LAW ANGELS

TRUSTS LAW

SQE 1 PREP

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PREFACE

Welcome to this textbook on Trusts Law, a subject that lies at the very heart of the English legal system. Born from the creative conscience of the Court of Chancery, the trust is a uniquely flexible and powerful institution, underpinning everything from family wealth preservation and charitable giving to sophisticated commercial and financial structures. A deep understanding of trusts is not merely an academic exercise; it is an essential tool for any aspiring solicitor or barrister.

This book has been designed with a clear purpose: to provide a clear, structured, and comprehensive guide to the principles of Trusts Law, tailored specifically for students preparing for the Solicitors Qualifying Examination (SQE 1) and for those embarking on their legal careers. We recognise that trust law can appear daunting, with its historical nuances, complex case law, and intricate equitable principles. Our goal is to demystify the subject, presenting the core concepts with clarity and precision.

The structure of this book follows a logical progression, building from foundational principles to advanced applications. We begin by exploring the historical context of equity and the core concept of separated legal and equitable title. We then guide you through the essential requirements for creating a valid express trust, the ‘three certainties’ and formalities, before examining how trusts are constituted and the nature of beneficial interests. Subsequent chapters delve into the various types of trusts, including purpose trusts, resulting trusts, and constructive trusts, with a dedicated chapter on the particularly contentious area of trusts of the family home. The final chapters address the critical responsibilities of trustees, their powers and duties, liability for breach, and the vital remedies available against third parties.

To aid your learning, each chapter begins with clear Learning Objectives and is rich with practical examples and analyses of landmark cases, from the foundational ***Keech v Sandford*** to the modern authority of ***Foskett v McKeown***. Key terms and principles are emphasised, and complex ideas are broken down into digestible parts.

Our hope is that this textbook will serve not only as a reliable guide for your examinations but also as a solid foundation for your future practice. The law is stated as we believe it to be on 1st September 2023.

We wish you every success in your studies of this fascinating and dynamic area of law.

Law Angels

ACKNOWLEDGEMENTS

The development of this textbook was a significant endeavor, and we extend our sincere gratitude to the collective efforts that made this publication possible.

At Law Angels, we are fortunate to be supported by a dedicated team whose commitment to legal education and excellence is the cornerstone of our work. The collaborative spirit, legal expertise, and tireless effort of our entire organization were instrumental in shaping this text from concept to completion.

We also extend our appreciation to the broader legal community. The insightful feedback from our academic and practitioner reviewers greatly enhanced the accuracy and clarity of the material. Their contributions, offered in a spirit of scholarly collaboration, have been invaluable in ensuring this resource meets the rigorous demands of the SQE curriculum.

We are also thankful for the unwavering support from our personal networks, whose understanding provided the foundation that allowed this project to thrive.

It is our privilege at Law Angels to contribute to the education of future solicitors, and we hope this text serves as a reliable guide for the next generation of legal professionals.

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GLOSSARY OF KEY TERMS

A

Absolute Entitlement: A beneficiary's right to the entire trust property, both income and capital, without any conditions or other beneficiaries with competing interests. This is a prerequisite for exercising the rule in *Saunders v Vautier*.

Accessory Liability (Dishonest Assistance): Personal liability imposed on a third party who dishonestly assists in a breach of trust, even if they do not receive any trust property for their own benefit.

Automatic Resulting Trust: A resulting trust that arises by operation of law when an express trust fails or does not exhaust the entire beneficial interest. It operates automatically to return the property to the settlor.

B

Bare Trust: A trust where the trustee holds the legal title for a single, absolutely entitled beneficiary of full age and capacity. The trustee has no active management duties and must deal with the property as the beneficiary directs.

Beneficiary: The person for whom the trust property is held. They hold the equitable (or beneficial) title and have the right to enforce the trust.

***Bona Fide* Purchaser for Value Without Notice:** A defence to a proprietary claim. A person who purchases a legal estate in property, in good faith, for valuable consideration, and without notice (actual, constructive, or imputed) of a prior equitable interest takes the property free from that interest.

C

Certainty of Intention: One of the three certainties. The settlor must have demonstrated a clear intention to impose a binding trust obligation on the trustee. Looks at substance over form.

Certainty of Objects: One of the three certainties. The beneficiaries of the trust must be defined with sufficient clarity. For fixed trusts, the "complete list" test applies; for discretionary trusts, the "any given postulant" test (*McPhail*) applies.

Certainty of Subject Matter: One of the three certainties. The trust property must be clearly identifiable with precision.

Charitable Trust: A trust for a purpose that falls within the statutory definition of charity, is for the public benefit, and is enforced by the Attorney General. Exempt from the rule against perpetual duration and enjoys tax advantages.

Common Intention Constructive Trust (CICT): A trust imposed by the court over the family home to give effect to the parties' common intention that the non-legal owner should have a beneficial interest, upon which they have acted to their detriment.

Constitution: The process of perfecting a trust by ensuring the trust property is vested in the trustee. This can be done by the settlor declaring themselves trustee or by perfectly transferring the property to a third-party trustee.

Constructive Trust: A trust imposed by operation of law as an equitable remedy, irrespective of the parties' intention, to prevent the legal owner from acting unconscionably (e.g., a CICT or a trust over an unauthorized fiduciary profit).

***Cy-près* Doctrine:** A rule applying to charitable trusts. If the original charitable purpose becomes impossible or impracticable, the court can order that the funds be applied to a purpose as close as possible ("*cy près*") to the original intention.

Discretionary Trust: A trust where the trustees have a power to decide which members of a defined class of beneficiaries will receive a benefit, and in what amounts. The beneficiaries have a mere hope (*spes*) until the discretion is exercised.

D

Donatio Mortis Causa (DMC): A gift made in contemplation of death. It is conditional on death and requires the donor to part with dominion over the property.

E

Equitable Compensation: The primary remedy for breach of trust. It aims to restore the value of the trust fund that was lost due to the breach.

Equitable Lien: A security interest awarded as a remedy following a successful trace. It gives the claimant a right to have a specific asset sold and be paid from the proceeds, rather than granting them ownership of the asset.

Equitable Title/Beneficial Interest: The right to enjoy the benefits of the trust property (e.g., income, use, or eventual capital). Held by the beneficiary.

Express Trust: A trust created deliberately and explicitly by a settlor, who must satisfy the three certainties and any relevant formalities.

F

Fiduciary: A person in a position of trust and confidence (e.g., a trustee, director, agent) who is subject to stringent duties, including the no-conflict and no-profit rules.

Fixed Trust: A trust where the settlor has defined the beneficial interests with precision, specifying exactly who gets what share. The trustees have no discretion over the distribution.

Formalities: Statutory requirements for creating certain trusts. A trust of land must be evidenced in writing (LPA 1925, s.53(1)(b)), while a trust of personalty requires no formalities.

I

Implied Trust: A trust that arises by operation of law, not by express declaration. It includes resulting and constructive trusts and is exempt from formality requirements (LPA 1925, s.53(2)).

***Inter Vivos* Trust:** A trust created during the settlor's lifetime.

K

Knowing Receipt: Personal liability imposed on a third party who receives trust property for their own benefit, where their receipt is unconscionable in the circumstances (*BCCI v Akindele*).

L

Legal Title: The formal ownership of property, which entitles the holder (the trustee) to control, manage, and sell the property.

N

No-Conflict Rule: A core fiduciary duty prohibiting a fiduciary from placing themselves in a position where their personal interest conflicts, or may possibly conflict, with their duty to the beneficiary (*Keech v Sandford*).

No-Profit Rule: A core fiduciary duty prohibiting a fiduciary from making any unauthorized profit from their position. Any such profit is held on constructive trust for the beneficiary (*Boardman v Phipps*).

P

Power of Advancement (s.32, TA 1925): A discretionary power allowing trustees to apply capital for the "advancement or benefit" of a beneficiary, up to one-half of their presumptive share.

Power of Maintenance (s.31, TA 1925): A discretionary power allowing trustees to use trust income for the "maintenance, education, or benefit" of a minor beneficiary.

Precatory Words: Words of hope, prayer, or expectation (e.g., "in full confidence") which, under the modern approach, are interpreted as creating a moral wish rather than a binding trust obligation.

Presumed Resulting Trust: A resulting trust that arises by presumption of law in two situations: a voluntary transfer to another, or a purchase in the name of another. It presumes the transferor did not intend a gift.

Presumption of Advancement: A now-weakened counter-presumption that in certain relationships (e.g., husband to wife, father to child), a transfer or payment was intended as a gift.

Proprietary Estoppel: An equitable doctrine that can grant an interest in property where an assurance has been made, relied upon, and detriment suffered. The remedy is flexible.

Proprietary Remedy: A remedy that gives the claimant rights in a specific asset, such as a constructive trust or an equitable lien, which provides priority in the defendant's insolvency.

Purpose Trust: A trust set up to achieve a purpose rather than to benefit specific individuals. Generally void unless it is a charitable trust or falls within a narrow exception (e.g., *Re Denley*, tombs, pets).

Q

Quistclose Trust: A purpose-based resulting trust that arises when money is lent for a specific, exclusive purpose. If the purpose fails, the money is held on resulting trust for the lender.

R

Resulting Trust: A trust that "results" or springs back to the settlor. It arises either by presumption (where a gift is not intended) or automatically (when an express trust fails).

Rule in Saunders v Vautier: The rule that a beneficiary of full age and capacity who is absolutely entitled to the trust property can direct the trustees to terminate the trust and transfer the legal title to them.

S

Settlor: The person who creates the trust and puts the property into it.

T

Testamentary Trust: A trust created by a will, which takes effect upon the settlor's death.

Tracing: The process of identifying trust property as it moves through substitutions and transformations. It is the evidential foundation for a proprietary claim.

Trust: The relationship that arises when property is vested in a person (the trustee) who is obliged to hold it for the benefit of another (the beneficiary).

Trust Corporation: A corporate body empowered to act as a trustee for a fee, offering permanence and professional expertise.

Trustee: The person who holds the legal title to the trust property and is subject to fiduciary duties to manage it for the benefit of the beneficiaries.

V

Volunteer: A person who has not provided valuable consideration for a promise or a gift. Equity will not assist a volunteer to perfect an imperfect gift.

1

THE FOUNDATIONS OF TRUSTS AND EQUITY

Welcome to the study of Trusts Law. This area of law may seem complex, but its core idea is simple: one person can own property for the benefit of another. This concept is the engine behind family wealth, charitable giving, and sophisticated financial structures.

This chapter builds your foundation. We will explore the unique history that created the trust, understand its core components, and introduce the different types of trusts you will encounter. My goal is to make these fundamental principles clear and intuitive, providing you with the bedrock knowledge needed for the SQE 1 exam and your future career.

1.1 The Historical Context: Common Law vs Equity

You cannot understand the what of trusts without understanding the why from history. The trust is a product of a divided English legal system: Common Law versus Equity.

The Common Law System

The common law was the original legal system in England. It was a rigid system based on precedent and writs. A writ was a standardised form needed to start a lawsuit. If your problem did not fit an existing writ, you had no legal claim. The common law courts provided limited remedies, with money damages being the primary solution.

The Birth of Equity

The common law's rigidity often led to unfair outcomes. A subject who was denied justice could appeal directly to the King, the "fountain of justice." The King delegated these appeals to his chief minister, the Lord Chancellor. The Chancellor, often a clergyman, was not bound by common law writs. He decided cases based on conscience, fairness, and good faith; on what was equitable.

Over time, the Chancellor's work became formalised into a separate court, the Court of Chancery, which administered the body of law known as Equity.

The Key Conflict and its Resolution

The two systems often clashed. For instance, under common law, if you transferred land to a friend to manage for your child, the friend was the absolute owner. Equity intervened, stating that in conscience, the friend held the land for the child's benefit.

This conflict was resolved by the *Judicature Acts 1873-1875*. These acts merged the common law and equity courts into one Supreme Court of Judicature. However, the principles themselves remain distinct. Today, all courts can apply both common law and equitable principles, but where they conflict, the rules of equity prevail.

1.2 Maxims of Equity Relevant to Trusts

Equity is guided by principles known as maxims. These are not strict rules but reflect the underlying philosophy of fairness. Key maxims for trust law include:

1. Equity will not suffer a wrong to be without a remedy. This is equity's raison d'être. It steps in where the common law is inadequate, which is how the trust itself was created.

2. Equity acts in personam. This means equity acts against the person. Its remedies are enforced against the conscience of a specific individual, such as a trustee.

3. He who comes to equity must come with clean hands. A claimant who has acted unfairly or in bad faith will not receive an equitable remedy.

4. Delay defeats equities. This is the doctrine of laches. A beneficiary who waits too long to enforce their rights may be barred from relief.
5. Equity looks to the intent rather than the form. Substance overrules technicalities. If a settlor clearly intended to create a trust, equity will look beyond the specific words used.
6. Equity regards as done that which ought to be done. If there is a binding duty to act, equity may treat the action as having already been completed for certain purposes.

1.3 The Core Concept; Separation of Legal and Equitable Title

This is the fundamental concept of every trust. The magic of a trust lies in splitting ownership into two parts: legal title and equitable title.

The Legal Title

The person with the legal title is the formal owner. Their name is on the deed, the share certificate, or the bank account. This is the trustee. They have the right to control, manage, and sell the property.

The Equitable Title

The person with the equitable title is the beneficial owner. This is the beneficiary. They have the right to enjoy the property's value and benefits.

The Trust Relationship

A trust is the relationship that arises when the legal title (held by the trustee) and the equitable title (held by the beneficiary) are separated. The trustee owns the property in name, but must use it for the benefit of the beneficiary.

A Simple Analogy

Imagine you give a valuable painting to a friend with the instruction: "Please keep this safe for my daughter until she turns 21."

- You are the settlor.

- The painting is the trust property.
- Your friend is the trustee; they hold legal title and have physical possession.
- Your daughter is the beneficiary; she holds the equitable title and is the true owner in the eyes of equity.

If your friend tries to sell the painting for personal gain, equity will intervene. Your friend may be the legal owner, but their conscience is bound by your instructions to hold it for your daughter.

1.4 The Parties to a Trust: Settlor, Trustee, and Beneficiary

Every trust involves three core parties.

1. **The Settlor**

   The settlor is the person who creates the trust and puts the property into it. They are the architect who sets the rules. They decide who the trustees and beneficiaries are, and the terms on which the trust property is managed.

   Once the trust is properly created and the property transferred, the settlor typically has no further rights or control over the trust assets.

2. **The Trustee**

   The trustee is a person(s) or company (like a bank) who holds the legal title to the trust property. They are the manager. This is a position of great responsibility and duty. Their core role is to manage the trust property strictly in accordance with the trust terms and for the exclusive benefit of the beneficiaries. Their duties, which we will explore in depth later, include:

   - Duty to obey the trust terms.
   - Duty of care to manage the property prudently.
   - Fiduciary duties of loyalty, which means they must avoid any conflict between their personal interests and their duties to the beneficiaries.
   - Duty to act impartially between different classes of beneficiaries.

Trustees are not usually paid for their work (unless the trust document says so or they are a professional trustee). They however have a right to be indemnified from the trust fund for any proper expenses they incur in running the trust.

3. The Beneficiary

The beneficiary is the person(s) for whose benefit the trust property is held. They are the true owners in equity. Their rights are powerful and include:

- **Right to due administration**: They can go to court to compel the trustees to properly perform their duties.
- **Right to information**: They are entitled to see the trust accounts and the trust document.
- **Proprietary right**: Their interest is in the property itself. If a trustee wrongly transfers trust property to a third party, the beneficiaries can often trace and recover the property.

The Rule in *Saunders v Vautier*: If a beneficiary is an adult, of sound mind, and absolutely entitled to the trust property, they can demand the trust be terminated and the property transferred to them outright, overriding the settlor's instructions.

1.5 Different Types of Trusts: A Comprehensive Analysis

Understanding the various classifications of trusts is the cornerstone of trust law. A single trust can often be described using multiple labels, each revealing a different aspect of its nature, creation, and operation. We will begin by classifying trusts based on their origin, and then by the nature of the beneficiaries' interests.

1.5.1 Classified by Creation

This classification is fundamental. It asks a simple but crucial question: how did this trust come into existence? The answer determines the legal rules that govern its validity and operation.

1. Express Trust

An express trust is a trust created deliberately, consciously, and explicitly by a settlor. It is the direct result of a settlor's intention to impose a trust relationship upon specific property for the benefit of specific persons or purposes.

The creation of a valid express trust requires the settlor to successfully jump through several legal hoops. These requirements will be the sole focus of Chapter 2, but they are worth introducing here. The foundational requirements are known as the "Three Certainties".

First, there must be Certainty of Intention. The settlor must have used words or conduct that show a clear intention to impose a binding trust obligation on the trustee, rather than a mere moral or predatory wish.

Second, there must be Certainty of Subject Matter. The trust property must be clearly identifiable. One must be able to ascertain exactly which assets are held on trust.

Third, there must be Certainty of Objects. The beneficiaries of the trust must be identifiable. The law must know for whom the trustees are managing the property. Furthermore, for certain types of property, statutory formalities must be observed. For instance, a trust of land must be evidenced in writing and signed by the settlor, as per *s.53(1)(b)* of the *Law of Property Act 1925*.

Express trusts can be created in two primary ways. An *inter vivos* trust is created during the settlor's lifetime. A testamentary trust is created through the settlor's will and only takes effect upon their death.

The defining feature of an express trust is that it exists solely to give effect to the express and conscious wishes of the settlor. The law's role is to interpret and enforce those wishes. The trustees' powers and duties, and the beneficiaries' rights, are all derived from the settlor's initial expression of intent.

A clear example of an *inter vivos* express trust is a settlor executing a deed that states: "I, Sarah, hereby transfer 100,000 pounds to my brother, David, and my sister, Emma, to hold upon trust. They shall invest the capital and pay the income equally to my two children, James and Lily, until the youngest reaches the age of 25, at which point the capital shall be divided equally between James and Lily."

An example of a testamentary express trust is a clause in a will that states: "I give the residue of my estate to my Executors, to hold upon trust. My Executors shall sell my assets and hold the proceeds upon trust to pay the income to my wife, Anna, for her life, and after her death, to divide the capital equally among my surviving grandchildren."

2. Implied Trusts

Implied trusts are trusts that are not created by the express declaration of a settlor. Instead, they arise by operation of law. The court imposes them to give effect to the presumed intentions of the parties involved, or to prevent a person from benefiting from their own unconscionable conduct. They are a quintessential example of equity's intervention to achieve a just result where the formalities of an express trust are absent.

These trusts are not founded on a formal declaration. They are inferred by the court from the circumstances of the case, typically from the conduct of the parties and the financial contributions made. The *Law of Property Act 1925*, in *s.53(2),* explicitly states that the formal writing requirement for the creation of a trust of land "does not affect the creation or operation of resulting, implied or constructive trusts." This statutory provision gives these trusts their legal force without the need for formalities.

Implied trusts are divided into two distinct and important categories: resulting trusts and constructive trusts.

The key feature of all implied trusts is that they operate independently of the formal intentions required for an express trust. They are remedies and legal constructs designed to remedy unjust enrichment, to fulfil common intentions, or to return property when a specific purpose fails.

Resulting Trust

A resulting trust is a trust that arises when the equitable interest in property "results" or springs back to the person who provided the purchase money for the property, or to the settlor of an express trust that has failed. The core principle is that the legal holder of the property is not intended to enjoy the entire beneficial interest. The trust "results" in favour of the true provider of the funds. Resulting trusts are traditionally categorised into two types, though modern jurisprudence sometimes blurs this distinction.

The first type is the Presumed Resulting Trust. This arises in two classic situations. One situation is a voluntary transfer. If Person A transfers the legal title of property to Person B for no consideration, and there is no evidence of a gift, the law presumes that Person B holds the property on a resulting trust for Person A. The other situation is a purchase in the name of another. If Person A pays the purchase price for a property, but the legal title is placed in the name of Person B, or in the joint names of A and B, the law presumes that Person B (or B's share) is held on a resulting trust for Person A. This presumption is based on the equitable maxim that "equity presumes a bargain, not a gift."

The second type is the Automatic Resulting Trust. This arises when an express trust fails, or does not exhaust the entire trust fund. For example, if a settlor transfers 50,000 pounds to a trustee upon trust for the education of his nephew, and the nephew dies before the fund is fully spent, the remaining money is held on an automatic resulting trust for the settlor or his estate. The equitable interest automatically returns to the settlor because the specific purpose for which it was given can no longer be fulfilled.

The traditional view, articulated by *Lord Browne Wilkinson* in ***Westdeutsche Landesbank v Islington LBC*** [1996] A.C. 669, is that resulting trusts give effect to the common intention of the parties.

In the case of a presumed resulting trust, the intention is presumed from the act of providing funds. In the case of an automatic resulting trust, the intention is that the property should return to the settlor if the primary trust fails. Consider a scenario where an elderly mother, Margaret, pays the full purchase price for a house but has the legal title put solely in the name of her son, Robert, to assist with administrative matters. There is no evidence she intended to make him a gift. The law presumes a resulting trust. Robert holds the legal title, but he is compelled in equity to hold the beneficial interest for Margaret. If Robert were to try to sell the house and keep the proceeds for himself, Margaret could go to court to enforce the resulting trust and reclaim her property.

Another example involves a failed purpose. A group of colleagues collect money to buy a retirement gift for their manager. They raise 2,000 pounds. The manager retires unexpectedly before the gift can be purchased. The 2,000 pounds is held on a resulting trust for the colleagues who contributed, in proportion to their contributions. The purpose of the trust has failed, so the money results back to them.

Constructive Trust

A constructive trust is a trust imposed by a court as an equitable remedy. It is imposed irrespective of, and sometimes directly contrary to, the intentions of the legal owner. The court "constructs" the trust to prevent the legal owner from acting unconscionably by asserting their strict legal rights to the property.

