention, and the argument has not satisfied me that he was wrong. It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's life-time injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable.

KEY POINT In coming to his decision, Judge Uthwatt, in the court of first instance, applied and relied on the rationale in *Re Stapleton-Bretherton* [1938] Ch 799. This was approved by the Court of Appeal in the instant case.

1.9.2 Trust and agency

Another concept with which common comparison with trust is often made is agency. Writing in 1898, Spencer Brodhurst argued that an agent is a trustee for his principal of

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property belonging to the principal committed to his care, either generally, or, specifically in situations where a particular confidential relationship exists (see also Keeton and Sheridan *Law of Trusts*, 12th edn at 246; Pettit at 27; WS Holdsworth (1954) 17 MLR 24; JD Stephens (1975) CLP 39).

As Pettit noted (at 27–8), 'there is no doubt that a principal can commonly exercise the same remedies against his agent as a cestuis que trust can against his trustee', but Professor Powell has pointed out that this

> does not necessarily mean that an agent is a trustee or that a trustee is an agent. It simply means that agents have something in common—and that 'something in common' is that they both hold a fiduciary position which imposes on them certain obligations.' Thus both agents and trustees are under a duty not to delegate responsibilities, not to let their interests conflict with their duties, not to make any unauthorised profits and to keep proper account. There are however considerable differences. Thus the relationship of principal and agent is created by their agreement, but this is not so in case of trustees and beneficiary. The trustee does not represent the beneficiaries, though he performs his duties for their benefits, as the agent represents his principal. Further the trustee does not bring his beneficiaries into any contractual relationship with third parties, while it is the normal function of an agent to do so. Again the concept of a trust necessarily involves the concept of trust property over which the trustee has at least nominal control, but an agent need never have any control over any property belonging to his principal. An agent is subject to control of his principal, but a trustee is not subject to the control by the beneficiaries except in the sense that the beneficiaries can take steps to compel him to carry out the terms of the trust.

thinking point

Do you think it is always easy to tell, from given facts of a case, whether an arrangement is a trust or an agency? What are those clues that you must look for to aid your analysis and decisions one way or the other?

Alastair Hudson adds a different distinction to the two concepts. The author notes that:

> The trust bears some superficial similarities to . . . agency arrangement. At first blush a trustee operates as a form of agent, dealing with the legal title in property according to the terms of the trust. However, there is not necessarily a contract between settlor and trustees, nor between trustee and beneficiary. Furthermore, in an agency arrangement a principal would not ordinarily acquire equitable interests in property acquired by the agent in the way that a beneficiary under a trust acquires equitable interests once the declaration of trust takes effect. It may however, be possible for the principal to assert that the contract of agency would transfer equitable rights by means of specific performance.

As will be seen in later chapters, it is possible to set up a trust which operates without the knowledge of a beneficiary of either existence of the trust or of themselves as the beneficiary, until such time, or such conditions, nominated by the testator, for its disclosure arrives. This is often the case with secret trusts, which were originally used to protect children born out of wedlock who, without the creation of secret trust in their favour, would be left without the benefit from their parents' estates. Secret trusts are the most discrete kind of trusts and are generally set up without conformity with the rules governing the creation of trusts in order to protect the identity of the beneficiaries. It is thus difficult to conceive of the relationship between a trustee and a beneficiary under this category as agency. Whereas an agent can occasionally exceed the scope of his or her authority and, provided there is subsequent ratification of the otherwise ultra vires acts he or she performs by the principal, such acts are deemed valid. But there still needs to be the knowledge that a relationship exists between the principal and agent before the latter can so act. Where there is no such relationship at all, as where there is no knowledge by one of the other's existence (as in secret trusts), a relationship cannot be uncontroversially presumed to exist. One cannot owe a duty to a principal who one does not know exists.

The other common law concepts with which trust has been compared, but which are not discussed in this text, are power, bailment, conditions and charges, and debt. (For these, see especially, Martin and Hanbury at 47–67; Paul Todd and Gary Watt *Cases and Materials on Equity and Trusts* (4th edn, Oxford: Oxford University Press, 2003) at 18–36; Pettit at 25–40; Haley and McMurtry at 21–4; and Hudson at 36–41).

1.10 The recognition of trusts

The next issue to consider briefly is how the concept of trusts has been perceived within and outside of the UK. Hanbury and Martin at 45ff write that:

> . . . [t]he trust is an English concept which has spread to common law, but not civil law, jurisdiction. The 1984 Hague Convention on the Law applicable to Trusts and their Recognition establishes common principles between states on the law governing trusts and provides guidelines for their recognition. The United Kingdom, by means of the Recognition of Trusts Act 1987, has ratified the Convention.
>
> The ratification does not have the effect of changing the substantive law of trusts of the United Kingdom, nor of importing trusts into civil law jurisdictions. The Convention seeks to establish uniform conflict of law principles and to assist civil law states to deal with trusts issues arising within their jurisdiction. Recognition implies, for example, that the trust property is a separate fund and is not part of the trustee's estate. A trust is to be governed by the settlor, expressly or by implication. In the absence of any such choice, the trust is to be governed by the law with which it is most closely connected. The applicable law governs the validity and construction of the trust, and its effects and administration.