A constructive trust arises by operation of law the moment the circumstances which equity deems to be unconscionable occur. It is not created by agreement or declaration. The categories of constructive trust are never closed, as equity operates to meet new forms of mischief. However, several well established situations trigger a constructive trust.

One major category is the common intention constructive trust. This is frequently used in disputes over the family home. If one person (A) is the sole legal owner, but both A and another person (B) had a common intention that B should have a beneficial interest, and B has acted to their detriment in reliance on that common intention, the court will impose a constructive trust to give B a share of the property. The common intention can be express, such as through a conversation, or it can be inferred from the conduct of the parties, such as B making substantial contributions to the mortgage or significant improvements to the property.

Another fundamental category involves fiduciaries making an unauthorized profit. A fiduciary, such as a trustee, director, or agent, is under a strict duty not to allow their personal interest to conflict with their duty. If a trustee uses trust property, or their position as trustee, to make a personal profit, they will be held to be a constructive trustee of that profit for the beneficiaries of the original trust. The landmark case of ***Keech v Sandford*** [1726] 25 ER 223 established this principle, where a trustee who renewed a lease for the trust in his own name was forced to hold that lease on constructive trust for the infant beneficiary.

A constructive trust can also arise in situations of mutual wills. Two individuals may make a legally binding agreement that they will not revoke their wills, which provide for the same ultimate beneficiary. After the first party dies, the second party becomes a constructive trustee of their estate, preventing them from revoking their will and defeating the agreement.

The key feature of a constructive trust is that it is a remedial institution focused on the defendant's unconscionable conduct. The question is not "what did the parties intend?" but "would it be unconscionable for the legal owner to keep the property for themselves?" The trust is the tool equity uses to strip away this unconscionable advantage.

In the context of the family home, imagine a couple, Mark and Chloe. Mark is the sole legal owner. They have an express conversation where Mark says to Chloe, "This is our home, it is as much yours as it is mine." Relying on this, Chloe uses her savings to pay for a substantial kitchen extension, significantly increasing the property's value. This is detrimental reliance. If Mark later tries to evict Chloe, claiming the house is solely his, a court will impose a constructive trust, recognising Chloe's beneficial interest.

In a commercial context, consider a company director, Ms. Evans, who learns of a lucrative business opportunity through her position as a director. The opportunity properly belongs to the company. If she secretly takes the opportunity for herself and makes a profit, she will be declared a constructive trustee of that profit for the company. Her fiduciary duty precludes her from making a secret profit, and the constructive trust is the mechanism for recovery.

1.5.2 Classified by Beneficial Interests

This classification moves from the origin of the trust to its internal mechanics. It focuses on the nature of the beneficiaries' rights and the extent of the trustees' powers and discretion.

1. **Bare Trust**

   A bare trust, also known as a simple trust, is the most fundamental type of trust structure. It involves a trustee who holds the legal title to property for a single beneficiary, or multiple beneficiaries who are jointly entitled. The beneficiary is of full age and capacity and has an absolute, indefeasible right to both the capital and the income of the trust property.

   A bare trust can be created expressly. For instance, a settlor might declare, "I hold my vintage car collection on trust for my adult son." More commonly, they arise by operation of law in situations where a person is legally required to hold property for another, such as a solicitor holding money in a client account.

   The most critical feature of a bare trust is the passivity of the trustee. The trustee has no active duties of management, investment, or discretion. Their role is that of a mere nominee or custodian. The trustee's only significant obligation is to deal with the property as the beneficiary directs. The beneficiary, being absolutely entitled and of full capacity, can terminate the trust at any time under the rule in ***Saunders v Vautier*** [1841] 4 Beav 115 and demand an immediate transfer of the legal title. The trustee has no right to refuse.

   A classic example is a stockbroker who holds shares on behalf of a client. The client is the absolute beneficial owner. The broker's only function is to register the shares in its name for administrative convenience and to sell or transfer them upon the client's direct instruction. The broker has no power to decide which shares to buy or sell. Another example is parents who hold a legal title to a bank account for their 18 year old child, where the money in the account originated from a gift to the child. The parents are bare trustees and must hand over control of the account to the child upon request.

2. Fixed Trust

A fixed trust is one in which the settlor has defined the beneficial interests with precision. The trust instrument specifies exactly who the beneficiaries are and the precise size of each beneficiary's share in the trust property. The trustees are given no discretion to alter this distribution.

A fixed trust is created expressly. The settlor must use clear and unambiguous language to define the beneficiaries and their fixed shares. For a fixed trust to be valid, it must satisfy the "complete list" test for certainty of objects. This means the trustees must be able, at the outset, to draw up a complete list of all the beneficiaries. If the class is too vague, such as "my old friends," the trust will fail for uncertainty.

The defining feature of a fixed trust is the absence of trustee discretion regarding the distribution of the beneficial interests. The trustees' role is administrative. They must identify all the individuals on the fixed list and distribute the trust property to them in the exact shares stipulated by the settlor. The beneficiaries have a fixed, immediate, and proprietary interest in their respective shares of the trust fund from the moment the trust is created.

A straightforward example is a trust established by a will: "I give my residuary estate to my trustees to hold upon trust for my three children, Alice, Ben, and Chloe, in equal one third shares." The trustees have no choice. They must divide the estate into three equal parts and distribute them.

A more complex fixed trust might be: "I give 120,000 pounds to my trustees to hold upon trust for all my grandchildren living at my death." If the settlor has six grandchildren at her death, each is entitled to a fixed share of 20,000 pounds. The trustees must compile a complete list of the six grandchildren and distribute the funds accordingly.

3. Discretionary Trust

A discretionary trust is a trust where the settlor gives the trustees a power of discretion. The trustees are given a defined class of potential beneficiaries, and the power to decide which member or members of that class will receive a benefit from the trust, what that benefit will be, and when it will be distributed.

A discretionary trust is created expressly. The settlor must define the class of objects (the potential beneficiaries) with sufficient clarity. The key legal requirement for its validity is the certainty of objects test, which is different from that of a fixed trust. For a discretionary trust, the test is whether it can be said with certainty that any given individual is or is not a member of the class. This is known as the "any given postulant" test, established in the seminal case of ***McPhail v Doulton*** [1971] AC 424.

The most important feature of a discretionary trust is the nature of the beneficiaries' interests. Until the trustees exercise their discretion in favour of a particular beneficiary, that person has no proprietary interest in the trust assets. They have only a *spes*; a hope or an expectation, coupled with a right to be considered by the trustees and a right to compel the trustees to properly administer the trust. The trustees have a fiduciary duty to survey the entire class of potential beneficiaries, to consider their needs and circumstances, and to exercise their discretion responsibly and impartially. They cannot simply refuse to act.

A typical discretionary trust clause in a will might state: "I give 500,000 pounds to my trustees to hold upon trust. My trustees shall have the discretion to distribute the income and capital of this fund among my nephews and nieces, and the children of my nephews and nieces, in such shares and proportions as my trustees shall in their absolute discretion think fit."

In this scenario, no individual nephew, niece, or grandchild has a right to any of the money. The trustees could decide to give the entire fund to one needy grandchild, or distribute small amounts to all of them, or even to accumulate the income and make no distributions for a period of time. The power and the responsibility lie with the trustees to make these decisions. The beneficiaries cannot demand a payment, but they can go to court if the trustees fail to consider exercising their discretion at all, or if they act irrationally or in bad faith.

This concludes the expanded and detailed analysis of the different types of trusts. This foundation is critical for understanding the more specific rules and applications we will explore in the following chapters.

1.6 Conclusion

In this chapter, we have established the fundamental principles of Trusts Law. We traced its origins to the historical conflict between the rigid Common Law and the flexible conscience of Equity. We learned that the trust's power comes from the essential separation of legal title (management) from equitable title (benefit).

We defined the roles of the three key parties: the Settlor who creates the trust, the Trustee who manages it with a high duty of care, and the Beneficiary who holds powerful rights to enforce and enjoy it. Finally, we categorised the main types of trusts, from express to constructive, and from fixed to discretionary.

This foundational knowledge is critical. In the next chapter, we will build directly upon it by examining the precise requirements for creating a valid express trust: the Three Certainties. You now have the map; let's begin the detailed journey.

2

CREATING AN EXPRESS TRUST

The creation of an express trust is a significant legal act. It involves the deliberate fragmentation of property ownership, imposing enduring duties on trustees and conferring valuable rights upon beneficiaries. Given the gravity of this arrangement, the law does not allow trusts to arise from vague or ambiguous circumstances. Instead, it demands a foundation of absolute clarity. This foundation is built upon the doctrine of the "three certainties," a principle famously articulated in ***Knight v Knight*** [1840] 49 ER 58. Without these certainties, a court cannot properly define, administer, or enforce the trust, and it will be declared void.

Alongside this conceptual blueprint, the law imposes formal requirements for creating certain types of trusts. These formalities, primarily concerned with written evidence, serve to prevent fraud and provide clear proof of the settlor's intentions. This chapter will guide you through both the conceptual and formal prerequisites for creating a valid express trust, providing you with the analytical tools to distinguish between a binding trust and a failed gift or unenforceable wish.

2.1 The Three Certainties

For an express trust to be valid, it must satisfy three distinct but interconnected requirements: certainty of intention, certainty of subject matter, and certainty of objects. These are not mere technicalities; they are essential preconditions for the trust's very existence. In essence, the court must be able to answer three fundamental questions: Did the settlor intend to create a trust? What property is subject to the trust? And for whom is the trust to be administered? If the answer to any of these is unclear, the trust fails.

2.1.1 Certainty of Intention

The foremost requirement is that the settlor must have genuinely intended to impose a legally binding trust obligation on the holder of the property. The central question is whether the settlor's words or conduct, construed in their proper context, demonstrate a mandatory instruction rather than a mere hopeful suggestion.

The law focuses on substance over form. A settlor need not use the technical legal phrase "I declare myself a trustee." The courts will look at the totality of the circumstances to ascertain the true intention. This involves a careful examination of the language used, the nature of the relationship between the parties, and the conduct of the alleged settlor.

Precatory Words vs. Binding Obligation

A classic pitfall in establishing intention involves the use of "precatory words", which are words of hope, expectation, or prayer, derived from the Latin *precari*, meaning 'to beg'. In earlier centuries, courts were more willing to interpret such language as creating a trust. However, the modern approach, firmly established in the 19th century, is to construe the document as a whole to see if the settlor intended to command or merely to recommend.

An example of words failing to create a trust can be found in ***Re Adams and the Kensington Vestry*** [1884] 27 Ch D 394. A testator gave his estate to his wife "in full confidence that she would do what was right as to the disposal thereof between his children." The Court of Appeal held that the words "in full confidence" were merely precatory. They expressed a moral wish or hope but did not impose a legally enforceable obligation on the wife. Consequently, she took the property absolutely and was free to dispose of it as she saw fit.

In contrast, an explicit command creates a binding trust. A clear directive such as, "I give my house to my brother, John, to hold upon trust for my daughter, Sarah," leaves no room for doubt. The phrase "upon trust for" is an imperative order, compelling John to hold the legal title for Sarah's exclusive benefit. The intention is certain.

Evidence from Conduct

Intention is not always expressed in formal documents or even in clear statements. It can be, and often is, inferred from an individual's conduct. This is particularly important in informal family or personal arrangements where legal advice has not been sought.

The seminal case of ***Paul v Constance*** [1977] 1 WLR 527 provides a powerful illustration of this principle. Mr. Constance was separated from his wife and cohabited with Ms. Paul. He received a sum of money as compensation for an injury and deposited it into a bank account held in his sole name. While he never used the formal language of trust, he repeatedly assured Ms. Paul, "The money is as much yours as mine." Furthermore, they both paid small amounts into the account and jointly decided to withdraw money for their shared benefit.

When Mr. Constance died, the legal question was whether he had held the money in the bank account on trust for himself and Ms. Paul. The Court of Appeal looked beyond the informality of the words and considered the entire course of conduct. The assurances, coupled with the practical management of the funds as a joint resource, demonstrated a clear common intention that Ms. Paul should have a beneficial interest. The court held that a trust had been created. This case stands as a vital authority for the proposition that a trust can be established through a combination of unambiguous statements and consistent conduct, even in the absence of legal jargon.

2.1.2 Certainty of Subject Matter

A trust cannot function if it is unknown what property is held on trust. The subject matter, or the trust property, must be identifiable with precision. This requirement ensures that the trustees know what assets they are to manage and that the beneficiaries know what they have a right to.

This certainty has two aspects: conceptual certainty and physical identification. Conceptual certainty asks whether the property can be described clearly. Physical identification asks whether that described property can be pinpointed in the real world. Problems most frequently arise when the purported trust property is part of a larger, unsegregated bulk.

The Problem of Unascertained Bulk

The principle is straightforward: if you cannot identify which specific items form the trust fund, there is no trust. This is vividly demonstrated in cases concerning tangible goods. In ***Re London Wine Co*** [1986] PCC 121, a company sold wine to customers, who were given certificates of ownership. However, the company stored all the wine of a particular type in a communal warehouse without physically separating or marking the bottles belonging to individual customers. When the company became insolvent, the customers argued that they were beneficiaries of a trust over their specific wine.

The court rejected this argument. It held that for a trust over tangible property to be created, the specific assets must be segregated from the bulk. Since it was impossible to say which bottles of wine belonged to which customer, the subject matter was uncertain, and no trust could arise. The customers were merely unsecured creditors.

Conceptual Certainty vs. Physical Segregation

The law, however, recognises a distinction between different types of property. While physical segregation is typically essential for tangible assets, the same strict requirement does not always apply to intangible assets that are identical and fungible.

This distinction was central to the decision in ***Hunter v Moss*** [1994] 1 WLR 452. The settlor, Mr. Moss, declared himself a trustee of 5% of the share capital of a company for the benefit of Mr. Hunter. Mr. Moss owned 950 shares in total, and 5% of this holding amounted to 47.5 shares. He did not identify any specific share certificates or numbers as being the trust property. The question for the court was whether this lack of segregation invalidated the trust for uncertainty of subject matter.

The Court of Appeal distinguished ***Re London Wine***. It reasoned that shares of the same class in a company are fungible; each share is identical and carries the same rights. Therefore, a declaration of trust over a specified number or proportion of such shares is conceptually certain. The subject matter of the trust was not a specific, physical asset but the beneficial interest in 50 shares from the identifiable total holding of 950. The trust was upheld as valid.

This creates a crucial point of analysis for the SQE. For tangible assets forming part of a bulk (like wine, grain, or cars), physical segregation is required (***Re London Wine***). For identical intangible assets (like shares of the same class), a declaration of a specified number from a defined holding can be sufficient (***Hunter v Moss***).

2.1.3 Certainty of Objects (Beneficiaries)

The third certainty requires that the beneficiaries, or "objects," of the trust are defined with sufficient clarity. This is underpinned by the "beneficiary principle," which states that for a trust to be valid, there must be human beneficiaries who can enforce it. Without someone to hold the trustees accountable, the trust is a mere "purpose," which is generally unenforceable.

The Beneficiary Principle

The classic authority is ***Morice v Bishop of Durham*** [1805] EWHC Ch J80. The testator left the residue of his estate to the Bishop of Durham "for such objects of benevolence and liberality as the Bishop in his own discretion shall most approve of." The court held this gift void. The terms "benevolence" and "liberality" described abstract purposes, not identifiable human beneficiaries. There was no one with the clear right to go to court to ensure the Bishop performed his duty. This principle ensures that every trust has an enforcer, which is fundamental to its operation.

The test for determining whether the objects are sufficiently certain depends entirely on the type of trust created.

1. **Fixed Interest Trusts: The "Complete List" Test**

   In a fixed trust, each beneficiary is entitled to a pre-determined share of the trust property. For example, "to my trustees to hold for my children, Andrew, Beatrice, and Chloe, in equal one third shares."

   The test for certainty of objects in such a trust is the strict "complete list" test. It must be possible, at the time the trust takes effect, to draw up a complete list of all the individuals who qualify as beneficiaries.

The reason for this strictness is practical. If the trustees are to distribute fixed shares, they must know the exact size of the class to calculate what each beneficiary is due. If it is impossible to ascertain whether a particular individual is a beneficiary (e.g., if the class is defined as "my old friends"), the entire list is incomplete, and the trust fails. The trustees cannot know if Andrew is entitled to one third or one quarter.

2. Discretionary Trusts: The "Any Given Postulant" Test

A discretionary trust gives the trustees a power to select who, from a defined class of beneficiaries, will receive a share of the trust fund and in what amounts. For example, "to my trustees to distribute the income among my employees and former employees at their absolute discretion."

For this type of trust, the test is less stringent. The landmark case of ***McPhail v Doulton*** [1971] AC 424 overruled the old "complete list" test for discretionary trusts and established a new standard, often called the "any given postulant" test or the "is or is not" test. The rule is that it must be possible to say with certainty, in relation to any given individual who comes forward (a "postulant"), whether they are or are not a member of the class of beneficiaries.

The House of Lords reasoned that the role of the court in a discretionary trust is different. The court is not required to distribute the fund equally, but merely to ensure that the trustees are exercising their discretion within the boundaries set by the settlor. If the trustees fail to consider the class or act capriciously, the court can intervene. It can only do this, however, if it can first determine whether a person complaining is even within the class. Hence, the "is or is not" test provides a workable standard for control without requiring the impossible task of listing every potential beneficiary.

The application of this test was then considered in ***Re Baden's Deed Trusts (No 2)*** [1972] EWCA Civ 10, the follow up to ***McPhail***. The court had to decide if the terms "relatives" and "dependants" satisfied the new test. The Court of Appeal adopted a practical, common sense approach. It held that "dependants" (those financially dependent on the employee) was conceptually certain. For "relatives," which could mean "descendants from a common ancestor," the court held that it was sufficient that for any given person, evidence could be gathered to determine, on the balance of probabilities, whether they were a relative. It did not matter that the exact line of ancestry might be difficult or impossible to trace for everyone in the world; the test was whether a decision could be made about any single individual who presented themselves. The class was therefore held to be certain.

2.2 Formalities for Creating Express Trusts

Satisfying the three certainties establishes the conceptual and intentional bedrock for a trust. It confirms that the settlor had a clear idea and a definite purpose. However, for this intention to be given legal force and effect, for it to become an enforceable reality in the eyes of the court, the correct formalities must often be observed.

These formalities are statutory rules that govern the evidence required to prove the trust's existence. They act as a protective gatekeeping mechanism, designed primarily to prevent fraud and perjury by ensuring that significant transactions, particularly those involving land, are not supported by mere oral assertions which are easily fabricated and difficult to disprove. It is crucial to understand that these rules do not generally dictate how a trust must be created, but rather how it must be proven.

The landscape of formalities is not uniform; it changes dramatically depending on the type of property involved. The most critical distinction the law draws is between real property (land) and personal property (everything else). This section will explore this dichotomy in detail, beginning with the strict requirements for trusts of land, moving to the liberating absence of formalities for trusts of personalty, and culminating in the vital exception that preserves the role of equity in preventing injustice.

2.2.1 Trusts of Land: *Section 53(1)(b), Law of Property Act 1925*

For any aspiring solicitor, a firm grasp of *s.53(1)(b)* of the *Law of Property Act 1925* is non-negotiable. This provision represents Parliament's intervention to bring certainty to dealings with land, the most significant asset most people will ever own. The subsection states, in its entirety: "A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."

This seemingly simple sentence contains several layers of meaning that must be unpacked with precision.

The Core Requirement: Manifestation and Proof

The statutory language does not demand that the declaration of trust itself be made in writing. In strict theory, an oral declaration is permissible. The key requirement is that the existence of this oral declaration must be "manifested and proved by some writing." This means there must be a subsequent written document, a piece of evidence, that can be produced to the court to demonstrate that the oral declaration was indeed made. The writing is the proof of the prior intention.

This was illustrated in the old case of ***Forster v Hale*** [1798] 3 Ves 696, where the court accepted a memorandum written by the trustee after the oral declaration as sufficient written evidence to satisfy the precursor statute. The modern interpretation continues this principle: the writing need not be a formal trust deed; it can be a letter, a diary entry, or even a hastily scribbled note, so long as it adequately records the fact of the declaration.

The Signature: An Authentication Imperative

The writing that serves as proof is not valid unless it is "signed by some person who is able to declare such trust." This person is almost invariably the settlor, the one who holds the beneficial interest and therefore has the power to create the trust. The signature serves the essential function of authentication, linking the written evidence definitively to the person whose intention it purports to record. A document that is not signed by the settlor, or someone lawfully authorised by them, cannot satisfy the statute.

The case of ***Shah v Shah*** [2010] EWHC 313 (Ch) underscores the importance of this requirement. The Court of Appeal held that a signature could include any mark made by the signatory with the intention of authenticating the document; it need not be a full, handwritten name. However, the crucial point is that the act of signing must be intentional and meant to give effect to the document. An automatic email footer, for instance, may not constitute a signature for these purposes without evidence of a specific intention to authenticate the content.

Scope: "Any Land or Any Interest Therein"

The ambit of *s.53(1)(b)* is broad. It applies to all legal and equitable interests in land. This includes the outright ownership of a freehold, the possession of a leasehold (whether for 999 years or 6 months), and even more complex interests such as easements (rights of way) or restrictive covenants. Any attempt to declare a trust over such an interest in land falls within this provision.

The Consequence of Non-Compliance

The consequence of failing to comply with *s.53(1)(b)* is severe. The declaration of trust is not void, but it is unenforceable. This is a critical distinction. A void act is a legal nullity from the outset. An unenforceable act is one that the law recognises as having been done, but which it will not uphold through its judicial machinery.

In practical terms, this means that if a purported beneficiary under an oral trust of land tries to bring a claim against the legal owner to enforce their rights, the court will refuse to hear the claim. The legal owner can simply plead the lack of written evidence, and the beneficiary's case will fail. The outcome is that the legal owner holds the land free of the trust, enjoying the full beneficial interest, despite what may have been a genuine oral promise. This harsh result is the price paid for the policy of certainty and fraud prevention.

An Illustrative Scenario:

Imagine Arthur owns a house and tells his sister, Beatrice, "I hold this house on trust for you and me in equal shares." He does this orally and never reduces this declaration to writing. Arthur continues to live in the house and pay the mortgage. If Arthur then tries to sell the house and keep all the proceeds for himself, Beatrice would go to court to assert her beneficial half share under the trust. The court would ask her for the written evidence required by *s.53(1)(b)*. When she produces none, her claim would be dismissed as unenforceable. Arthur, despite his moral wrongdoing, would succeed in keeping the entire proceeds. This outcome powerfully demonstrates why advising a client to document a trust of land in writing is not a mere technicality but a fundamental step to secure their rights.

2.2.2 Trusts of Personalty: No Formality Required

In stark and deliberate contrast to the regime for land, the declaration of a trust over personal property requires no formalities whatsoever. Personal property, or "personalty," encompasses all property that is not land. This includes a vast array of assets: chattels (physical objects like cars, jewellery, and paintings), choses in possession (rights to tangible items), and choses in action (intangible rights such as bank account balances, shares, patents, and debts).

The rule here is one of pure flexibility. A trust of personalty can be created orally, through a written document, or can be inferred from the conduct of the parties. This liberal approach reflects a historical and pragmatic view that transactions involving moveable property are often more informal, of lower value, and less prone to the specific types of fraud that the land formalities were designed to prevent.

The case of ***Paul v Constance*** [1977] 1 WLR 527, which we discussed in the context of intention, is also the paramount authority for the formality rules governing personalty. The subject matter of the trust was the money in a bank account, a classic form of a chose in action and therefore personalty. Mr. Constance's oral declarations ("The money is as much yours as mine"), combined with the conduct of both parties in using the fund, were sufficient to create a valid and perfectly enforceable trust. The Court of Appeal did not even require a single piece of paper to satisfy a formality rule because none existed for this type of property. The evidence of intention was enough.

Examples of Informal Creation

The simplicity of creating trusts of personalty can be seen in everyday scenarios.

1. **Tangible chattels**: If Claudia takes a valuable family heirloom, a gold pocket watch, and hands it to her friend David saying, "David, I want you to look after this watch for my son, Edward, and give it to him when he turns 21," a trust is immediately created. Claudia is the settlor, David is the trustee, and Edward is the beneficiary. The

declaration is oral, the property is a tangible chattel, and no writing is required. David is under a fiduciary duty to safeguard the watch for Edward's benefit.

2. **Intangible property**: If a shareholder, Fiona, instructs her broker to transfer 100 of her shares in XYZ PLC into the names of herself and her nephew, George, as joint holders, and George is a minor, the law will infer a trust. Fiona, as the adult legal owner, will be considered to hold the shares on a bare trust for George until he comes of age. This trust arises by operation of law based on the circumstances of the transfer, again without any need for a formal written declaration.

This freedom from formalities allows for great flexibility in managing financial affairs and making gifts. However, it also carries a risk of evidential uncertainty and disputes, as seen in ***Paul v Constance*** itself. The lack of a "paper trail" can make it difficult to prove what was said and intended, but it does not, in principle, invalidate the trust.

2.2.3 The *Section 53(2)* Exception for Implied Trusts

The formality regime established by *s.53(1)* would be an instrument of injustice if applied without exception. It would allow a legal owner who had encouraged another to act to their detriment on the promise of an interest in land to hide behind the statute and deny that interest. Equity, true to its maxim that "equity will not permit a statute to be used as an engine of fraud," has carved out a crucial exception. This is found in *s.53(2)* of the same Act, which provides: "This section does not affect the creation or operation of resulting, implied or constructive trusts."

This saving provision is of profound importance. It means that the strict writing requirement in *s.53(1)(b)* does not apply to trusts that the law itself implies. These are not express trusts declared by the settlor, but trusts that arise by operation of law to give effect to the parties' common intentions or to prevent unconscionable conduct.

The Rationale: Conscience Over Form

The policy behind this exception is straightforward. Resulting and constructive trusts are remedies for unjust enrichment and unconscionable behaviour. To require written evidence for such trusts would be to allow a fraudster to benefit from their own wrongdoing. If a person contributes to the purchase price of a house but is not on the legal title, the law infers a common intention that they should have an interest. To allow the legal owner to then say, "Ah, but you have no written declaration of trust!" would be to make a mockery of justice.

The classic authority is ***Rochefoucauld v Boustead*** [1897] 1 Ch 196. The plaintiff owned a coffee estate that was mortgaged. To prevent the mortgagees from seizing the estate, she transferred it to the defendant, Mr. Boustead, on the oral understanding that he would hold it on trust for her and would reconvey it once the debts were settled from the profits of the estate. Boustead subsequently denied the trust and claimed the estate for himself.

The Court of Appeal held that the trust was enforceable despite the lack of writing. It was a classic constructive trust arising from the circumstances of the transfer. The court famously held that it would be a fraud for Boustead to rely on the Statute of Frauds (the precursor to the *Law of Property Act 1925*) to deny the trust he had expressly agreed to. Section 53(2) (or its equivalent) operated to take this trust outside the formality requirements.

Modern Application in the Family Home

This exception is the very foundation upon which the law of "common intention constructive trusts" in cohabitation disputes is built, a topic we will explore in depth in Chapter 7. When an unmarried couple purchase a home together, but it is conveyed into the sole name of one of them, the other may still acquire a beneficial interest. They do so not through an express declaration, but by establishing a common intention that they should have a share (often through direct financial contributions to the purchase) and having acted to their detriment in reliance on that intention.

For example, if a couple, Henry and Isabelle, buy a house. Henry provides the entire deposit, but the mortgage is in their joint names, and Isabelle contributes significantly to the monthly repayments and household bills. The house is put in Henry's name alone due to a administrative oversight. There is no written declaration of trust for Isabelle. If they separate, Isabelle can claim a beneficial share under a constructive trust. She would argue that their common intention, evidenced by their financial conduct, was that she should have an interest. Her detriment is her financial contribution. The court will quantify her share. Throughout this process, Henry cannot defeat her claim by pointing to the lack of writing under *s.53(1)(b)*, because *s.53(2)* exempts constructive trusts from this requirement.

The law of formalities for express trusts presents a carefully balanced system. For trusts of land, the policy of certainty and fraud prevention demands written evidence, rendering oral trusts unenforceable. For trusts of personalty, the policy of freedom and flexibility allows for informal creation. Crucially, hovering over this entire structure is the equitable safety valve of *s.53(2),* which ensures that the formalities can never be used as a shield for fraudulent or unconscionable conduct. A competent solicitor must not only know these rules but must understand the policy reasons behind them, enabling them to advise clients on how to properly create an enforceable trust and how to protect their interests when informal arrangements break down.

2.4 Conclusion

The journey to creating a valid express trust is a structured one, requiring meticulous attention to both conceptual clarity and procedural correctness. The three certainties ensure that the trust is conceptually sound, while the formalities provide the necessary legal proof. A failure at any stage can be fatal.

To recap, a valid express private trust requires:

1. **Certainty of intention**: An imperative intention to create a trust, gleaned from the settlor's words or conduct, not merely precatory wishes.
2. **Certainty of subject matter**: Clearly identifiable trust property, with special rules for segregation of tangible bulk versus intangible, fungible assets.
3. **Certainty of objects**: A defined class of human beneficiaries, tested by the "complete list" rule for fixed trusts and the "any given postulant" rule for discretionary trusts.
4. **Compliance with formalities**: For trusts of land, written evidence signed by the settlor is required (*s.53(1)(b) LPA 1925*). For trusts of personalty, no formalities are needed. These rules do not apply to resulting or constructive trusts (*s.53(2) LPA 1925*).

3

CONSTITUTION OF TRUSTS AND GIFTS; PERFECTING THE TRANSFER

Creating a trust is not just about intention, it's about constitution. This chapter explains the two routes to make a trust effective in law: a self-declaration (the settlor declares "I hold on trust") and a transfer to a third-party trustee (the settlor must perfect the legal title by the correct formalities for the asset). Get that final step wrong and the trust fails, leaving the would-be beneficiary with no enforceable rights.

The baseline is governed by one of equity's sternest rules, it will not assist a volunteer. This means a beneficiary who has given no value for a gift cannot ask a court to fix the settlor's failure to complete the trust properly. However, this rigid principle is tempered by significant exceptions where the court's sense of conscience demands intervention to prevent an unjust outcome, creating a fascinating tension between strict legal doctrine and equitable fairness.

3.1 The Requirement of Constitution: Declaration vs. Transfer

Imagine you want to give your friend a book. You have two clear options. First, you can simply say, "I give this book to you," and hand it over directly. This is a straightforward gift. Second, you could point to the book on your shelf and tell a mutual friend, "I want you to take that book and give it to our friend for me." The first method is direct; the second uses an intermediary.

In trust law, this concept is paramount. Creating a trust involves more than just having the intention to do so. For a trust to become fully operational and legally enforceable, it must be "constituted." Constitution is the process of ensuring the trust property is properly placed under the control of the trustee. It is the final, essential step that transforms a mere intention into a binding legal arrangement.

There is a crucial distinction every law student must grasp. The method of constitution depends entirely on who the settlor intends to be the trustee.

Declaration of Trust

This occurs when the settlor states, "I hold my own property on trust for someone else." In this scenario, the settlor wears two hats: they are both the original legal owner and the new trustee. The physical property never moves. It remains in the settlor's possession. However, its legal status changes profoundly. The settlor's ownership is no longer absolute. They retain legal title but now hold it for the benefit of the beneficiary, who immediately acquires the equitable, or beneficial, title. The property is, in effect, ring fenced within the settlor's hands.

Transfer of Trust Property

This occurs when the settlor states, "I give my property to you, Mr. Trustee, so that you can hold it on trust for a beneficiary." Here, the settlor intends for a third party to manage the trust. To achieve this, the settlor must successfully transfer the legal title of the property to this new trustee. This requires the settlor to follow all the legal formalities necessary for transferring that specific type of property.

A key point to remember is that a declaration of trust, provided it satisfies the three certainties and any relevant formalities, is sufficient to constitute the trust by itself. The property is already with the trustee (the settlor themselves). However, if the settlor intends to appoint a third party as trustee, a successful transfer of the property to that person is mandatory. If this transfer is done incorrectly or incompletely, the entire trust fails. The intended trustee never gains legal title, the trust remains unconstituted, and the intended beneficiary receives nothing. This fundamental principle leads directly to one of equity's most important and strict rules.

3.2 Methods of Constitution

There are two primary methods to perfectly constitute a trust, each corresponding to the distinction outlined above.

3.2.1 Self-Declaration as Trustee

This is the more straightforward method of constitution. The settlor simply declares themselves to be the trustee of specific, identifiable property for the benefit of one or more beneficiaries. No physical transfer of the property is required because the settlor already holds the legal title. The constitution happens at the moment of a valid declaration.

Consider this example: Sarah owns a valuable painting. She writes a signed document stating, "I, Sarah, hereby declare that I hold my painting, 'Sunset Over the Thames,' on trust for my daughter, Chloe." From that moment, the trust is perfectly constituted. Sarah is the trustee, and Chloe is the beneficiary who holds an immediate equitable interest in the painting. Legally, Sarah can no longer treat the painting as her own personal asset to sell or give away as she pleases. She is bound by fiduciary duties to manage and preserve the painting for Chloe's benefit.

The legal requirements from Chapter 2 still apply. The three certainties; intention, subject matter, and objects, must be present. Furthermore, if the trust property is land, the declaration must be evidenced in writing and signed by the settlor to comply with *s.53(1)(b)* of the *Law of Property Act 1925*. The crucial takeaway is that no transfer of the property to another person is required. The trust is constituted by the sheer force of the settlor's binding declaration.

3.2.2 Transfer to a Third-Party Trustee

This method is used when the settlor wishes for someone else to act as the trustee. To constitute the trust this way, the settlor must successfully transfer the legal ownership of the trust property to the intended third-party trustee. This transfer is not a mere handover; it must comply precisely with all the legal rules governing the transfer of that particular type of property.

If the transfer is not executed correctly, it fails. The consequence is severe: the intended trustee never becomes the legal owner, and the trust remains unconstituted. The settlor remains the absolute owner of the property, and the intended beneficiary has no legal right to it whatsoever. They are a mere volunteer, and as we will see, equity will not assist them.

The case that established this rule with crystal clarity is ***Milroy v Lord*** [1862] 45 ER 1185. In this case, Mr. Medley intended to create a trust of shares for the benefit of Mr. Milroy. He executed a deed, a formal legal document, which appointed Mr. Lord as the trustee. However, Mr. Medley failed to complete the process. He never followed the necessary procedure to have the shares formally registered in Mr. Lord's name in the company's books.

The court held that the trust had failed. The transfer of the shares was legally imperfect. The court refused to use its equitable powers to perfect the flawed transfer. The judges emphasized that if a settlor intends to make a gift by transferring property to a trustee, the means must be perfected. Equity cannot perfect an imperfect gift. As a result, the shares still legally belonged to Mr. Medley, and Mr. Milroy, the intended beneficiary, received nothing. This case remains a cornerstone of trust law, illustrating the critical importance of properly executing the transfer of property to a third-party trustee.

3.3 Transfer Requirements for Different Property Types

The previous section established that transferring property to a third-party trustee is a common method of constituting a trust. However, a generic intention to transfer is not enough. The law imposes specific, formal requirements for transferring different categories of assets. A competent solicitor must have these rules at their fingertips, as failure to adhere to them scrupulously will result in an imperfect transfer and an unconstituted trust, leaving the intended beneficiary with nothing. The method of transfer is not a matter of choice; it is dictated by the nature of the property itself.

1. **Land**

   The transfer of a legal estate in land is governed by strict statutory formality. Under *s.52* of the *Law of Property Act 1925*, a conveyance of a legal estate in land "must be by deed." A deed is not merely a signed document; it is a formal legal instrument that must be clearly labelled as a deed, executed in the presence of a witness, and delivered as a deed. The purpose of this formality is to provide absolute certainty and a clear public record for transactions involving what is typically a person's most valuable asset. A mere written contract or an oral agreement is insufficient to transfer the legal title. Therefore, if a settlor wishes to transfer a house or a parcel of land to trustees, they must do so by means of a properly executed deed. Anything less is fatal to the constitution of the trust.

2. Shares

Transferring shares in a company is a two-stage process. First, the transferor (the settlor) must complete a stock transfer form, sign it, and hand it over to the transferee (the new trustee) along with the relevant share certificate. This stage represents the settlor doing their part. However, this alone does not make the transferee the legal owner. The second, crucial stage is registration. The company must enter the new trustee's name in its register of members. Until this registration occurs, the transfer is not legally complete. The case of ***Milroy v Lord*** [1862] 45 ER 1185 is a prime example of a failure at this stage. The settlor had executed a deed but never procured the registration of the shares in the trustee's name. This imperfect transfer meant the trust was never constituted.

3. Chattels (Physical Goods)

Chattels are tangible, moveable items like jewellery, paintings, furniture, or cars. The general rule for transferring legal title to chattels is simple: physical delivery with an intention to pass title. The settlor must hand over the item to the trustee. Symbolic delivery can sometimes suffice for bulky items; for instance, handing over the key to a car or a warehouse can be treated as handing over the property itself. However, for most common items, actual physical transfer is required. It is also important to note that for certain chattels, like a car, additional steps are needed for the transfer to be fully effective against third parties, such as notifying the Driver and Vehicle Licensing Agency (DVLA) and handing over the vehicle registration document. Failure to physically deliver the chattel means the legal title remains with the settlor.

4. Money and Choses in Action

Money in a bank account is not a physical pile of cash; it is a "chose in action," a right to sue the bank for the debt it owes you. Transferring this right to a trustee requires a legal assignment. The settlor must absolutely assign the beneficial interest in the bank account to the trustee. This typically requires written notice to the bank, or at the very least, a clear written assignment from the settlor. A mere verbal instruction or an unacted upon intention to place funds in trust is ineffective. The trustee must be placed in a legal position where they can assert control over the debt, which usually hinges on the bank being put on notice of the assignment.

In summary, the constitution of a trust via transfer is a technical process. There is no one size fits all approach. Using the wrong method for a given asset for example, trying to transfer land by simply handing over the keys is like trying to open a door with the wrong key; it will not work, and the door to a valid trust will remain locked.

3.4 The Fundamental Rule: Equity Will Not Assist a Volunteer

This maxim is one of the most fundamental and enduring principles of equity. To understand it, one must first understand the term "volunteer." In legal terms, a volunteer is a person who has not provided any valuable consideration for a promise or a gift. Consideration is the price paid for a promise, typically money, goods, or services. A beneficiary under a trust is almost always a volunteer; they are the recipient of a gift from the settlor and have given nothing in return for their beneficial interest.

The rule, "Equity will not assist a volunteer," means exactly what it says. If a settlor fails to properly constitute a trust that is, if they fail to either declare themselves trustee or to perfectly transfer the property to a third-party trustee then the intended beneficiary cannot run to a court of equity and ask the judge to fix the problem. The court will not compel the settlor to complete the imperfect transfer, nor will it treat the imperfect transfer as if it were perfect. The beneficiary is left without a remedy.

The policy behind this strict rule is to respect the freedom of the settlor. The law takes the view that until the settlor has taken every necessary step to divest themselves of their property, they are entitled to change their mind. Making a promise to give a gift is not legally binding; only the completed act of giving is. Equity will not force a person to be generous.

The case of ***Milroy v Lord*** [1862] 45 ER 1185 is the classic illustration. Mr. Milroy was a volunteer; he had given nothing to Mr. Medley in exchange for the shares. When the transfer of shares was imperfect, Mr. Milroy asked the court to intervene. The court refused. Lord Turner's judgment made the position clear: if a settlor intends to make a gift by transferring property to a trustee, the means must be perfected. The court cannot perfect those means for him. To do so would be to assist a volunteer, which equity will not do.

This principle creates a clear and harsh dividing line. It places the risk of imperfect constitution squarely on the intended beneficiary. It is a powerful reminder to legal practitioners that when advising a client on creating a trust, meticulous attention to the correct legal procedures is not just good practice; it is the only way to ensure the client's wishes are fulfilled and the beneficiaries' rights are secured. Without perfect constitution, a beneficiary's hope is merely an unenforceable expectation.

3.5 Exceptions to the Volunteer Rule

The principle that "equity will not assist a volunteer" is a stern one. However, equity is also a system of fairness, and its rigid rules are tempered by a desire to prevent injustice. In several well-defined situations, the courts have developed exceptions where it would be unconscionable to allow a settlor to resile from their promise. These exceptions provide a safety valve, ensuring that the law does not produce outcomes that shock the conscience.

3.5.1 The "Every Effort" Doctrine: Re Rose

This exception mitigates the harshness of the ***Milroy v Lord*** rule by focusing on the settlor's actions rather than purely on the technical completion of the transfer. The doctrine, established in ***Re Rose*** [1952] EWCA Civ 4, states that if a settlor has done everything in their power, everything that is necessary for them to do, to transfer the legal title to the property, then equity will regard the transfer as complete from that moment. The trust is constituted, even if some external, administrative step remains.

In ***Re Rose*** itself, the settlor executed a transfer of shares and delivered the signed transfer form along with the share certificate to the transferee. The only remaining step was for the company to register the transfer in its books, a step over which the settlor had no direct control. The Court of Appeal held that the settlor had done all that was required of him. Equity therefore treated the gift as complete, and the trust as constituted, from the date of delivery. The intended beneficiaries, though volunteers, were assisted.

A helpful analogy is posting a letter. Once you have written the letter, addressed the envelope, affixed the stamp, and dropped it into the post box, you have done everything within your power. The legal risk passes to the recipient at that moment, even though the letter has not yet reached its destination. Similarly, once a settlor has completed all the steps required on their part, they are considered to have irrevocably parted with the beneficial interest in the property.

3.5.2 The Rule in *Strong v Bird*

This is a unique exception that applies where an imperfect lifetime gift is subsequently perfected by the donor's death. The rule in ***Strong v Bird*** [1874] LR 18 Eq 315 states that if a donor makes an imperfect gift during their lifetime but subsequently appoints the donee as the executor (or administrator) of their will, the appointment completes the gift.

In the case, Mr. Bird borrowed money from his stepmother who later lived with him, agreeing he would repay the loan by deducting amounts from his rent. The loan was not fully repaid by the time she died. Crucially, she had appointed Mr. Bird as the executor of her will. The court held that his appointment as executor perfected the imperfect gift of the debt forgiveness. The reasoning was that as executor, Mr. Bird was the legal owner of the debt owed to the estate. The law presumed that his legal title to the debt, vested in him in his capacity as executor, was intended to give effect to the donor's continuing intention to make the gift. The same principle applies if the donee is appointed an administrator of the estate.

3.5.3 *Donatio Mortis Causa* (DMC)

A *donatio mortis causa* is a "gift made in contemplation of death." It occupies a middle ground between an outright gift (which takes immediate effect) and a legacy under a will (which takes effect only on death). For a DMC to be valid, three conditions must be strictly satisfied:

1. The gift must be made in contemplation of the donor's impending death from a specific cause, such as a serious illness or a dangerous operation. A general fear of death is insufficient.
2. The gift must be conditional upon the donor's death from that contemplated cause. If the donor recovers, the gift must be returned.
3. The donor must part with "dominion" over the subject matter of the gift. This means they must deliver the property itself, or the means of obtaining it, to the donee. For example, handing over a key to a safe deposit box where title deeds are held can constitute delivery of the house itself.

A classic example is a person on their deathbed handing their bank passbook to a relative and saying, "This is for you if I don't pull through." If the person dies from the illness, the gift is complete. If they recover, the gift fails and the passbook must be returned. This exception is justified by the donor's specific intention in the face of death, and the court gives effect to that final wish.