Conclusion

As seen above, one of the advantages of equity over common law is its flexibility and ability readily to meet the challenges of changing circumstances of modern society. But then, the rapidity and intensity of today's commercial interactions and human relations means that people and businesses are much less attentive to legal rules governing their relations with others in general. In such an atmosphere, genuine mistakes—with devastating legal consequences—are made.

Spouses provide cash support for their spouses to help them purchase property or other chattels, without ever signing any paper to evidence their intention to possess any interest in the property. The dubious spouse returns later to claim that, in the absence of any formal agreement, the cash advance was a gift. Company directors use knowledge derived from their position to profit themselves at the expense of their companies; a rich neighbour perennially annoys his poorer counterpart by throwing mindless night parties and buys the 'right' to do so at law by paying small compensations every now and then to the displeasured neighbour; a debtor, unwilling to settle his debt to a claimant certain to get justice against him decides to remove or dissipate his money within the jurisdiction or elsewhere so as to frustrate the judgement. A trustee thinks because he has charge of certain trust funds he could deal with them as he likes, regardless of his status under the trusts and the rules of engagement. A dubious businessman believes by simply designating that all his money should go to a charity set up to benefit members of his family, he cheats the law.

The scenarios to which equity and trusts respond vary significantly. As will be seen in the following chapters, equity tries to keep pace with modern developments. As already seen, equity does not allow formality to defeat intentions; but such intentions must be genuine, and the mistake must have been honest. Equity will not aid the indolent. A nonchalant spouse, who, despite being aware of legal rules decides nonetheless to throw away caution, will have no respite in the court of equity. Nor will someone who has not done what is right, or who is not prepared to do so, receive any sympathy in the court of equity. Equity does not intend to destroy the common law but to fulfil it. Like the common law, equity believes in rules and principles, only that in attempting to achieve that a practical and useful balance needs to be struck. It is a balance between extreme formality and sensibility. Nor is there any point for a person to seek legal and equitable justice from different courts. Why should a single court not be able to apply the rules of law and the principles of equity to the same case? Is it not much easier, time saving, and more practical to do so than to toss claimants from one court to another as though they are involved in a game of ping-pong? This is what the Judicature Act of 1875 started and which has now been furthered by more recent legislation.

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Questions

Self-test questions

1 What is equity?

2 What are trusts?

3 Do you think the Judicature Act fused the rules or administration of equity and common law?

4 What is the difference, if any, between the English and the commonwealth approaches to the Judicature Act? Do you think one is to be preferred, assuming that there is a difference?

5 Is it the same meaning to say someone is a trustee and that Mr A trusts Mr B?

6 What is the rationale behind the emergence of trusts?

7 Is there a difference between equity and trusts?

8 Do you think there is any justification in the merging of equity and trusts?

9 What is the relevance of equity in today's world?

Discussion questions

For a suggested approach to answering these questions see p. 555–6

1 The Judicature Act does nothing that fuses the administration of equity and common law. Both still retain their distinctive rules and although they now run side by side, they do not mingle. Discuss.

2 The fact that equity was besieged by serious problems before the Judicature Act is a clear indication that it should never have been introduced into the English legal system in the first place. It is nothing but an avoidable waste of time. Do you agree?

3 There is no distinction between trusts and contract. It is the chancellor's lust for power, and nothing more, that led to the development of trusts as a distinct category. To what extent do you think this statement represents the rationale and use of trusts?

4 Is it true that once a person has been named as a trustee, he can deal with the property as he likes?

5 Equity is so flexible it can apply to anything; it is so powerful it can revoke or nullify a judgement given by a common law court. Is this true?

Assessment questions

Check the suggested answer on p. 556–7

It does not matter what the effect of the Judicature Act is. What is indisputable today is that equity has passed the age of child-bearing. In light of the above chapter, would you agree with this assertion?

Check the suggested answer on p. 557

How do you deal with issues or questions concerning the effects of the Judicature Acts?

Key cases

- *Earl of Oxford* (1615) 1 Rep Ch 1
- *Gee v Pritchard* (1818) 2 Swans 402
- *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA)
- *Errington v Errington and Woods* [1952] 1 KB 290
- *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204
- *Cowcher v Cowcher* [1972] 1 All ER 943
- *Saunders v Vautier* (1841) 4 Beav 115

Further reading

Maitland *Equity* (Cambridge:Cambridge University Press, 1947).
For a detailed history of the origin of equity.

Anthony Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law' (1994) 110, LQR 238.
Placing equity and its remedy in the Contemporary world.

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