3.5.4 The *Choithram* "Hybrid" Declaration

This modern exception, from ***T Choithram International SA v Pagarani*** [2001] 1 WLR 1, demonstrates equity's flexibility in interpreting a settlor's words. In this case, a wealthy, dying man declared before witnesses, "I now give all my wealth to the foundation." He was one of several trustees of that foundation. The legal problem was that this looked like an imperfect transfer; he had not formally transferred his assets to his fellow trustees.

The Privy Council adopted a pragmatic approach. They held that his words could be construed as a "hybrid" declaration: "I give my property to the foundation, and as I am a trustee of the foundation, I now declare that I hold my property as a trustee for it." In other words, he was effectively declaring himself a trustee of his own property for the foundation of which he was already a trustee. This was a valid declaration of trust, which perfectly constituted the trust without the need for a formal transfer. The court looked at the substance of what he intended to achieve, rather than insisting on a strict and formalistic separation between a declaration and a transfer.

3.5.5 Unconscionability and Imperfect Gifts

This is the most controversial modern exception, pushing the boundaries of equitable intervention. In ***Pennington v Waine*** [2002] EWCA Civ 227, an aunt wished to give shares to her nephew. She signed a stock transfer form and instructed her agent to arrange registration. The nephew was informed of the gift and, in reliance on it, was appointed a director of the company, a role that required him to own shares. The aunt died before the transfer form was delivered to the company.

The Court of Appeal held that it would have been "unconscionable" for the aunt's estate to go back on the gift. The combination of the aunt's clear intention, the completion of the transfer form, and the nephew's detrimental reliance in becoming a director created a situation where denying the gift would be unjust. The court effectively deemed the transfer to have been completed in equity.

This decision has been both praised for its pragmatic fairness and heavily criticised for undermining the certainty of the principle in ***Milroy v Lord***. It introduces a significant element of judicial discretion, suggesting that where the conscience of the court is affected, it may intervene to perfect an imperfect gift for a volunteer, even where the settlor has not done everything in their power. It remains a potent but uncertain tool, used sparingly in subsequent cases.

While the rule against assisting volunteers is a cornerstone of trust law, these exceptions ensure that the law remains responsive to fairness and intention. They serve as crucial reminders that equity is, at its heart, a system of conscience.

3.6 Conclusion

Constitution is the final, vital step in creating a trust. The key principle is that for a trust to be binding, the trustee must have legal control over the trust property, achieved either by the settlor declaring themselves trustee or by perfectly transferring the property to a third-party trustee.

The foundational rule, established in *Milroy v Lord*, is that equity will not assist a volunteer by perfecting an incomplete gift or transfer. However, this strict principle is balanced by equity's flexibility and its commitment to conscience.

When analysing a problem, one must first identify the intended method of constitution and assess whether the transfer was executed correctly. If an imperfect transfer leaves a volunteer without a remedy, it is then essential to meticulously examine whether any established exceptions; such as those in ***Re Rose***, ***Strong v Bird***, or ***Pennington v Waine***, apply to prevent an unconscionable outcome.

Understanding this tension between strict rules and equitable exceptions is at the very heart of mastering trust law.

4

BENEFICIAL ENTITLEMENT: INTERESTS AND EXIT RIGHTS

The rights of a trust beneficiary are not uniform; they are defined by the specific nature of the interest they hold. These interests can be classified along key spectra, such as fixed versus discretionary, and vested versus contingent, which fundamentally determine the beneficiary's power and proprietary claim over the trust property.

A foundational principle governing these rights is the rule in ***Saunders v Vautier***, a powerful doctrine that empowers beneficiaries. This rule allows adults of sound mind who are collectively entitled to the entire trust fund to override the settlor's instructions, terminate the trust, and demand immediate transfer of the assets, asserting their ultimate ownership in equity.

4.1 Classification of Beneficial Interests

A beneficiary's rights and powers depend entirely on the nature of the interest they hold. We can classify these interests along several key spectra.

4.1.1 Fixed Interests: Specific Shares and Rights

A fixed interest is one where the settlor has specified precisely which beneficiary receives what share of the trust property. The trustees have no discretion; their role is purely administrative in giving effect to the settlor's fixed instructions.

In a fixed trust, the beneficiaries have an immediate, proprietary right to their defined share of the trust fund from the moment the trust is created. This is a right *in rem* (a right in the property itself), not just a personal right against the trustees. If the trust property increases in value, their share increases proportionally. If the property is wrongfully sold, they can trace their share into the proceeds.

For example, a testator's will states: "I give my residuary estate to my trustees to hold for my three children, Anna, Ben, and Chloe, in equal shares." Each child has a fixed, one-third interest in the entire trust fund. The trustees must manage the fund and eventually distribute one-third of the capital to each.

4.1.2 Discretionary Interests

A discretionary interest exists where the trustees have the power to decide which members of a class of beneficiaries will receive a benefit, and in what amounts. A discretionary beneficiary has no proprietary right to any part of the trust fund. Their interest is best described as a mere *spes* (Latin for "hope") or an expectancy. They have a right to be considered by the trustees and a right to compel the trustees to properly exercise their discretion, but they cannot demand a payment. Their interest only crystallizes into a proprietary right at the moment the trustees exercise their discretion in their favour.

For example, a trust deed states: "My trustees shall hold the fund and may distribute the income or capital at their absolute discretion among my grandchildren." A grandchild, David, has no right to any money. If the trustees decide to give David 10,000 pounds, he has a right to that 10,000 pounds once the decision is made. Until that point, he only has a hope.

4.1.3 Vested Interests: Immediate and Absolute Rights

A vested interest is a present, fixed right to either the immediate enjoyment of the trust property, or to its enjoyment in the future. The key is that the right is not subject to any condition precedent, other than the passage of time.

A vested interest can be:

- **Vested in possession**: The right to present enjoyment, such as a life tenant's right to current income.
- **Vested in interest**: A fixed right to future enjoyment. For example, a remainderman who is entitled to the capital after a life interest has a vested interest, even though they cannot access it until the life tenant dies.

For example, a trust is set up: "For my wife, Eleanor, for life, and thereafter for my son, Frederick, absolutely." Frederick has a vested interest in remainder from the moment the trust is created. His interest is fixed and certain; he will receive the capital upon his mother's death. His interest is not contingent on him meeting any conditions.

4.1.4 Contingent Interests: Dependent on a Future Event

A contingent interest is a right to the trust property that is dependent upon the occurrence of a future, uncertain event. Until that event occurs, the interest is not vested.

The contingency might be reaching a certain age, graduating from university, or surviving another person. If the contingency never occurs, the interest never vests and fails.

For example, a trust states: "I give 50,000 pounds to my nephew, George, provided he qualifies as a solicitor." George's interest is contingent. He has no right to the money until he satisfies the condition. If he never qualifies, the gift fails and the money will likely result back to the settlor's estate or pass to other beneficiaries under an alternative provision in the trust.

4.1.5 Successive Interests: Life Tenants and Remaindermen

Successive interests occur when a settlor carves up the benefits of the trust property over time, granting different persons exclusive rights to the same property in a defined sequence. This is a classic method of providing for a series of beneficiaries, most commonly by separating the right to income from the right to capital.

This structure creates a temporal division of ownership in equity. It allows a settlor to provide for someone during their lifetime without giving them the power to consume the underlying capital, thereby preserving the family wealth for the next generation. The arrangement creates two distinct roles with very different rights and responsibilities, and the trustees have a paramount duty to act impartially between them.

1. The Life Tenant

The life tenant, also known as the tenant for life or the income beneficiary, is the person entitled to the income generated by the trust assets for a defined period, most commonly for the duration of their life.

Rights and Limitations

The life tenant has a right to all the net income produced by the trust fund. This can include rental income from properties, dividends from shares, and interest from cash deposits. The trustees have a duty to collect this income and pay it to the life tenant. However, the life tenant's rights are strictly limited to the income. They have no right to the capital itself. They cannot demand that a trust property be sold to give them a share of the proceeds, nor can they compel the trustees to invest in high-risk, high-income strategies that might jeopardise the capital value for the remainderman. Their interest ends upon their death, at which point no further income is paid to their estate.

2. The Remainderman

The remainderman, also known as the capital beneficiary, is the person entitled to the capital of the trust fund upon the termination of the preceding interest, typically the death of the life tenant.

Nature of their Interest

The remainderman holds a future interest. During the lifetime of the life tenant, the remainderman has no right to the income or to possession of the assets. Their interest is in the capital value of the fund. This future interest can be either vested or contingent. A vested remainderman has a fixed right to the capital that is not subject to any condition precedent other than the end of the life interest. A contingent remainderman's right is dependent on a future uncertain event, such as reaching a specified age.

The Trustee's Impartiality

This structure places a critical duty on the trustees to act impartially between the life tenant and the remainderman. This duty of even handedness means the trustees must balance the life tenant's desire for high income with the remainderman's interest in the long term growth and preservation of the capital. For instance, a trustee must not invest solely in high yielding bonds that offer no capital growth, nor solely in growth stocks that pay no dividends. The investment strategy must balance the interests of both classes of beneficiary.

For example, a testator's will establishes a trust as follows: "I give my estate to my trustees to pay the income to my wife, Eleanor, for her life, and after her death, to hold the capital for my daughter, Fiona, absolutely."

- **Life tenant**: Eleanor is the life tenant. She is entitled to receive all the income generated by the trust investments for as long as she lives.
- **Remainderman**: Fiona is the remainderman with a vested interest. Upon Eleanor's death, Fiona becomes absolutely entitled to the entire capital fund. The trustees must then transfer the legal ownership of all the remaining trust assets to her.
- **Trustee's duty**: The trustees must manage the investments to produce a reasonable income for Eleanor while ensuring the capital value is maintained and hopefully grown for Fiona's ultimate benefit. For example, if the trust holds a rental property, the rent is paid to Eleanor, but the property itself is preserved for Fiona.

It is important to note that if both the life tenant and the remainderman are adults and between them are absolutely entitled to the entire trust fund, they can collectively use the rule in ***Saunders v Vautier*** to terminate the trust and override this successive structure, demanding the capital be transferred to them to deal with as they see fit.

4.2 The Rule in Saunders v Vautier

The rule in ***Saunders v Vautier*** [1841] 4 Beav 115 is a powerful principle of equity. It states that if all beneficiaries of a trust are of full age (18 or over), of sound mind, and together absolutely entitled to the entire trust fund, they can direct the trustees to terminate the trust and transfer the legal title of the trust property to them, even if this is contrary to the settlor's instructions as set out in the trust instrument.

4.2.1 Conditions for Application

For the rule to apply, the following conditions must be met simultaneously:

1. **Adults of sound mind**: Every beneficiary must have reached the age of 18 and must have the mental capacity to understand the nature and consequences of their decision.
2. **Absolute entitlement**: The beneficiaries, acting together, must be entitled to the entire beneficial interest in the trust property. This means there must be no other person with any beneficial interest, whether present or future, vested or contingent. They must collectively be the only people interested in the trust fund.

Example

A trust is created for "my son, Henry, if he reaches the age of 25." When Henry turns 18, he is the only person with any interest in the fund, but his interest is still contingent on reaching 25. The rule does not apply. However, once Henry turns 25, his interest becomes absolute and vested. He can then demand the trustees transfer the legal title to him immediately, even if the trust document said he should receive it at age 30.

4.2.2 Collective Action by Beneficiaries

The rule requires the unanimous agreement of all beneficiaries who are together absolutely entitled. This is crucial in fixed trusts with multiple beneficiaries.

Example

In a trust for "my children, Alice, Brian, and Chloe, in equal shares," all three children are together absolutely entitled to the whole fund. Once the youngest turns 18, all three can agree to collectively direct the trustees to terminate the trust and transfer the assets to them, either in their current shares or in any other way they agree upon.

4.2.3 The Power to Override the Settlor's Instructions and Terminate the Trust

This is the most significant aspect of the rule. It establishes the primacy of the beneficiaries' proprietary rights over the settlor's intentions once the property has been given away absolutely.

The settlor's control ends once a complete and perfect gift has been made to the trust. The beneficiaries, as the true equitable owners, are entitled to deal with their property as they see fit. The trustees' duties are to hold the legal title for the beneficiaries, and if the beneficiaries in unison demand it, the trustees must comply. The rule applies even if the settlor's intention was to protect the beneficiary from their own immaturity or imprudence.

In ***Stephenson v Barclays Bank Trust Co Ltd*** [1975] 1 WLR 882, the trust was for a woman for life, with remainder to such of her children as attained 21. The life tenant and her children, who were all adults and between them absolutely entitled to the fund, sought to invoke the rule to terminate the trust. The court held they were entitled to do so. They collectively represented 100% of the beneficial interest and could therefore overreach the life interest and demand the capital.

Also, in ***Gould v Gould*** [1970] 1 QB 275, A trust provided income for a man until he "shall become entitled to a qualifying interest in possession," at which point the capital was to be paid to him. The court held that he was absolutely entitled from the outset because he could use the rule in ***Saunders v Vautier*** to demand the capital immediately. The condition was therefore meaningless, and he was entitled to the capital.

4.2.4 Limitations

The rule does not apply to discretionary trusts because it is impossible to say that any individual, or even the entire class, is "absolutely entitled" until the trustees have exercised their discretion. The beneficiaries only have a hope, not a fixed share.

4.3 Conclusion

This chapter has provided a detailed map of the landscape of beneficial entitlement. We have distinguished between the solid ground of a fixed, vested interest and the shifting sands of a discretionary or contingent hope. Understanding these classifications is the first step in advising any beneficiary.

We then explored the profound power granted to beneficiaries by the rule in ***Saunders v Vautier***. This rule is a testament to the fact that, in equity, the beneficiaries are the true owners. When they are all in agreement, of age, and capacity, their collective will is sovereign. They can collapse the trust structure and claim their property, bringing the trustees' management to an end and fulfilling the ultimate purpose of the trust: the enjoyment of the property by those for whom it was intended. This principle sits at the very core of the relationship between legal and equitable ownership.

5

PURPOSE TRUSTS: CHARITABLE AND NON-CHARITABLE

A fundamental principle of trust law is that a trust must have identifiable human beneficiaries who can enforce the trustee's duties. This creates a significant legal obstacle for "purpose trusts," which are established to achieve a specific aim or purpose rather than to benefit a person. Without a beneficiary to hold the trustee accountable, such trusts face a core enforcement dilemma, rendering them generally void.

Despite this strict rule, the law carves out crucial exceptions. The most significant is the charitable trust, which is enforced by the state for the public good. Beyond this, a handful of anomalous, non-charitable purpose trusts are tolerated, and other mechanisms, like the ***Re Denley*** and ***Quistclose*** trusts, provide limited ways to give effect to a settlor's specific intentions.

5.1 The Problem with Purpose Trusts: The Enforcement Dilemma

To fully grasp the unique legal status of purpose trusts, one must first recall the fundamental architecture of a traditional express trust. As established in earlier chapters, a classic trust involves a three-part relationship: a settlor who places property in the hands of a trustee, who is under a legally binding obligation to manage that property for the benefit of identifiable beneficiaries. These beneficiaries are the cornerstone of the arrangement. They are the equitable owners of the trust property, and this ownership confers upon them a vital right: the right to enforce the trust.

If trustees fail in their duties by mismanaging the assets, misappropriating funds, or ignoring the terms of the trust, the beneficiaries can seek recourse. They can bring a lawsuit against the trustees, demanding an accounting, the recovery of lost assets, or the proper administration of the trust. The court's role is to supervise this relationship and provide a remedy when the trustees' obligations are breached. This system of enforcement is what gives a trust its legal teeth.

Now, consider a different intention. Imagine a settlor, Arthur, who is a passionate animal lover. In his will, he leaves £50,000 to his brother, Brian, "on trust to use the income for the care and maintenance of my beloved dog, Rover, for the rest of Rover's life." This is not a trust for a person; it is a trust for a purpose: the purpose of caring for Rover.

This simple, well intentioned gift creates a profound legal problem. Who can enforce this trust? If Brian decides to ignore Rover, spend the money on a luxury holiday, and leave the dog at a shelter, who has the right to take Brian to court?

Rover, the intended object of the settlor's bounty, cannot. A non-human animal has no legal personality and no standing to sue in an English court. The settlor, Arthur, has passed away and is no longer able to protect his wishes. The beneficiaries of his residual estate might be able to sue if they can show that the failed trust means the money should return to the estate, but they are not interested in enforcing the purpose of caring for the dog; they are only interested in the money. The Attorney General, who enforces charitable trusts for the public benefit, has no interest in a private matter concerning a single dog.

This is the core "problem with purpose trusts." They lack a beneficiary with both the interest and the legal right to ensure the trustee performs their job. The trustee's duty becomes, in the words of the courts, "imperfect." It is a moral obligation, but without a human enforcer, it is not a legally compelling one. The court is left in a difficult position: it may wish to honour the settlor's wishes, but it has no one before it to whom it can award a remedy, and no clear standard by which to judge the trustee's performance. How much spending on dog food is reasonable? Should Rover get premium vet insurance? Without a beneficiary to approve or challenge these decisions, the court would be forced to micromanage the trust, a role it is institutionally reluctant to assume.

This enforcement dilemma is the reason why the law has developed a general rule of invalidity for non-charitable purpose trusts. It is a rule born not of hostility to a settlor's intentions, but of the practical necessity of having a mechanism to make a trust workable and controllable within the legal system.

5.2 The General Rule: Void for Lack of a Human Enforcer

The principle that a trust must have a human beneficiary who can enforce it is known as the "beneficiary principle." It is one of the most deeply entrenched doctrines in English trust law. Without a beneficiary, the trust lacks its essential legal machinery and is considered void. The journey to understanding this rule requires a close examination of the landmark cases that defined it.

5.2.1 The Foundational Case: *Morice v Bishop of Durham*

This case is the cornerstone of the beneficiary principle. The facts involved a will in which the testatrix, Miss Malin, left the residue of her estate to the Bishop of Durham "to be disposed of to such objects of benevolence and liberality as the Bishop in his own discretion shall most approve of."

The central question for the court was straightforward: did these words create a valid trust?

The Bishop argued that they did, and that he had the power to apply the funds to benevolent and liberal purposes as he saw fit. The next of kin, who would inherit the residue if the trust failed, argued that the trust was void and the money should pass to them.

Sir William Grant, the Master of the Rolls, delivered the judgment that would become a classic statement of the law. He held the trust to be void. His reasoning was powerful and clear. He stated that for a trust to be valid, "there must be somebody in whose favour the court can decree performance." The terms "benevolence" and "liberality" were, he found, descriptions of purposes, not of people. They were so wide and vague that they encompassed almost any act of charity or generosity, but they did not point to any specific, ascertainable class of human beneficiaries.

The Bishop's discretion was therefore unanchored. There was no one who could come to court and say, "I am an object of this trust, and the Bishop has failed in his duty to me." The court had no standard against which to measure the Bishop's actions and no one to whom it could direct a remedy. The trust was therefore incapable of being enforced by the court, and it failed. This established the core principle: a trust must be for the benefit of individuals, not abstract purposes.

5.2.2 The Modern Affirmation: *Re Astor's Settlement Trusts*

The principles in ***Morice v Bishop of Durham*** [1805] EWHC Ch J80 were tested and robustly reaffirmed in the 20th century in ***Re Astor's Settlement Trusts*** [1952] Ch 534. This case involved a very elaborate and well drafted settlement established by Viscount Astor. The trust property was a large number of shares in The Observer newspaper. The stated purposes of the trust were decidedly non-charitable and reflected the settlor's worldview. They included:

- The maintenance of good understanding between nations.
- The preservation of the independence and integrity of newspapers.
- The promotion of freedom of the press.

The trustees were given extensive powers, and the settlement even attempted to provide a mechanism for enforcement by appointing a "trust protector" who could apply to the court for guidance.

Despite this sophisticated drafting, the court held the trust void. *Lord Justice Roxbury*, delivering the judgment, systematically dismantled the argument for its validity.

First, he confirmed that the beneficiary principle was "firmly established." A trust cannot be carried out if there is no one who can enforce it. The purposes listed, however noble, were abstract ideas. Who was the beneficiary? Was it "the nations"? Was it "the press"? These were not ascertainable persons. No individual could claim to be a beneficiary and sue the trustees for failing to "maintain good understanding between nations."

Second, he addressed the argument about the trust protector. He held that this did not solve the problem. The protector was not a beneficiary; they were merely a functionary. The fundamental issue remained: the trust property was not dedicated to the benefit of any person. The protector might be able to ask the court what the trust meant, but they had no personal interest that would allow them to enforce how the trustees managed the assets.

Third, and crucially, *Roxbury J*. highlighted the problem of administrative unworkability. Even if the court wanted to enforce the trust, how would it do so? What does "preservation of the independence of newspapers" mean in practice? Would it preclude the trustees from accepting a certain advertisement? Would it prevent them from appointing an editor with certain political views? The terms were so vague and political that the court would have no objective standard by which to judge the trustees' decisions. The duties of the trustees were, in his words, "too uncertain" and "uncontrollable."

The failure of the ***Astor trust***, despite its detailed provisions and significant funding, sends a powerful message to aspiring solicitors: the beneficiary principle is a substantive rule of law that cannot be circumvented by clever drafting. If a trust lacks a human beneficiary, it is fundamentally flawed and will be declared void.

5.2.3 The Rationale Summarised

The strict adherence to the beneficiary principle is justified by two overarching policy considerations:

1. **Enforceability**: A trust is a fiduciary relationship. The law must be able to control the trustee and provide a remedy for misadministration. This requires a person with a vested interest in the trust property to act as a watchdog. Without such a person, the trustee's duties are merely nominal and the trust is a pointless exercise.

2. **Certainty**: The terms of a trust must be sufficiently certain for the court to execute them. If the trustees were to ask the court for directions, or if a dispute arose, the court must be able to interpret the settlor's intention and determine whether the trustees are acting correctly. Vague purposes like "benevolence," "public good," or "the promotion

of freedom" provide no discernible standard for the court to apply. The court cannot supervise what it cannot understand or define.

In conclusion, the combined authority of ***Morice v Bishop of Durham*** and ***Re Astor*** establishes a clear and strict rule: a non-charitable purpose trust is void. This rule exists not to frustrate settlors, but to ensure that the powerful mechanism of the trust remains operable, supervised, and legally enforceable. It is the essential framework that makes the exceptions, which we will explore next, both necessary and logically defined.

5.3 Charitable Trusts: The Major Exception to the Beneficiary Principle

Charitable trusts represent the most significant and socially important exception to the rigid beneficiary principle. While a trust for the purpose of "promoting art for art's sake" would fail, a trust for "the advancement of education in the arts" will likely succeed. The crucial difference is that charitable trusts are deemed to be for the benefit of the public as a whole, and their enforcement is undertaken by the Attorney General on behalf of the Crown. This public character justifies their special status and the unique advantages they enjoy.

5.3.1 The Statutory Definition: *The Charities Act 2011*

The modern law of charity in England and Wales is largely codified in the *Charities Act 2011*. This Act does not abolish the centuries of case law but provides a statutory framework. *Section 2(1)* of the Act states that a purpose is charitable only if it falls within one of thirteen listed descriptions of purposes and is for the public benefit. These thirteen descriptions can be usefully condensed into the four principal heads that have developed through common law, often referred to as the "*Pemse*l classification" after ***Commissioners for Special Purposes of Income Tax v Pemsel*** [1891] AC 531.

1. **The prevention or relief of poverty**: This head encompasses trusts for the poor, the aged, the distressed, or other needy persons. The term "poverty" is interpreted flexibly; it does not mean absolute destitution but signifies a genuine lack of financial

means. A trust for "distressed gentlefolk" or for "the working classes in a particular town" has been upheld. The key is that the class of beneficiaries must be those in need.

2. **The advancement of education**: This extends far beyond formal schooling. It includes the founding of schools and universities, the promotion of research, and the support of cultural and artistic pursuits such as music, theatre, and fine art. The purpose must be to educate, not merely to inform. For instance, a trust for a political purpose may be valid if it is educational in nature, such as educating the public about a particular political philosophy, but not if its goal is merely to promote a specific political party.

3. **The advancement of religion**: This head involves the promotion of spiritual teachings and the practice of faith in a supreme being. It covers all major world religions and includes purposes such as maintaining places of worship, supporting the clergy, and funding missionary work. The religion must have a certain level of coherence and seriousness, but the courts will not judge the validity of its beliefs.

4. **The advancement of health or the saving of lives**: This includes trusts for hospitals, hospice care, medical research, and organisations like the Red Cross or air ambulance services. It also encompasses trusts for the advancement of amateur sport, provided the sport promotes health by involving physical skill and exertion.

Other heads under the Act include the advancement of citizenship or community development, the advancement of the arts, culture, or heritage, and the advancement of environmental protection.

5.3.2 The Public Benefit Requirement

The *Charities Act 2011* explicitly preserves the requirement that a purpose must be for the public benefit. This is a two-limb test that must be satisfied for each and every charitable purpose.

1. **The benefit limb**: The purpose itself must be beneficial. The court determines this objectively, based on evidence, not simply on public opinion. For example, in ***Re Pinion*** [1965] Ch 85, a trust to display the testator's own art collection was held not

to be charitable because an expert witness testified that the works were of such poor quality that their display would be of no educational value to the public. The purpose was not truly beneficial.

2. **The public limb**: The benefit must be available to a sufficient section of the public, not a private class. The "public" means the community at large or a significant section of it. A trust "for the education of my descendants" is a private family trust, not a charity, because the class is defined by a personal relationship to the settlor. Conversely, a trust "for the education of children in the city of Birmingham" is public. The class must not be numerically negligible, and the defining characteristic for the class must not be a contractural or personal relationship.

5.3.3 The Advantages of Charitable Status

Charitable trusts enjoy privileges that make them highly advantageous.

1. **Perpetuity**: Charitable trusts are exempt from the rule against perpetual trusts. They can be established to last forever, allowing them to pursue their goals across generations.

2. **Fiscal advantages**: Charities benefit from extensive tax reliefs, including exemptions from income tax, corporation tax, capital gains tax, and inheritance tax on donations. This provides a significant financial incentive for individuals to establish and support charitable causes.

3. **The *cy près* doctrine**: This is a crucial saving provision. If a charitable gift becomes impossible or impracticable to carry out (for instance, the named charity has ceased to exist, or the purpose has been fulfilled), the court can apply the funds *cy près*, meaning "as near as possible" to the settlor's original intention. This requires the court to find a general charitable intention. For example, if a trust was created for "the ABC School" which has since closed, the funds could be applied to another local school with similar aims, preserving the settlor's philanthropic goal.

5.4 Non-Charitable Purpose Trusts (NCPTs): Limited Exceptions

Despite the general rule of invalidity, the courts have recognised a handful of narrow exceptions for non-charitable purpose trusts. These are often tolerated due to long historical acceptance or because they confer a tangible benefit on an identifiable group of individuals.

5.4.1 Established Exceptions: Trusts of Imperfect Obligation

These are anomalous exceptions, often called "trusts of imperfect obligation" because, while valid, the trustees' duty to perform them is not perfectly enforceable. The courts will not compel the trustees to execute the purpose, but if the trustees choose to do so, the trust provides them with the lawful authority to use the funds for that purpose.

1. **Trusts for the care of specific animals**: A trust for the settlor's own pets is valid, provided it is limited to the animal's lifetime. In ***Re Dean*** [1889] 41 Ch D 552, a trust to care for the testator's horses and hounds for 50 years was upheld. The period was valid as it was within the permissible perpetuity period.

2. **Trusts for the erection or maintenance of graves and monuments**: A trust for building or maintaining a specific tomb, monument, or grave in a churchyard is valid, usually if limited to a perpetuity period of 21 years.

3. **Trusts for the saying of masses**: Trusts for saying masses, even in private, have been upheld by the courts.

It is vital to note that these are closed categories. The courts have consistently refused to extend them to new types of purposes.

5.4.2 The *Re Denley* Exception: A Purpose for the Benefit of Ascertainable Individuals

The case of ***Re Denley*** [1969] 1 Ch 373 created a middle ground that does not fit neatly into the categories of either a pure purpose trust or a standard trust for persons. Land was conveyed to trustees "for the purpose of a recreation or sports ground for the benefit of the employees" of a company.

The court upheld the trust. *Goff J*. drew a critical distinction. This was not a trust for an abstract purpose with no beneficiaries, like in ***Re Astor***. Instead, it was a trust for a purpose that directly and immediately benefited an ascertainable class of individuals (the employees). Although the trust was expressed as a purpose, the employees had a sufficient practical interest to enforce it. They were the definite beneficiaries of the purpose.

Therefore, the ***Re Denley*** trust is best understood not as a true purpose trust, but as a trust for persons (the employees) by way of a purpose (the sports ground). It is valid provided it is limited to the perpetuity period.

5.4.3 The *Quistclose* Trust: A Purpose Based Resulting Trust

The ***Quistclose*** trust, from ***Barclays Bank Ltd v Quistclose Investments Ltd*** [1970] AC 567, is a unique and commercially vital mechanism. It arises when money is lent for a specific, exclusive purpose, such as "to pay dividends to my shareholders."

The House of Lords held that if the primary purpose fails (the dividends cannot be paid), the money is not available to the borrower's general creditors in an insolvency. Instead, it is held on a resulting trust for the lender. The legal analysis is that the borrower receives the money *as a trustee*, not as an absolute owner. They have a power (or in some views, a duty) to apply it only for the specified purpose. If that power cannot be exercised, the trust property returns to the settlor/lender under a resulting trust.

This is not a true exception to the beneficiary principle. The primary trust is for the purpose, but it is enforceable by the lender, who has a resulting trust interest if the purpose fails. The lender is, in effect, the ultimate beneficiary with a proprietary right to recover the funds.

5.5 Conclusion

In summary, the law surrounding purpose trusts is defined by a fundamental tension between the rigid beneficiary principle and pragmatic exceptions. The default position remains clear:

a non-charitable purpose trust is void unless it can be brought within one of the narrowly defined, anomalous categories or satisfies the requirements for a charitable trust.

Ultimately, this framework seeks a practical balance. It upholds the essential need for enforceability and certainty in trust law, while still making room for socially beneficial charities and giving limited effect to a settlor's specific, well-defined intentions where a tangible human benefit is evident.

6

RESULTING TRUSTS: PRESUMPTION AND AUTOMATIC OPERATION

In our exploration of trusts, we have so far focused primarily on express trusts, which are created by the deliberate intention of a settlor. We now turn to one of the most important categories of trusts that arise by operation of law: the resulting trust. Imagine ordering a product online, but the company sends you the wrong item. Your natural response is to expect a return of your money or the correct product. A resulting trust operates on a similar principle of "return to sender."

This chapter will delve into the legal mechanism that sees property returned to its original provider when the specific purpose for its transfer fails or when the provider's intention to make a gift is unclear. We will distinguish between the two main types of resulting trusts, examine the controversial presumption of advancement, and learn how these legal presumptions can be rebutted. Understanding resulting trusts is fundamental to resolving disputes over property, particularly in situations where there are no clear written agreements, such as in the context of family homes or failed business ventures.

6.1 The Nature of Resulting Trusts: "Return to Sender”

A resulting trust represents a fundamental equitable principle where property returns to its original owner when the specific purpose for its transfer fails or when the transferor's intention to make a gift remains unproven. This legal mechanism operates as equity's method of ensuring that property does not remain with someone who was not intended to benefit from it beneficially.

Resulting trusts arise by operation of law rather than through express declaration. They function as equity's method of filling gaps in ownership or rectifying situations where property transfers have not achieved their intended purpose. The central concept revolves around the idea that when Person A provides funds for property that ends up in Person B's name, and no evidence exists that A intended a gift, the law presumes that A intended for B to hold the property for A's benefit. The beneficial interest consequently "results" back to A, making B a resulting trustee for A, the true provider of the funds.

6.1.1 Legal Principle and Historical Development

The modern understanding of resulting trusts was authoritatively articulated by *Lord Browne Wilkinson* in the landmark case of ***Westdeutsche Landesbank v Islington LBC*** [1996] AC 669. His judgment clarified that resulting trusts primarily arise in two distinct situations, each with its own theoretical foundation.

The first situation involves voluntary transfers or purchases in another's name. When A makes a voluntary payment to B or pays wholly or partially for property vested in B alone or in joint names of A and B, the law presumes A did not intend to make a gift to B. The property becomes subject to a trust for A in proportion to their contribution.

The second situation occurs when A transfers property to B on an express trust that fails entirely or does not exhaust the whole beneficial interest. The undisposed of equitable interest automatically results back to A.

The theoretical basis for resulting trusts has been subject to considerable academic debate. Two main theories have emerged: the automatic theory and the presumed intention theory. The automatic theory, championed by judges like *Lord Wilberforce* in ***Vandervell v IRC*** [1967] 2 AC 291, suggests resulting trusts arise automatically by operation of law regardless of intention when there is a gap in beneficial ownership. The presumed intention theory, favored by *Lord Browne Wilkinson* in ***Westdeutsche***, maintains that resulting trusts give effect to the parties' presumed intentions.

6.1.2 Key Features and Distinguishing Elements

Several characteristics distinguish resulting trusts from other forms of trusts. The most crucial feature is their basis in presumed intention. While constructive trusts focus on preventing unconscionable conduct and express trusts on declared intention, resulting trusts operate on what the law presumes the parties intended based on their actions and circumstances.

The timing of the trust's creation is also distinctive. A resulting trust arises at the moment of property transfer when the necessary circumstances exist. It is not created retrospectively by a court order, though judicial declaration may be necessary to establish its existence.

Furthermore, resulting trusts do not require writing for their creation, as explicitly provided by Law of Property Act 1925 section 53(2), which states that the formalities required for express trusts "do not affect the creation or operation of resulting, implied or constructive trusts." This statutory provision acknowledges their unique nature as trusts arising by operation of law.

Practical Applications and Contexts

Resulting trusts frequently appear in various practical contexts, making their understanding essential for legal practitioners. In family property disputes, they often determine beneficial ownership when legal title does not reflect financial contributions. In commercial contexts, they resolve issues arising from failed transactions or incomplete arrangements.

The courts have consistently emphasized that resulting trusts serve as equity's mechanism for preventing unjust enrichment. By returning property to those who provided the purchase money without intending gifts, the resulting trust ensures that wealth follows the money unless a contrary intention is proven.

The case of ***Vandervell v IRC*** [1967] 2 AC 291 provides a classic illustration of the automatic resulting trust. Mr. Vandervell arranged for a bank to hold shares with an option for a charitable company to purchase them. When the option was exercised, no provision had been made for the option itself. The House of Lords held that the equitable interest in the option was held on resulting trust for Vandervell, as he had not disposed of this beneficial interest.

In ***Westdeutsche Landesbank v Islington LBC*** [1996] AC 669, the House of Lords further refined the principles governing resulting trusts. The case involved payments made under a swap agreement that was subsequently found void. The court emphasized that resulting trusts arise from the presumed intentions of the parties, focusing particularly on the absence of intention to make a gift.

6.1.3 Relationship with Other Trusts

Understanding resulting trusts requires distinguishing them from constructive and express trusts. While express trusts arise from conscious declaration and constructive trusts from unconscionable conduct, resulting trusts emerge from circumstances that imply the transferor did not intend to benefit the transferee.

The line between resulting and constructive trusts can sometimes blur, particularly in cases involving property disputes between cohabitees. However, the courts maintain the distinction by examining whether the trust arises from presumed intention (resulting) or from the need to prevent unconscionable conduct (constructive).

6.1.4 Modern Developments and Criticisms

The traditional understanding of resulting trusts has faced academic criticism, particularly regarding their theoretical basis. Some scholars argue that the presumed intention theory is fictional in many cases, suggesting that a more principled approach based on unjust enrichment might provide greater coherence.

Despite these criticisms, resulting trusts remain a vital tool in English trust law. Their flexible nature allows courts to achieve fair outcomes in diverse situations, from failed business ventures to family property arrangements. The principles continue to evolve through judicial decisions, maintaining their relevance in contemporary legal practice.

The enduring importance of resulting trusts lies in their ability to provide practical solutions to common problems of property ownership. By presuming that people generally do not intend to make gifts unless clearly demonstrated, the resulting trust protects those who provide funds for property purchases and ensures that beneficial ownership follows financial contribution unless a contrary intention is proven.

This comprehensive understanding of resulting trusts provides the foundation for examining their specific applications in the subsequent sections of this chapter, where we will explore presumed resulting trusts, the presumption of advancement, and the various ways these legal presumptions can be rebutted through evidence of actual intention.

6.2 Presumed Resulting Trusts

A presumed resulting trust represents one of the two primary categories of resulting trusts, distinguished by its basis in the law's presumption about human behaviour and intention. This legal construct arises in circumstances where the facts suggest that the person providing funds for property did not intend to benefit the legal title holder. The presumption operates as equity's default position, reflecting the principle that people generally do not intend to make gifts without clear evidence of such intention.

The theoretical underpinning of presumed resulting trusts lies in the equitable maxim that "equity presumes a bargain, not a gift." This means that when the factual circumstances align with certain patterns, the courts will presume that the parties intended a commercial style arrangement rather than a gratuitous transfer. The presumption serves as an evidential tool, allocating the burden of proof to the legal owner to demonstrate that a gift was intended rather than requiring the contributor to prove they did not intend a gift.

6.2.1 Legal Principles and Evolution

The modern law of presumed resulting trusts has evolved through centuries of judicial development. The foundational principle was established in early cases such as ***Dyer v Dyer*** [1788] 30 E.R. 42, where the court articulated that "the trust of a legal estate... results to the man who advances the purchase money." This principle has been consistently applied and refined in subsequent jurisprudence.

In more recent times, the House of Lords in ***Westdeutsche Landesbank v Islington LBC*** [1996] AC 669 reaffirmed the traditional approach while providing contemporary justification for the presumption. Lord Browne Wilkinson's speech emphasized that the presumption arises from the absence of any intention to make a gift, rather than from any positive intention to create a trust. This distinction is crucial because it means the presumption can operate even when the contributor has not turned their mind to the question of beneficial ownership.

The presumption is not a rigid rule but a flexible principle that responds to the specific facts of each case. As *Lord Diplock* noted in Pettitt v Pettitt (1970), the strength of the presumption may vary depending on the relationship between the parties and the context of the transaction. In commercial relationships, the presumption is particularly strong, while in familial contexts, it may be more readily rebutted.

6.2.2 The Two Established Categories

The law recognizes two specific situations where the presumption of a resulting trust automatically arises. These categories are well defined and consistently applied, though their application to novel factual scenarios continues to evolve through case law.

The first category involves voluntary transfers of existing property from one person to another. The second concerns purchases of new property in the name of someone other than the provider of the purchase money. Both situations share the common element that the legal title holder has provided no consideration for the acquisition of the property.

1. **Voluntary Transfer to Another**

   This category encompasses situations where Person A voluntarily transfers the legal title of an existing asset to Person B, or causes an asset to be transferred into B's name, without receiving any consideration in return. The term "voluntary" in this context means absence of valuable consideration, distinguishing these transfers from commercial transactions.

   The types of property that can be subject to this presumption are extensive, including real property, shares, bonds, bank accounts, and other forms of personal property. The critical factor is that the property must be specifically identifiable and capable of being held on trust.

Rationale and Application

The presumption arises because, in the absence of evidence to the contrary, the law assumes that people do not generally dispose of valuable property without expectation of return or reciprocal benefit. As *Lord Eldon* observed in early jurisprudence, "the court will not presume a gift from the mere circumstance of a voluntary conveyance."

The practical application of this principle requires careful analysis of the transfer circumstances. For instance, if an elderly parent transfers shares to an adult child for management purposes, the law presumes the child holds as trustee unless evidence shows a gift was intended. Similarly, when business partners rearrange legal ownership for administrative convenience, the presumption maintains the underlying beneficial ownership according to financial contributions.

The case of ***Re Vinogradoff*** [1935] W.N. 68 provides a compelling example of the presumption's operation. A grandmother transferred 800 pounds worth of war loan stock into the joint names of herself and her four year old granddaughter. The court applied the presumption of a resulting trust, finding it inconceivable that a gift to an infant was intended. Notably, the young age of the transferee strengthened the presumption, as the practical impossibility of the granddaughter managing the property made the intention of a gift inherently unlikely.

Modern Applications

In contemporary practice, this presumption frequently arises in various contexts. When individuals transfer property to family members for specific purposes such as tax planning or asset protection, the courts often must determine whether the presumption applies. Similarly, in business contexts where assets are transferred between companies within a group, the presumption may determine beneficial ownership in insolvency situations.

The digital age has introduced new complexities, with courts applying these principles to cryptocurrency transfers and other digital assets. The fundamental principle remains unchanged: the provider of the asset is presumed to retain the beneficial interest unless a gift is clearly demonstrated.

2. Purchase in the Name of Another

This represents the most frequently encountered scenario for presumed resulting trusts. It occurs when Person A pays the purchase price for property, either wholly or in part, but the legal title is placed solely in the name of Person B, or in the joint names of A and B.

The principle applies regardless of whether the purchase involves real property, personal property, or intangible assets. The essential question is always: who provided the purchase money? The legal presumption follows the money, attributing beneficial ownership to the financial contributor.

Rationale and Application

The underlying logic, as expressed in numerous decisions, is that "the beneficial interest follows the purchase money." This reflects the commonsense view that people who provide funds for purchases generally expect to receive the benefit of ownership. The presumption operates even when the contributor knows the property is being placed in another's name, provided there is no evidence of donative intent.

The application of this principle requires precise identification of the source of funds. The courts examine bank records, payment receipts, and financial transactions to determine the actual provider of purchase money. Indirect contributions may also trigger the presumption, though their evaluation requires more nuanced analysis.

Types of Contributions

The presumption applies to various forms of financial contribution. Direct cash payments toward the purchase price most clearly engage the principle. Mortgage payments made by someone other than the legal owner may also give rise to the presumption, particularly when they represent contributions to the capital element of the mortgage.

In ***Stack v Dowden*** [2007] 2 All ER 929, the House of Lords acknowledged that financial contributions beyond the initial purchase price could inform the beneficial ownership analysis. However, for the strict presumption of resulting trust, the focus remains primarily on contributions to the acquisition cost.

Proportional Interests

When multiple parties contribute to the purchase price, the presumption operates to allocate beneficial interests in proportion to their contributions. This proportional approach reflects the principle that equity treats like contributions alike, without arbitrary distinctions.

For example, if three business partners contribute forty percent, thirty five percent, and twenty five percent respectively toward a commercial property purchase, but legal title is held in equal shares, the presumption attributes beneficial ownership according to the actual financial input. The legal owners hold the disproportionate legal shares on resulting trust for the contributors.

The historic case of ***Dyer v Dyer*** [1788] 30 E.R. 42 established the enduring principle that payment of purchase money raises the presumption of beneficial ownership. The court declared that this presumption "is a general proposition supported by all the authorities" and applies "whether the purchase be in the name of one or more." The judgment emphasized that the presumption operates unless contradicted by evidence of contrary intention.

Contemporary Significance

In modern property law, this presumption remains highly relevant, particularly in cohabitation cases and commercial joint ventures. While the approach to family homes has evolved with the development of constructive trust doctrines, the resulting trust presumption continues to provide the foundational framework for analysing financial contributions.

The presumption also plays a crucial role in commercial contexts, where business partners frequently acquire property in unequal legal shares despite proportional financial contributions. The resulting trust ensures that beneficial ownership reflects the economic reality of the transaction rather than the formalities of legal title.

Practical Considerations

The operation of presumed resulting trusts requires careful attention to evidence and documentation. Legal practitioners must gather comprehensive financial records, correspondence between parties, and contemporaneous documents that might reveal the actual intentions behind property transfers.

The timing of contributions is particularly significant. Payments made at the time of acquisition most clearly engage the presumption, while subsequent contributions may be analyzed differently. The relationship between the parties also influences how strongly the presumption applies, with arm's length transactions typically attracting stronger presumption than familial arrangements.

In practice, the evidence required to establish the presumption is straightforward: demonstration of financial contribution toward property acquired in another's name. However, the evidence required to rebut the presumption may be more complex, involving proof of donative intent or other arrangements that explain the disparity between financial contribution and legal ownership.

This comprehensive examination of presumed resulting trusts provides the necessary foundation for understanding how these principles interact with the presumption of advancement and how both presumptions can be rebutted by evidence of actual intention, which we will explore in the subsequent sections of this chapter.

6.3 The Presumption of Advancement

The presumption of advancement is a counter presumption that operates in the opposite direction to the presumed resulting trust. In certain relationships, a voluntary transfer or a payment for property in the name of another is presumed to be a gift, or an "advancement."

This presumption arose from social and moral obligations that were historically recognised by the courts. It assumes that in certain relationships, the provider of the funds (such as a husband or father) intended to make a gift to the recipient (such as a wife or child). When the presumption of advancement applies, it defeats the presumption of a resulting trust. The legal owner is presumed to also be the full beneficial owner.

6.3.1 Relationships Giving Rise to the Presumption

The traditional relationships that triggered the presumption of advancement were:

1. **Husband to wife**: A transfer of property or a payment for property by a husband into the name of his wife was presumed to be a gift.
2. **Father to child**: A transfer or payment by a father (or a person *in loco parentis*) into the name of his child was presumed to be a gift.
3. **Engaged man to his fiancée**: Historically, a transfer from a man to his fiancée in contemplation of marriage was also presumed to be an advancement.

It is crucial to note that the presumption was not traditionally reciprocal. A transfer from a wife to her husband, or from a child to a parent, did not give rise to the presumption of advancement; the presumption of a resulting trust would apply instead.

6.3.2 The Modern Weakening of the Presumption

The presumption of advancement is now considered a relic of a bygone era with outdated assumptions about family relationships and dependency. The courts now take a much more skeptical view of its application, and it is easily rebutted by relatively slight evidence of a contrary intention.

In ***Pettitt v Pettitt*** [1970] AC 777, *Lord Reid* stated that the presumptions of advancement and resulting trust are "out of date" and that "the court should seek to reach a result which is fair and reasonable in the circumstances."

In the context of the family home, Lady Hale in ***Stack v Dowden*** [2007] 2 All ER 929 indicated that the presumptions of resulting trust and advancement have very limited, if any, role to play. The search is for the parties' common intention.

Statutory Abolition

The *Equality Act 2010*, in *Schedule 26, Part 5*, provided for the abolition of the presumption of advancement. However, as of the time of writing, this part of the Act has not been brought into force. Nevertheless, its existence signals the clear policy direction and reinforces the judicial view that the presumption is anachronistic.

6.4 Rebutting the Presumptions: Evidence of Intention

Both the presumption of a resulting trust and the presumption of advancement are *rebuttable*. This means they can be overturned by evidence of the transferor's actual intention at the time of the transfer.

The presumptions are merely a starting point for the court. They are evidential tools that apply in the absence of other evidence. The ultimate goal of the court is always to discover the true intention of the person who provided the funds. Any relevant evidence can be admitted to show what that intention was, whether it was to make a gift, to create a loan, or to have the property held on trust.

Methods of Rebuttal

1. **Direct Evidence**

   Direct evidence comprises explicit statements, whether written or oral, that clearly express the transferor's intention regarding the property transfer. Such evidence provides the most straightforward method of rebutting either presumption, as it directly addresses the crucial question of intention.

   Written evidence possesses particular strength in rebutting presumptions due to its contemporaneous nature and reduced susceptibility to fabrication or faulty memory. Documents such as declarations of trust, contemporaneous correspondence, written instructions to solicitors, or signed memoranda can provide compelling evidence of intention. For instance, a written statement by a father explaining that a property transferred to his daughter was for investment purposes only, not as a gift, would powerfully rebut the presumption of advancement.

Oral evidence, while potentially less reliable, remains admissible to prove intention. Courts carefully assess such testimony for consistency, plausibility, and corroboration. In ***Shephard v Cartwright*** [1955] AC 431, the court established important principles regarding oral evidence, noting that "the acts and declarations of the parties before or at the time of the purchase are admissible in evidence either for or against the party who did the act or made the declaration." However, subsequent declarations are admissible only against the party who made them.

The case of ***Warren v Gurney*** [1944] 2 All E.R. 472 exemplifies how direct evidence, even of a circumstantial nature, can rebut a presumption. The father's retention of title deeds to a property purchased in his daughter's name constituted conduct so inconsistent with an intention to make a gift that it successfully rebutted the presumption of advancement. This demonstrates that direct evidence encompasses not only statements but also conduct that unequivocally demonstrates intention.

2. Conduct of the Parties

The conduct of the parties before, during, and after the property transfer provides rich evidence for rebutting presumptions. Courts examine the entire course of dealing between the parties to infer their actual intentions. This method recognizes that parties often reveal their true intentions through their actions rather than explicit statements.

Financial conduct following the transfer offers particularly compelling evidence. If the legal owner assumes full responsibility for mortgage payments, property taxes, insurance, and maintenance costs, and treats the property as their own, this conduct may rebut a resulting trust by demonstrating that a gift was intended. Conversely, if the transferor continues to manage the property, collect rents, or pay expenses, this supports the presumption of a resulting trust by showing they still treated the property as their own.

The case of ***Sekhon v Alissa*** [1989] 2 F.L.R. 94 illustrates how conduct rebuts a presumption. The mother provided the bulk of the purchase price for a property placed in her daughter's name to facilitate a mortgage. The court found that the mother's substantial financial contribution, coupled with the specific purpose of the arrangement, demonstrated that she did not intend a gift. The presumption of resulting trust was not rebutted, and the mother retained a beneficial interest proportionate to her contribution.

Another significant aspect of conduct evidence involves the parties' financial arrangements more broadly. If the transferor continues to act as the true owner by controlling the property, deriving benefits from it, or referring to it as their own in other contexts, these actions powerfully rebut any presumption of gift. Similarly, if the transferee acknowledges the transferor's ongoing interest through their conduct, this evidence rebuts the presumption of advancement.

3. The Nature of the Relationship and Surrounding Circumstances

The relationship between the parties provides essential context for evaluating their intentions. Courts recognize that intention is not formed in a vacuum but reflects the nature of the relationship and the practical circumstances surrounding the transfer.

In commercial contexts, the presumption of resulting trust operates with particular strength. The law assumes that parties in business relationships do not intend gifts unless clearly demonstrated. Business people are presumed to act in their economic self-interest, making the presumption of resulting trust difficult to rebut without compelling evidence of donative intent. Loan documentation, partnership agreements, or other commercial arrangements typically provide this evidence.

In familial relationships outside the traditional categories of advancement, courts examine the specific nature of the relationship. Transfers between siblings, from children to parents, or between more distant relatives do not attract the presumption of advancement. In these cases, the presumption of resulting trust applies, but may be more readily rebutted by evidence of the family's typical patterns of giving and support.

The purpose of the transfer often proves decisive in rebutting presumptions. As demonstrated in ***Sekhon***, if property is placed in another's name for a specific practical purpose such as obtaining a mortgage, avoiding creditors, or tax planning, this purpose may rebut both the presumption of advancement and any presumption of gift. The court examines whether the purpose is consistent with retained beneficial ownership by the transferor.

The size of the transfer relative to the transferor's wealth provides another important contextual factor. A small transfer from a wealthy parent to a child may more readily be found to be a gift than a transfer that represents the substantial portion of the parent's assets. Courts recognize that people are more likely to intend gifts of modest amounts than transfers that would significantly diminish their financial security.

6.5 Automatic Resulting Trusts

An automatic resulting trust arises not from a presumption of intention, but automatically by operation of law when an express trust fails or does not exhaust the entire beneficial interest in the property.

This type of resulting trust is "automatic" because it does not depend on any presumed intention. It is a logical necessity. If a settlor transfers property to a trustee on certain trusts and those trusts cannot be carried out, the equitable interest must go somewhere. It cannot simply vanish. Equity abhors a vacuum of beneficial ownership, and so the interest "results back" to the settlor or their estate.

6.5.1 Failure of an Express Trust

This occurs when the purpose of an express trust is never fulfilled or becomes impossible to fulfil. This can happen for various reasons, such as the trust being void for uncertainty, the beneficiary dying before the trust takes effect, or the trust being for an illegal or non charitable purpose.

Example:
A settlor transfers 100,000 pounds to a trustee upon trust to pay the income to his nephew, Charles, for life, provided Charles qualifies as a doctor. Charles dies in a car accident before graduating from medical school. The express trust for Charles has failed. The 100,000 pounds is held on an automatic resulting trust for the settlor.

In ***Re Ames' Settlement*** [1946] 1 All ER 689, A marriage settlement was created. The marriage subsequently was annulled. The court held that the failure of the consideration (the marriage) caused the property held on the trusts of the settlement to result back to the settlor's estate.

6.5.2 Surplus of Trust Funds after Fulfilment of Purpose

When property is transferred for a specific purpose and that purpose is fulfilled, but there are surplus funds left over, those surplus funds are held on a resulting trust for the contributors.

Example:
Residents of a street contribute to a fund to build a new community wall. The wall is built for 80% of the funds raised. The remaining 20% of the fund is held on a resulting trust for the residents in proportion to their original contributions.

In ***Re The Trusts of the Abbott Fund*** [1900] 2 Ch 326, Money was raised for the support of two deaf and mute sisters. Upon the death of the second sister, a surplus remained. The court held that the surplus was held on a resulting trust for the subscribers to the fund, as the specific purpose for which they had paid the money had been fulfilled.

6.5.3 The "Left-Over" Principle: *Vandervell v IRC*

The most famous case illustrating the automatic resulting trust is ***Vandervell v IRC*** [1967] 2 AC 291. Mr. Vandervell wished to donate money to the Royal College of Surgeons. To do this, he arranged for a bank to hold shares on trust, with an option for a charitable trust company to purchase them for a nominal sum. The option was exercised, but no one had specified what should happen to the option itself once it was used. The House of Lords held that the equitable interest in the option had been left out of the arrangement. It was an undisposed-of equitable interest. Therefore, it was held on an automatic resulting trust for Mr. Vandervell.

The Legal Principle from *Vandervell*

This case underscores that when a settlor does not successfully dispose of the entire beneficial interest in property, the undisposed-of interest does not belong to the trustee. It automatically results back to the settlor. This is not a matter of intention, but a legal consequence of an incomplete gift. As Lord Wilberforce stated, a resulting trust is the "default" mechanism that fills the gap in ownership.

Conclusion

This chapter has provided a comprehensive analysis of resulting trusts, a fundamental mechanism in equity for returning property to its rightful owner. We have distinguished between presumed resulting trusts, which are based on the rebuttable presumption that a gift was not intended, and automatic resulting trusts, which operate as a legal default when an express trust fails. We have also explored the diminishing role of the presumption of advancement and emphasized that the court's ultimate goal is always to ascertain the true intention of the parties.

The principles governing resulting trusts are essential for resolving property disputes in a wide range of contexts, from informal family arrangements to complex commercial transactions. They ensure that property rights are allocated according to the facts of who provided the funds and for what purpose, providing a crucial safety net against unjust enrichment.

In the next chapter, we will apply these principles directly to one of the most common and contentious areas: the family home.

7

TRUSTS OF THE FAMILY HOME: ESTABLISHING A BENEFICIAL INTEREST

The family home is often the most significant financial and emotional asset in a person's life. However, its legal ownership can become a source of intense dispute, particularly when personal relationships break down. The core problem is simple: the name or names on the property's title deeds (the legal owners) do not always reflect the true, beneficial ownership.

This disconnect arises for many reasons. A couple may decide to put a property in one name only for reasons of convenience, mortgage eligibility, or perceived tax advantages. One partner may have contributed to the deposit or mortgage payments even though their name is not on the title. Others may have contributed in non-financial ways, such as through significant renovations or by caring for the family, enabling the other to earn the money for the mortgage.

This chapter explores the legal tools that courts use to determine the beneficial interests in the family home in the absence of an express declaration of trust. We will examine two primary scenarios: when the property is in the sole name of one party, and when it is in the joint names of both. The key legal concepts we will use are the Common Intention Constructive Trust (CICT), the resulting trust, and the related doctrine of proprietary estoppel.

7.1 Sole Legal Owner Scenarios

When a family home is legally owned by one person alone, the starting point of English law is straightforward and seemingly harsh. The sole legal owner is presumed to be the sole beneficial owner. They hold the entire equitable interest, the whole "cake" of ownership. This is a powerful presumption that reflects the primacy of legal title. For a claimant, someone who is not on the title deeds, to succeed in claiming a beneficial share, they must positively prove that they have an interest. They must provide compelling evidence to convince the court that the legal owner holds the property on trust for both of them, to some extent.

The law provides two primary, and sometimes overlapping, mechanisms for a claimant to establish such a beneficial interest: the Common Intention Constructive Trust (CICT) and the resulting trust. Understanding the differences between these two, their requirements, and their practical application is fundamental for any solicitor dealing with cohabitation disputes.

7.1.1 Common Intention Constructive Trust (CICT)

The Common Intention Constructive Trust is the modern, flexible, and most frequently used tool by the courts. It is a trust imposed by law to give effect to the actual, shared understanding of the parties regarding the ownership of their home. It prevents the legal owner from denying the claimant's interest where it would be unconscionable to do so. The doctrine is founded on the principles of agreement and reliance.

To establish a CICT, a claimant must satisfy a two-stage test, as set out by the House of Lords in the seminal case of ***Lloyds Bank plc v Rosset*** [1991] 1 AC 107. The claimant must prove:

1. That there was a common intention between the legal owner and the claimant that they would both share the beneficial interest in the property.
2. That the claimant acted to their detriment in reliance on that common intention.

We will now explore each of these requirements in detail, with illustrative examples.

Establishing Common Intention

The first hurdle is to prove the common intention itself. The courts recognise that couples do not always have formal, written agreements about property ownership. Therefore, common intention can be established in one of two ways: through express discussions or by inference from conduct.

1. **Express Common Intention**

   This is the clearest and most reliable way to establish the first limb of the test. It arises from direct conversations, promises, or agreements between the parties where they discuss and agree that the property, despite being in one name, is to be shared beneficially.

   The case of ***Lloyds Bank plc v Rosset*** [1991] 1 AC 107 itself provides a key example, albeit one that failed on the facts. The husband and wife were discussing the renovation of a farmhouse that was purchased in the husband's name alone. The wife supervised the builders and decorated the house. The House of Lords held that these discussions about the renovation were not sufficient to constitute an express common intention to share the *beneficial ownership* of the property itself. They were merely about the use and decoration of the home.

   A successful example can be found in ***Eves v Eves*** [1975] 1 WLR 1338. In this case, the property was in the man's sole name. He told his partner that the only reason her name was not on the title was because she was under 21. The court held that this was an express representation that she was to have an interest in the property. It was a clear, albeit indirect, statement of common intention.

   Example 1: Adam and Bella are looking to buy a house. Adam has a better credit rating, so they decide to secure the mortgage in his name only. During discussions, Adam tells Bella, "Don't worry, it's our house. Your name may not be on the mortgage, but it's just as much yours as it is mine. We're in this together." This constitutes an express common intention to share the beneficial interest.

   Example 2: Charles and Diana live in a house owned solely by Charles. Diana uses her savings to pay for a large, expensive kitchen extension. Before doing so, Charles says, "This is a great investment for our home. It will add value for both of us." This statement could be evidence of an express common intention that Diana's contribution is for the benefit of their joint ownership.

2. Implied Common Intention from Conduct

If there is no express discussion, the court may still infer a common intention from the conduct of the parties. However, the law in this area, as set out in ***Rosset***, is strict. Lord Bridge stated that for conduct to give rise to an inference of an intention to share the beneficial ownership (as opposed to just a right to live in the property), it must consist of direct financial contributions to the purchase price.

These include:

- Contributing to the deposit.
- Contributing directly to mortgage instalments.
- Making a substantial financial contribution to the purchase price in some other way.

The case of ***Lloyds Bank v Rosset*** is again the authority. The wife's contributions involved extensive manual labour and project management during the renovation. The court held that this non-financial conduct, however significant, was insufficient to infer an intention to share the beneficial ownership. It did not constitute a direct financial contribution to the purchase.

Example 3: Fiona and George buy a house. It is in George's name. Fiona cannot contribute to the deposit, but from the outset, she pays half of the monthly mortgage payments directly from her bank account to the lender. A court would likely infer from this conduct that the common intention was for her to have a beneficial interest. Her direct payments to the mortgage are a classic example of conduct from which an intention can be inferred.

Example 4: Henry and Isabella buy a house in Henry's name. Isabella does not contribute to the deposit or the mortgage. However, she pays all the household utility bills, groceries, and council tax, which allows Henry to use his salary to cover the full mortgage. Under the strict rule in ***Rosset***, these are considered "indirect" contributions. While they may be relevant to the second stage (detriment) if there is an express common intention, they are unlikely, by themselves, to allow the court to infer a common intention to share beneficial ownership. This distinction is crucial and often leads to unfair outcomes, which later cases have tried to mitigate.

Detrimental Reliance

The second stage of the test is just as important as the first. It is not enough for the claimant to prove that there was a common intention. They must also show that they acted upon it to their detriment. The claimant must have done something on the faith of the agreement that has materially prejudiced them.

The essence of this requirement is the link of causation. The claimant must show: "I did this because I believed I had an interest in the property."

What constitutes detriment? The courts have taken a broad view. Examples include:

- **Direct financial contributions**: As mentioned above, paying for the deposit or the mortgage is both conduct from which an intention can be inferred and a detriment. The claimant has spent their own money in reliance on the belief that they are buying a share of the property.
- **Indirect financial contributions**: Paying for other household expenses, renovations, or repairs can amount to detriment, provided they are linked to an *express* common intention. In ***Grant v Edwards*** [1986] Ch 638, the woman's payments of household bills were held to be detrimental reliance because they freed up the man's money to pay the mortgage, and this was done in the context of an express common intention (the fraudulent excuse for not putting her name on the title).
- **Labour and improvements**: Significant manual labour in renovating or improving the property can constitute detriment. In ***Eves v Eves***, the woman's work wielding a sledgehammer to break up a concrete path and decorating the house was held to be sufficient detriment, following the express common intention.
- **Non-financial detriment**: A claimant may act to their detriment in other ways. For example, giving up a secure home or a job to move into the property, or providing care for the family that enables the legal owner to earn the money for the mortgage.

Example 5 (Building on Example 1): Recall Adam and Bella, where Adam expressly stated the house was "theirs." In reliance on this, Bella uses £15,000 of her inheritance to pay for a new roof for the property. This is a clear act of detrimental reliance. She would not have spent this large sum on someone else's house.

Example 6: David and Eleanor live in a house owned by David. David tells Eleanor, "I want you to feel this is your home too, so I'm putting it in our joint names next year." Relying on this, Eleanor gives up her own rented flat, moves in with David, and spends her weekends for a year landscaping the garden. If David then fails to add her to the title, Eleanor can argue she has suffered detriment: she has lost her rented home and expended significant labour based on his promise.

7.1.2 Resulting Trusts

The resulting trust provides an alternative, and historically older, path to establishing a beneficial interest. It is a more mechanistic and less flexible doctrine than the CICT. It focuses purely on the financial facts of the purchase, not on the parties' intentions regarding shared home life.

A resulting trust arises by operation of law in the following situation: where person A (the claimant) contributes to the purchase price of a property that is legally vested in person B (the legal owner) alone, or in person B and others, the law presumes that person A did not intend to make a gift of that money to the legal owner. Therefore, the legal owner is presumed to hold the property on a resulting trust for person A in proportion to their contribution.

The key case is ***Dyer v Dyer*** [1788] 30 E.R. 42, where the classic statement was made: "The trust of a legal estate... results to the man who advances the purchase money." This is a presumption of law.

Example 7: Grace and Harry purchase a house for £300,000. The legal title is in Harry's name only. Grace contributes £90,000 to the deposit, and Harry contributes £30,000. The balance is covered by a mortgage in Harry's name, which he pays. Under a resulting trust analysis, Grace is presumed to have a beneficial interest proportionate to her contribution to the total initial purchase price. Here, she contributed 75% of the deposit (£90,000 out of

£120,000). The court might therefore declare that Harry holds the property on a 75% resulting trust for Grace. In practice, the mortgage complicates this, and the share may be calculated based on the total equity.

Example 8: Ian and Jessica buy a house for £400,000 in Ian's name. Ian pays the entire £100,000 deposit. The £300,000 mortgage is in Ian's name, but from the start, Jessica pays half of every monthly mortgage instalment. Her payments are direct contributions to the purchase price. A resulting trust will arise in her favour. Her share will be calculated based on the proportion her total mortgage payments bear to the total purchase price plus mortgage interest.

Rebutting the Presumption

The presumption of a resulting trust is just that; a presumption. It can be rebutted by evidence showing that the claimant actually did intend a gift. For example, if a parent gives a child money for a deposit on the understanding it is a gift to help them onto the property ladder, the presumption of a resulting trust is rebutted. The burden of proof to show a gift lies on the legal owner who is claiming the money was a gift.

7.1.3 The Relationship between CICTs and Resulting Trusts

These two doctrines can operate together. A claimant may plead their case in the alternative, arguing both a resulting trust based on their financial contribution and a CICT based on a wider common intention.

The key difference is one of focus:

- A resulting trust is concerned with a single question: "Who paid for what?" It is a crude but certain tool.
- A Common Intention Constructive Trust is concerned with a broader question: "What did the parties intend for their shared life, and how did they act on that intention?" It is a nuanced and flexible tool.

In modern practice, the CICT has become the dominant approach, particularly in cases involving couples in a family relationship, as it allows the court to consider the entire context of their relationship and conduct, not just the initial financial input.

7.1.4 Quantifying the Beneficial Share

Once a claimant has successfully established that they have a beneficial interest (under either a CICT or a resulting trust), the final step is for the court to determine the size of that share.

For a resulting trust, the process is traditionally mathematical. The court looks at the proportion of the purchase price contributed directly by the claimant. This is often described as the "purchase money resulting trust."

For a CICT, the process is more nuanced. The court's goal is to ascertain the parties' common intention as to the size of their shares. This was the approach set out in ***Oxley v Hiscock*** [2004] EWCA Civ 546. The court asked: what would be a fair share for each party, taking into account the whole course of dealing between them in relation to the property?

This "whole course of dealing" is a broad enquiry and can include:

- The initial contributions to the deposit.
- The responsibility for paying the mortgage.
- The payment of household bills.
- Contributions to repairs, improvements, and insurance.
- The parties' financial arrangements generally.

Example 9: Let's return to Fiona and George from Example 3. The house cost £250,000. George paid the £50,000 deposit. The £200,000 mortgage is in his name, but Fiona has paid exactly half of every mortgage payment for 10 years. Under a resulting trust, her share might be calculated based on her financial input relative to the total cost. Under a CICT, the court would look for their common intention. If they always split everything 50/50, the court may well impute an intention to hold the property in equal shares, even though Fiona did not contribute to the deposit. The outcome can be a 50:50 split, reflecting the reality of their financial partnership, rather than a mathematically precise share based only on the initial purchase.

Establishing an interest in a sole name property is a fact intensive exercise. A claimant must navigate the requirements of common intention and detrimental reliance for a CICT, or prove a direct financial contribution for a resulting trust. The modern trend favours the flexible, intention based approach of the Common Intention Constructive Trust, which allows courts to achieve fairer outcomes that reflect the true economic reality of a domestic partnership.

7.2 Joint Legal Owner Scenarios

The scenario is different when a couple purchases a property together and both are named as the legal owners on the title. The key question here is not whether they have a beneficial interest, but what the size of their respective beneficial interests is.

7.2.1 The Starting Point: The Conclusive Declaration

Where the legal title is held jointly and the transfer deed or trust deed contains an express declaration of the beneficial interests (e.g., "as tenants in common in equal shares"), this declaration is conclusive. It is very difficult to challenge this later, absent a plea of fraud or mistake. The parties are bound by the legal document they signed.

7.2.2 Rebutting the Presumption of a 50:50 Split

In the vast majority of cases, however, a couple will be registered as "joint tenants" at law with no express declaration as to the beneficial interests. In this situation, the landmark case of ***Stack v Dowden*** [2007] 2 All ER 929 established a strong starting point: equity follows the law. The presumption is that the beneficial interests reflect the legal interests. Therefore, joint legal owners are presumed to be joint beneficial owners, meaning they hold the property in equal 50:50 shares.

However, this is only a presumption. It can be rebutted by a party who claims they are entitled to more (or less) than a 50% share. To rebut the presumption, that party must produce evidence to show that the parties' common intention was, when the property was purchased or later, to own the property in different shares.

As *Lady Hale* stated in ***Stack v Dowden***, the search is to ascertain the parties' "shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

The types of evidence that can rebut the 50:50 presumption include:

- **Extremely unequal financial contributions**: For example, if one party provided the entire deposit and paid the vast majority of the mortgage, this could indicate an intention to have a larger share. In ***Laskar v Laskar*** [2008] EWCA Civ 347, a mother and daughter were joint owners, but the mother had provided almost all the finances. The 50:50 presumption was rebutted, and the beneficial shares were held to reflect their financial contributions.
- **The purpose of the purchase**: If the property was bought as an investment rental property rather than as a family home, the court may be more likely to find an intention to hold shares in proportion to financial input.
- **The parties' overall financial arrangements**: Separate finances and the absence of a joint bank account might support an argument against a 50:50 split.

The subsequent case of ***Jones v Kernott*** [2011] UKSC 53 confirmed and refined the approach in ***Stack v Dowden***. The Supreme Court set out a three-stage process:

1. The starting point is that equity follows the law; joint legal ownership indicates joint beneficial ownership.

2. This presumption can be displaced by evidence of a different common intention, either at the time of purchase or later.

3. Where it is clear the parties did not intend a 50:50 share but it is impossible to ascertain their actual intention, the court will impute an intention that is fair having regard to the whole course of dealing between them.

7.3 Proprietary Estoppel

While not a trust doctrine per se, proprietary estoppel is a closely related equitable remedy that can also grant a person an interest in the family home. It operates as a "safety net" to prevent unconscionable conduct.

To establish a claim in proprietary estoppel, a claimant must prove three elements:

1. **An assurance or promise**: The property owner must have made a clear assurance or promise to the claimant that they would acquire an interest in the property (e.g., "This will all be yours one day").
2. **Reliance**: The claimant must have relied on this assurance.
3. **Detriment**: The claimant must have suffered a detriment as a result of their reliance. This detriment can be financial (spending money on the property) or non-financial (caring for the property owner for many years in the belief they would inherit the house).

If these elements are proven, the court has a very wide discretion to fashion the "minimum equity to do justice." The remedy is flexible and can range from awarding the claimant the entire property, to a beneficial share, to a mere monetary payment to compensate them for their detriment. The leading case is ***Thorner v Major*** [2009] UKHL 15, where a cousin worked for low pay on a farm for decades based on the owner's implicit assurances that he would inherit it. The House of Lords upheld his claim to the entire farm.

7.5 Conclusion

The law governing the family home is a complex interplay of property law, trust law, and equity, designed to achieve fairness in intensely personal and fact-specific situations.

Where one partner is not on the title, their claim depends on proving a beneficial interest, either through a Common Intention Constructive Trust, requiring evidence of shared intention and detrimental reliance, or through a resulting trust, which arises from direct financial contributions to the purchase price. For joint legal owners, the presumption of equal ownership stands unless clear evidence shows a different shared understanding.

Ultimately, courts focus on what the parties intended and how they conducted themselves. If common intention cannot be determined, equity steps in to achieve what is fair in light of their whole relationship. Alongside these doctrines, proprietary estoppel provides a flexible remedy where a promise, reliance, and detriment make it unjust to deny a claimant's expectation, ensuring that justice is achieved even when formal legal rights fall short.

8

FIDUCIARY OBLIGATIONS AND THE OFFICE OF TRUSTEE

The preceding chapters have explored how trusts are created, the interests they create, and the various forms they may take. We now reach the very heart of the trust's operation: the office of trustee and the profound legal duties that accompany it. A trust is not a static entity; it is a dynamic relationship that requires active, loyal, and skilful management. The trustee is the engine at the center of this relationship, entrusted with the legal ownership of property that they must not use for their own benefit.

This chapter provides a comprehensive examination of the trustee's role. We will first unpack the nature of fiduciary relationships, establishing the core principles that underpin all the duties to follow. We will then delve into the specific, stringent fiduciary duties imposed on trustees, illustrated by landmark cases that have shaped this area of law for centuries. Finally, we will examine the practical aspects of the office of trustee: who can act, how they are appointed and removed, and the administrative framework that supports the proper administration of trusts. Understanding these principles is not merely an academic exercise; it is essential for any solicitor who will advise trustees, beneficiaries, or individuals considering taking on this weighty responsibility.

8.1 The Nature of Fiduciary Relationships

A fiduciary relationship is a relationship of trust and confidence where one party (the fiduciary) is vested with power and authority to act on behalf of, or for the benefit of, another party (the principal or beneficiary). The fiduciary is required to exercise that power exclusively for the benefit of the other party, putting that party's interests ahead of their own.

The trustee beneficiary relationship is the paradigm, or classic example, of a fiduciary relationship. However, the concept extends to other roles including company directors towards their company, solicitors towards their clients, agents towards their principals, and partners towards each other. What unites these relationships is the scope for power and discretion granted to one party and the potential for abuse of that power.

The law imposes fiduciary duties as a protective mechanism. It recognizes that the beneficiary is vulnerable to the fiduciary's actions and therefore places stringent obligations on the fiduciary to prevent that vulnerability from being exploited. The core idea is that a fiduciary must not allow any conflict to arise between their personal interests and their duties to the beneficiary.

8.1.1 Key Characteristics

Several key characteristics define a fiduciary relationship. The most important is the duty of loyalty. This is the highest duty known to law and requires the fiduciary to be perpetually loyal to the beneficiary's interests. Another characteristic is the principle of undivided loyalty. A fiduciary must not place themselves in a position where their duty to one beneficiary conflicts with their duty to another. Furthermore, fiduciaries are typically held to an objective standard of conduct. It does not matter that the fiduciary acted in good faith or that the beneficiary suffered no loss; the mere presence of a conflict of interest or unauthorized profit is sufficient to constitute a breach.

8.1.2 The Rationale for Strict Rules

The justification for these strict rules was eloquently stated by *Lord Herschell* in the case of ***Bray v Ford*** [1896] A.C. 44: "It is an inflexible rule of a Court of Equity that a person in a fiduciary position... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." The rules are strict because human nature is such that the temptation to abuse a position of power for personal gain can be strong. The law, therefore, removes the temptation by imposing a blanket prohibition, thereby ensuring that fiduciaries remain beyond reproach.

8.2 Core Fiduciary Duties of Trustees

The appointment as a trustee carries with it the imposition of the most onerous duties known to English law. These fiduciary duties are not mere guidelines but are stringent, proscriptive rules designed to ensure that a trustee's conduct remains beyond reproach. They flow directly from the core fiduciary principles of loyalty and good faith, which form the bedrock of the trustee beneficiary relationship. The fundamental purpose of these duties is to eliminate any temptation for a trustee to abuse their position for personal gain and to ensure that the trustee's focus remains exclusively on furthering the best interests of the beneficiaries. This section provides a comprehensive analysis of the four principal fiduciary duties: the no conflict rule, the no profit rule, the self-dealing rule, and the duty to act impartially.

8.2.1 The No Conflict Rule: *Keech v Sandford*

The no conflict rule is the central, overarching fiduciary duty. It imposes a strict prohibition on a trustee from placing themselves in a position where their personal interests conflict, or may possibly conflict, with their duties to the beneficiaries. The rule is concerned not only with actual conflicts but also with potential conflicts. Its application is objective; it does not depend on the trustee's good faith or whether the beneficiary has suffered a tangible loss. The mere existence of the conflict of interest constitutes a breach of duty.

The rationale for the rule's inflexibility was articulated by Lord Herschell in ***Bray v Ford*** [1896] A.C. 44. The courts have long recognized that human nature is such that a fiduciary faced with a conflict between personal interest and fiduciary duty may unconsciously favour their own interests, even with the best of intentions. The rule therefore acts as a prophylactic, removing the temptation by forbidding the situation entirely.

The facts of the seminal case of ***Keech v Sandford*** [1726] 25 ER 223 are straightforward yet profound. A trustee held a lease of the profits of a market on trust for an infant beneficiary. As the lease neared its expiration, the trustee approached the landlord to renew the lease for the benefit of the infant. The landlord refused, expressing reluctance to have a minor as a tenant due to the legal complexities involved. Subsequently, the trustee negotiated and obtained the lease for his own personal benefit.

The Court of Chancery, under *Lord King LC*, delivered a judgment that has resonated for centuries. The court held that the trustee was compelled to hold the renewed lease on trust for the infant beneficiary and to account for all profits derived from it. The *Lord Chancellor* acknowledged that the trustee may have acted in good faith and that the landlord was genuinely unwilling to grant the lease to the infant. However, he emphatically stated that this was irrelevant. The rule of equity had to be enforced with utmost strictness. The trustee's duty was to secure the renewal for the trust. His personal interest was to acquire it for himself. This constituted a clear conflict, and the law would not permit a fiduciary to benefit from such a position.

Keech v Sandford established several enduring principles. First, the rule is absolute and does not yield to inquiries into good faith or fairness. Second, the duty is not merely to avoid harm to the trust but to actively avoid situations of conflict. Third, the rule applies even where the opportunity could not have been obtained by the trust itself. The opportunity came to the trustee by virtue of his fiduciary position, and therefore it belonged in equity to the trust.

Modern Application and Examples

The principle in ***Keech v Sandford*** remains vigorously applied in modern courts. Its logic extends to various scenarios.

- A corporate director (a fiduciary to the company) who learns of a valuable business opportunity through their position cannot divert that opportunity to a private company they own, even if the main company is unable or unwilling to pursue it.
- A trustee who uses information confidential to the trust to make a personal investment has breached the no conflict rule, as their duty to safeguard trust information conflicts with their personal interest in using it for gain.
- A solicitor trustee who advises the trust on a matter in which they have a personal financial interest is in a clear position of conflict.

The strictness of the rule serves as a constant reminder to trustees that their office demands undivided loyalty.

8.2.2 The No Profit Rule: *Boardman v Phipps*

The no profit rule is a specific and potent application of the no conflict rule. It dictates that a trustee must not make any unauthorized profit from their fiduciary position, whether by using trust property, confidential information, or their status as a trustee. Any such profit is deemed to belong in equity to the beneficiaries. The rationale is that a trustee is appointed to benefit the beneficiaries, not themselves. If a profit is generated through the trustee's role, it is rightfully the property of the trust.

This House of Lords decision in ***Boardman v Phipps*** [1967] 2 AC 4 is the leading modern authority on the no profit rule and demonstrates its rigorous application. The trustees of a will trust held a minority shareholding in a private company. Boardman, the trust's solicitor, and Tom Phipps, one of the trustees, became concerned about the company's management and perceived its potential for greater profitability.

Acting on their own initiative, but using information gained in their fiduciary capacities and representing themselves as acting for the trust, they negotiated to acquire a controlling interest in the company. They succeeded, and through their diligent management, the company's value increased substantially. This benefited the trust's original shareholding. However, they also made a very significant personal profit on the shares they had acquired for themselves.

A beneficiary sued, demanding that Boardman and Phipps account for their personal profits to the trust. The defendants argued that they had acted in good faith, that the trust had benefited from their actions, that they had kept the other trustees informed, and that the trust itself lacked the resources to have made the acquisition.

The House of Lords, by a narrow majority, held that Boardman and Phipps had to account for all their profits. The core of the majority's reasoning was that the defendants had used their fiduciary position, specifically the confidential information and the strategic opportunity it presented, to make a personal gain. *Lord Guest* stated that the "fundamental rule" is that a trustee "is not entitled to make a profit out of trust property." *Lord Hodson* emphasized that the information they used was "the property of the trust" and that it was immaterial that the trust could not have itself made the purchase.

The Defense of Fully Informed Consent

A critical aspect of ***Boardman v Phipps*** is the discussion of consent. The defendants argued that the beneficiaries (other than the plaintiff) had consented to their actions. The majority, however, found this consent was invalid because it was not fully informed. The beneficiaries had not been provided with all the material facts, including the full extent of the potential profit and the legal risks involved.

This establishes that for consent to be a valid defense to a breach of fiduciary duty, it must be given by beneficiaries of full age and capacity after full and frank disclosure of all relevant information. The burden of proving such consent rests on the fiduciary.

The Dissenting Judgment and Lingering Debate

The dissenting judges, *Lord Cohen* and *Lord Upjohn*, would have found no breach. They focused on the good faith of the defendants and the fact that the trust had benefited, arguing that the profit was not made from the use of "trust property" in the conventional sense. This dissent highlights the tension between the strict application of fiduciary principles and a more flexible, merits based approach. Nevertheless, the majority judgment represents the prevailing, strict orthodoxy.

Contemporary Significance

Boardman v Phipps serves as a stark warning to all fiduciaries. It confirms that the no profit rule is strictly enforced, and that subjective good faith and even objective benefit to the trust are not defences. The case is routinely cited in modern litigation concerning corporate opportunities, insider information, and any situation where a fiduciary's personal commercial activities overlap with their fiduciary role.

8.2.3 The Duty Not to Purchase Trust Property (Self-Dealing Rule)

The self -dealing rule is a specific, inflexible application of the no conflict rule tailored to the context of a trustee purchasing trust property. The rule is simple: a trustee cannot purchase trust property for themselves. The transaction is voidable at the option of any beneficiary, irrespective of the adequacy of the price or the fairness of the terms. The justification is self-evident.

A trustee selling trust property has a duty to secure the best possible price for the beneficiaries. The same trustee, as a purchaser, has a personal interest in acquiring the property for the lowest possible price. This conflict of interest is inherent and irreconcilable.

These two early nineteenth century cases of ***Ex parte Lacey*** [1802] 31 Eng. Rep. 1228 and ***Ex parte James*** [1803] 32 ER 385 firmly established the self-dealing rule. In ***Ex parte Lacey***, the *Vice Chancellor* stated that such a purchase "is not permitted" because it is impossible for the trustee to act fairly in such a dual capacity. In ***Ex parte James***, *Lord Eldon LC* delivered the classic formulation: "The rule is, that a trustee, having a duty to perform, shall not place himself in a situation that his interest conflicts with his duty." He held that the court will not inquire into the fairness of the deal; the sale will be set aside as a matter of course.

The Consequences of Breach

If a trustee breaches the self-dealing rule, the sale is not automatically void, but is voidable. This means the beneficiaries have the right to choose whether to affirm the sale or to have it set aside. If they choose to set it aside, the trustee must return the property to the trust and account for any profits made from it, and the trust must return the purchase price. The right to set aside can be lost if the beneficiaries affirm the transaction, or if an innocent third party purchaser for value without notice acquires the property.

The Fair Dealing Rule

A related but distinct principle is the fair dealing rule. This applies when a trustee purchases the beneficial interest of a beneficiary, as opposed to the trust property itself. For example, a trustee buys a life tenant's interest in the trust. Such a transaction is not automatically voidable. However, it is viewed with the utmost suspicion by the courts.

The trustee bears the heavy burden of proving that they made full disclosure of all material facts, that they took no advantage of their position, that the beneficiary had independent legal advice, and that the transaction was objectively fair and for full value. The distinction lies in the nature of the purchase: the self-dealing rule protects the trust as a whole, while the fair dealing rule protects an individual beneficiary from being exploited by their trustee.

Methods of Validating a Purchase

A trustee can only validly purchase trust property through one of three sanctioned routes:

1. With the prior, fully informed consent of all beneficiaries (if they are all of full age and capacity).
2. Under an express power in the trust instrument that authorizes such a purchase.
3. By an order of the court, which will only be granted in exceptional circumstances and with robust safeguards for the beneficiaries.

These exceptions are narrowly construed, reinforcing the primary rule's strictness.

8.2.4 The Duty to Act Impartially Between Beneficiaries

A trustee is often required to act for more than one beneficiary. The duty to act impartially, also known as the duty of even handedness, requires the trustee to administer the trust without favouring one beneficiary or class of beneficiaries over another. This duty is of paramount importance in trusts with successive interests, such as a trust for a life tenant and a remainderman, but it also applies to discretionary trusts and fixed trusts with multiple beneficiaries.

The Conflict Between Income and Capital

The most common context for this duty is balancing the competing interests of income beneficiaries and capital beneficiaries.

- The life tenant (income beneficiary) has a primary interest in maximizing the income generated by the trust assets.
- The remainderman (capital beneficiary) has a primary interest in the long-term preservation and growth of the capital value of the trust fund.

A trustee who invests solely in high yielding, but volatile or inflation prone, assets would generate good short-term income for the life tenant but risk eroding the capital for the remainderman. Conversely, a trustee who invests solely in non-income producing growth assets, like undeveloped land, would preserve capital for the remainderman but provide no income for the life tenant.

The Trustee's Balancing Act

The trustee's duty is to maintain a balanced portfolio that generates a reasonable income while ensuring the capital value is maintained in real terms. This is not a one time decision but an ongoing responsibility. The trustee must periodically review the investments and adjust the portfolio as economic conditions and the needs of the beneficiaries change. The *Trustee Act 2000*, with its standard investment criteria, implicitly supports this duty by requiring trustees to consider both the suitability of investments and the need for diversification.

Application to Discretionary Powers

The duty of impartiality also governs the exercise of discretionary powers, such as a power to appoint capital or income. When a trustee holds a power to distribute among a class of beneficiaries, they must consider the range of potential beneficiaries and exercise their discretion in a fair and rational manner. They cannot arbitrarily exclude a beneficiary from consideration or exercise the power for a collateral purpose. For instance, a trustee could not properly use a power of appointment to punish a beneficiary for personal reasons. The discretion must be exercised in good faith, upon genuine consideration, and for the purposes for which it was given.

Practical Challenges and Guidance

This duty can create difficult practical dilemmas. For example, should a trustee sell a non-income producing but historically significant family asset that the remainderman wishes to retain, in order to generate income for a life tenant in financial need? There is no easy answer. The trustee must act reasonably, taking into account the terms of the trust and all relevant circumstances, and may need to apply to the court for directions in cases of serious doubt. The key is that the trustee must be able to demonstrate that they have properly considered the interests of all beneficiaries and have not sacrificed one for the other.

The fiduciary duties explored in this section are the essential safeguards that make the institution of the trust workable. They transform the potentially dangerous concentration of legal ownership in the trustee's hands into a secure mechanism for managing property for others. The rules are strict, sometimes unforgivingly so, because they must be.

They are designed to operate in a context where temptation and conflict are inherent risks. By imposing a regime of no conflict, no profit, no self-dealing, and impartiality, equity ensures that the trustee's conduct conforms to the highest possible standards of loyalty and integrity.

A thorough understanding of these duties, as illustrated by the timeless authorities of ***Keech v Sandford*** and ***Boardman v Phipps***, is fundamental for any solicitor advising trustees or beneficiaries, as a breach can have severe personal consequences for the trustee, regardless of their intentions.

8.3 The Office of Trustee

The stringent fiduciary duties explored in the previous section are imposed upon the holder of an office. The role of trustee is not merely a title; it is a formal position with defined responsibilities, powers, and a governance framework established both by the trust instrument and by statute. The law provides a comprehensive structure for the administration of this office, ensuring that trusts can be managed effectively over time, even as circumstances change.

This section delves into the practical aspects of the trusteeship: who is legally capable of acting as a trustee, the mechanisms for bringing trustees into and out of office, and the rules governing the number of trustees required for the proper administration of a trust. Understanding this administrative framework is crucial for solicitors who will be responsible for drafting trust instruments, advising trustees on their appointment and retirement, and navigating the complexities that arise when a trusteeship needs to be reconstituted.

8.3.1 Who Can Be a Trustee? Capacity and Disclaimer

Definition of Capacity

The law regarding who may act as a trustee is broadly inclusive. In principle, any legal person capable of holding and administering property can be a trustee. This encompasses individual human beings, corporate entities known as trust corporations, and partnerships that are legally authorized to conduct trust business. The primary consideration is whether the proposed trustee has the legal competence to own property and to perform the functions required of the office.

Capacity of Individual Trustees

For an individual to be a valid trustee, they must possess legal capacity. This requires that the individual is of full age, meaning eighteen years or older under the law of England and Wales. A minor cannot be appointed as a trustee, and any attempt to appoint a minor is void. Furthermore, the individual must be of sound mind. This means they must have the mental capacity to understand the nature of the role, the duties it entails, and the responsibilities involved in managing trust property. If an individual loses mental capacity after their appointment, this may form grounds for their removal from the office.

There is no statutory requirement for an individual trustee to possess specific qualifications or professional expertise. A layperson with no legal or financial training can be a trustee. However, the standard of care expected of a trustee, as codified in the Trustee Act 2000, is objective and varies depending on the circumstances. A trustee who professes to have special skills, such as a solicitor or an accountant, or who is acting in the course of a business or profession, is held to a higher standard of care and is expected to demonstrate the expertise they claim to possess.

Trust Corporations

A trust corporation is a corporate body empowered by its constitution to act as a trustee for a fee. Typically, these are specialist subsidiaries of major banks or other financial institutions. The use of a trust corporation offers several advantages, including permanence (as a company does not die), professional expertise, and the ability to give a valid receipt for capital money arising from a sale of land as a sole trustee. Their services are particularly valuable for large, complex, or long-lasting trusts.

The Right to Disclaimer

A fundamental principle of trusteeship is that it is a voluntary office. No one can be compelled to act as a trustee against their will. Consequently, a person nominated as a trustee has the right to disclaim, or refuse, the appointment. Disclaimer must be of the entire trust; a potential trustee cannot disclaim part of the trust property while accepting the rest.

For a disclaimer to be effective, it must be clear and unequivocal, and it must occur before the person has done any act that signifies an intention to accept the trusteeship. Such acts of acceptance could include interfering with the trust property, exercising powers as a trustee, or expressly agreeing to act. Once a person has accepted the office, they cannot subsequently disclaim; they must instead follow the formal procedures for retirement. A disclaimer, once effectively made, is retrospective to the date of appointment, meaning the person is treated as never having been a trustee.

8.3.2 Appointment, Retirement, and Removal of Trustees

The *Trustee Act 1925* provides a detailed statutory code that supplements the express terms of the trust instrument. It governs the processes for appointing new trustees, enabling existing trustees to retire, and for the removal of trustees where necessary.

Appointment of New Trustees

The need to appoint new trustees arises frequently. Common scenarios include the death of a trustee, a trustee wishing to retire, a trustee being unfit or incapable of acting, or a trustee refusing to act. The process for appointment is typically hierarchical, looking first to the trust instrument and then to the statutory default powers.

The trust instrument itself will almost always contain an express power of appointment. This power is usually given to the settlor during their lifetime, and thereafter to the surviving or continuing trustees, or to a named individual. This is the primary method for appointing new trustees, as it reflects the settlor's specific wishes.

Where the trust instrument is silent or the named appointor is unable or unwilling to act, the statutory power under *s.36* of the *Trustee Act 1925* applies. This power is vested in the "person nominated for the purpose of appointing new trustees by the instrument." If there is no such person, or that person fails to act, the power falls to the surviving or continuing trustees. Failing that, it passes to the personal representatives of the last surviving or continuing trustee.

Section 36 allows for the appointment of a new trustee in place of one who is dead, remains out of the United Kingdom for more than twelve months, desires to be discharged, refuses or is unfit to act, is incapable of acting, or is an infant. When exercising the power of appointment, the appointor must have regard to the wishes of the settlor and the expediency of appointing a person who will promote the interests of all the beneficiaries. The appointment is made by a written deed, which vests the trust property in the new and continuing trustees.

Retirement of Trustees

A trustee who has accepted the office cannot unilaterally resign. Retirement must be effected through one of several authorized channels. The trustee may retire under an express power contained in the trust instrument. Alternatively, they may retire with the consent of all the beneficiaries, provided the beneficiaries are of full age and capacity and together absolutely entitled to the trust property. A trustee may also apply to the court for an order permitting their retirement.

The most common method is under the statutory power found in *s.39* of the *Trustee Act 1925*. This section allows a trustee to retire by a written deed, provided that after their retirement, there will be at least two individual trustees or a trust corporation remaining, and that their fellow trustees and any person with the power to appoint new trustees consent to the retirement by deed. This mechanism provides a straightforward administrative process for trustees who wish to step down.

Removal of Trustees

The removal of a trustee is a more serious step, typically taken where a trustee is failing in their duties or is otherwise unsuitable to act. The court possesses an inherent jurisdiction to remove a trustee where it is necessary for the welfare of the beneficiaries. Grounds for removal include persistent failure to act, incompetence in managing the trust affairs, dishonesty, bankruptcy, or being in a position of acute conflict of interest.

Additionally, *s.41* of the *Trustee Act 1925* provides the court with a statutory power to appoint a new trustee whenever it is found "expedient, difficult or impracticable" to do so without the court's assistance. This power is frequently used to remove an existing trustee and appoint a replacement in the same order. The court's focus under section 41 is on the interests of the beneficiaries and the proper administration of the trust.

In practice, the threat of a court application for removal often leads to a negotiated retirement. Solicitors advising dissatisfied beneficiaries or fellow trustees will often first explore whether the problematic trustee can be persuaded to retire voluntarily under *s.39*, as this is a quicker and less costly solution than court proceedings.

8.3.3 The Minimum and Maximum Number of Trustees

The law establishes rules governing the number of trustees to ensure that the trust can be administered efficiently, to prevent deadlock, and to provide safeguards for the beneficiaries, particularly in relation to the sale of land.

The Minimum Number

A trust must have at least one trustee. It is legally possible for a single individual or a single trust corporation to act as the sole trustee. However, a crucial protective rule applies to trusts of land. *Section 27* of the *Law of Property Act 1925* requires that a minimum of two trustees or a single trust corporation must be appointed in order to give a valid receipt for capital money arising from a sale or other disposition of land. This rule is designed to prevent a sole individual trustee from misappropriating the proceeds of sale. If a sole trustee of land is left, perhaps due to the death of a co-trustee, a new trustee must be appointed to join them before a sale of the land can be completed and the purchase money validly received.

The Maximum Number

For reasons of administrative efficiency, the law also imposes a maximum number of trustees. *Section 34* of the *Trustee Act 1925* states that where more than four persons are named as trustees of a settlement of land, the first four named who are able and willing to act shall be the trustees. Although this rule expressly refers to settlements of land, it is applied by analogy to all personal property trusts as a matter of best practice. The purpose is to prevent the administration of the trust from becoming unwieldy and paralyzed by the need to obtain the consent of a large number of people for every decision and action.

If a trust is established with five named trustees, only the first four will be recognized as the legal owners of the trust property. The fifth named person does not become a trustee unless and until one of the first four ceases to act, creating a vacancy. This rule does not prevent the appointment of successor trustees over time; it merely limits the number of individuals who can hold the legal title and exercise the powers of trusteeship at any given moment.

Practical Consequences and Strategic Considerations

These rules have significant practical implications. When establishing a trust, a settlor and their solicitor must give careful thought to the initial number and identity of the trustees. Appointing two trustees from the outset is common for trusts that include land, as it avoids the need for a future appointment before a sale can occur. Appointing a trust corporation as a sole trustee provides both permanence and the ability to act alone, but this comes at a financial cost.

Solicitors advising on the administration of an existing trust must be vigilant in monitoring the number of trustees. If the number falls below the statutory minimum for a trust of land, or if it becomes excessive, they must advise the continuing trustees to exercise their power of appointment to rectify the situation. Failure to do so can hamper the administration of the trust and potentially amount to a breach of the trustees' duty to act impartially and in the best interests of the beneficiaries.

The office of trustee is therefore a carefully regulated legal construct. The law strikes a balance between flexibility, by allowing a wide range of persons to act as trustees and providing mechanisms for change, and protection, by imposing rules on numbers and procedures to safeguard the trust property. The framework established by the *Trustee Act 1925* provides a robust and practical system for ensuring the continuity of trust administration.

For the solicitor, a mastery of these rules is essential. It enables them to properly constitute the trusteeship at the outset, to guide clients through the processes of appointment, retirement, and removal, and to ensure that the trust is always capable of being administered effectively for the benefit of its beneficiaries. This administrative foundation, coupled with the stringent fiduciary duties, completes the picture of the trustee's role, making clear that it is an office of both great responsibility and detailed legal procedure.

8.4 Conclusion

This chapter has laid bare the core of the trust relationship: the powerful, non-negotiable duties imposed on the trustee for the protection of the beneficiary. The fiduciary obligations of no conflict, no profit, and impartiality are the bedrock upon which the integrity of the trust institution is built. The cases of ***Keech v Sandford*** and ***Boardman v Phipps*** are not historical curiosities; they are living authorities that continue to demand the highest standards of conduct from those who assume the office of trustee.

Coupled with these duties is a practical legal framework governing the appointment, retirement, and removal of trustees, ensuring that the trust can continue to function effectively over time. A thorough grasp of these principles is indispensable for any solicitor advising in this area. In the next chapter, we will build upon this foundation by examining the specific managerial duties of trustees in administering the trust, their powers of investment and maintenance, and the consequences they face for any breach of their formidable responsibilities.

9

TRUSTEES' POWERS, DUTIES, AND LIABILITY FOR BREACH

Accepting the office of trustee is to accept a role laden with significant legal obligations and potential personal liability. A trust is not a passive arrangement; it requires active, prudent, and loyal management. This chapter moves from the creation of the trust to its ongoing administration. We will explore the duties that compel trustees to act, the powers that give them flexibility, and the serious consequences they face if they fail to uphold the standards the law demands. Understanding this balance is crucial for any solicitor advising trustees or beneficiaries.

9.1 Trustees' Management Duties

The acceptance of a trusteeship is the acceptance of a role governed by a rigorous framework of mandatory obligations. These are not mere guidelines or best practices; they are legally enforceable duties that form the bedrock of the trustee's function. Their purpose is to ensure that the trust property is managed with integrity, prudence, and loyalty, safeguarding the interests of the beneficiaries for whom the trust exists. A failure to adhere to these core duties constitutes a breach of trust, for which a trustee can be held personally liable. This section delves into the most critical of these management duties, exploring their legal basis, practical application, and the standards by which a trustee's conduct will be judged.

9.1.1 The Duty of Care

The duty of care is the fundamental standard against which all of a trustee's administrative actions are measured. It answers the question: "How careful must a trustee be?"

Historically, the common law set the standard in the case of ***Speight v Gaunt*** [1883] 9 App Cas 1. The court held that a trustee must "conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own." This "prudent person" test served as the foundation for centuries. However, it lacked specificity and did not explicitly account for the higher skills of a professional trustee.

This was modernised and codified by the *Trustee Act 2000*. *Section 1* of the Act imposes a statutory duty of care that applies whenever a trustee is carrying out certain specific functions, primarily those listed in *Schedule 1* of the Act. These include investing trust assets, acquiring or managing land, insuring property, and appointing agents or nominees.

The statutory standard requires a trustee to exercise "such care and skill as is reasonable in the circumstances." This seemingly simple phrase is unpacked by two crucial considerations:

1. The trustee's own knowledge and experience.
2. The trustee's professional status.

This creates a two-tier standard of care:

The lay trustee: A trustee who is a family friend or relative, with no special financial or legal expertise, will be judged by the objective standard of the ordinary, prudent person. They are expected to act sensibly, to take advice where necessary, and to avoid reckless or speculative decisions. For example, a lay trustee would likely breach their duty if they invested the entire trust fund in a highly speculative cryptocurrency without seeking any advice, as this is not how an ordinary prudent person would manage their affairs.

The professional trustee: A higher standard is imposed on a trustee who is a professional, such as a solicitor, accountant, or bank (a trust corporation). The law holds them to the standard of a reasonably competent member of their profession. They are expected to utilise the specialist knowledge and skills they purport to have. Furthermore, if a trustee holds themselves out as having a special knowledge or experience, even if they are not a professional, they will be judged accordingly. For instance, a trustee who is a qualified financial advisor would be expected to demonstrate the skill and diligence of a competent financial advisor when managing the trust's investments. A mistake that might be excused for a lay trustee could constitute a clear breach for a professional.

Example: A trust fund holds a portfolio of stocks. A lay trustee might fulfil their duty by investing in a well diversified range of blue-chip companies based on the advice of a qualified financial advisor. A professional trustee, however, would be expected to understand the principles of diversification and risk themselves and to be able to critically evaluate the advice they receive. Simply blindly following advice without any independent thought might, in some circumstances, be a breach of the professional trustee's higher duty of care.

9.1.2 The Duty to Invest

One of the most important and ongoing duties of a trustee is to preserve and enhance the value of the trust fund. A passive approach, such as leaving large sums of money in a non-interest bearing current account, can be as much a breach of trust as making a reckless investment. The duty to invest is therefore a positive and dynamic obligation. The *Trustee Act 2000* provides the modern legal framework governing this duty.

The General Power of Investment (*s.3*)

This provision grants trustees a remarkably wide power. It states that trustees may "make any kind of investment that he could make if he were absolutely entitled to the assets of the trust." This sweeping power replaced the old, restrictive statutory lists of "authorised investments." Trustees are no longer limited to, for example, government bonds or first mortgages. They can now invest in shares, corporate bonds, derivatives, or any other asset class, no matter how seemingly speculative.

However, this power is not a licence to gamble. Its breadth is tempered by the crucial safeguard of the *Standard Investment Criteria*.

The Standard Investment Criteria (*s.4*)

When exercising the power of investment, a trustee must have regard to two key principles:

1. **The suitability of investments**: The trustee must consider whether the investment is appropriate for this particular trust. This involves considering the trust's purposes, the needs of the beneficiaries, and the time horizon for the trust. For example, a high-risk investment might be unsuitable for a trust that needs to provide a stable income for an elderly beneficiary, but it might be suitable for a long-term trust for a young child.

2. **The need for diversification**: The trustee must ensure the investments are diversified, "so far as is appropriate to the circumstances of the trust." The age old wisdom of "not putting all your eggs in one basket" is a legal requirement for trustees. A portfolio concentrated in a single company's shares or a single sector would likely breach this duty, as it exposes the trust fund to an unnecessary level of risk.

The Duty to Obtain Proper Advice (*s.5*)

To help them comply with the *Standard Investment Criteria*, trustees are generally required to obtain and consider "proper advice" on how the criteria should be followed. "Proper advice" is defined as the advice of a person who is reasonably believed by the trustees to be qualified to give it by their ability in and practical experience of financial and other matters relating to the proposed investment.

The duty to take advice is not absolute. The statute provides an exception where the trustees reasonably conclude that in all the circumstances it is unnecessary or inappropriate to do so. For instance, if the trust fund is very small, the cost of advice might be disproportionate. Or, if the trustees are themselves highly qualified financial experts, they might reasonably decide that external advice is unnecessary for a routine investment. However, this exception is interpreted narrowly, and a trustee who fails to take advice without a very good reason does so at their peril.

9.1.3 The Duty to Act Impartially (The Duty to Balance Interests)

A trust often creates successive interests, meaning different beneficiaries have rights to the trust property at different times. The most common example is a trust with a life tenant and a remainderman.

- The life tenant is entitled to the income generated by the trust assets (e.g., dividends, rent) for the duration of their life.
- The remainderman is entitled to the capital of the trust (the assets themselves) after the life tenant's death.

The trustee has a fiduciary duty to act impartially between these competing interests. This is often called the duty to maintain a fair balance. An investment strategy that focuses exclusively on high income generation (benefiting the life tenant) might jeopardise the long-term capital growth of the fund (harming the remainderman). Conversely, investing solely for capital growth with no regard for income would unfairly prejudice the life tenant.

Example: A trustee invests the entire trust fund in rapidly growing technology stocks that pay no dividends. The life tenant receives no income, while the remainderman stands to benefit from the significant capital appreciation. This would be a breach of the duty to act impartially. The trustee must construct a balanced portfolio that provides a reasonable income for the life tenant while also seeking to preserve and enhance the capital for the remainderman.

9.1.4 The Duty to Act Unanimously and Not to Delegate

Unanimity: At common law, where there is more than one trustee, they must act unanimously. All trustees must agree on a decision for it to be binding. One trustee cannot outvote the others. This ensures that every trustee exercises their discretion and shares responsibility for decisions. The trust instrument can override this rule and allow for decision making by a majority.

Non-delegation: The core principle here is *delegatus non potest delegare* a delegate cannot further delegate. Trustees are appointed for their personal judgment and discretion; they cannot simply pass their responsibilities to someone else. However, the practical demands of modern trust administration mean that some delegation is essential. The *Trustee Act 2000* strikes a balance. It permits trustees to delegate certain administrative and ministerial functions to agents, such as appointing a stockbroker to execute share trades. However, trustees cannot delegate their fiduciary discretions. For example, they cannot delegate the power to decide which investments to buy or sell, or the power to select which beneficiaries should receive distributions. The trustees must always retain core decision making power and must supervise their agents.

9.1.5 The Duty to Keep Accounts and Provide Information

Transparency is a cornerstone of trusteeship. Trustees are under a duty to maintain clear, accurate, and up to date accounts detailing all the trust's financial transactions, including income, expenditures, investments, and capital changes.

More importantly, they have a duty to provide this information to the beneficiaries. The beneficiaries have a proprietary right to see the trust accounts and the trust instrument itself. They cannot enforce their rights if they do not know what those rights are. This duty is not absolute; a trustee may withhold documents that reveal their reasons for exercising a discretion (their "thought processes"), but the basic financial facts of the trust's administration must be made available. A trustee who is secretive or obstructive in providing accounts is likely committing a breach of trust.

9.2 Trustees' Discretionary Powers

While the previous section detailed the mandatory duties that bind trustees, the role is not one of mere automatons executing fixed commands. To administer a trust effectively, particularly one that may last for many years, trustees require a degree of flexibility to respond to changing circumstances and the evolving needs of the beneficiaries. This flexibility is granted through discretionary powers. Unlike duties, which are imperative and must be performed, powers are authorities that trustees may choose to exercise. The decision to act, or not to act, lies within their discretion. However, this discretion is not absolute or unfettered. It must be exercised in good faith, upon a genuine consideration of the relevant factors, and for the proper purpose for which it was granted. This section explores the two most significant discretionary powers afforded to trustees: the power of maintenance and the power of advancement.

9.2.1 Power of Maintenance

The power of maintenance is designed to address the immediate welfare needs of a specific class of beneficiary: minors. A minor is a person under the age of 18. The core purpose of this power is to allow trustees to use the income generated by the trust fund for the "maintenance, education, or benefit" of a beneficiary who is still a child. This ensures that a young beneficiary can be supported from the trust during their childhood, rather than having to wait until they reach the age of majority to receive any benefit.

The statutory framework for this power is primarily found in *s.31* of the *Trustee Act 1925*. Its operation involves several key conditions and considerations:

1. **The Source of Funds: Trust Income**

   The power of maintenance applies only to the income of the trust. This includes money generated from investments, such as dividends from shares or rent from property. It does not permit the use of the trust's capital. The distinction between income and capital is fundamental here.

2. **The Beneficiary: A Minor with a Contingent Interest**

   The power is most relevant for a minor who has a future, but not yet vested, interest in the trust. For example, a trust might be for "my son, Andrew, provided he attains the age of 25." Until Andrew turns 25, his interest is contingent. Section 31 allows the trustees to use the income for his upkeep while he is a minor, even though he may never fulfill the contingency and inherit the capital.

3. **The Trustees' Discretion**

   The power is discretionary. The trustees are not obliged to use the income for maintenance. They must actively consider whether to exercise the power. In making this decision, they should take into account a number of factors, including:

- The age and needs of the minor.
- The availability of other sources of income for the minor's support (for example, if the child's parents are wealthy and already providing full support, the trustees might decide to accumulate the income).
- The overall size of the trust fund and the interests of other beneficiaries.

4. The Statutory Direction

Section 31 provides that the trustees shall pay all the accumulated income for the maintenance of the minor if:

- The trust instrument does not contain a direction to the contrary, and
- The minor's interest is vested (i.e., they have an absolute right to it, even if it is to be received in the future), or
- The trust instrument expressly directs the income to be used for maintenance.

However, even in these cases, the trustees retain a discretion to withhold income if they believe it is not needed for the minor's maintenance.

5. Accumulation of Surplus Income

If the trustees do not use all the available income for maintenance in a given year, they must "accumulate" the surplus. This means they invest it, and the resulting income from those investments becomes capital of the trust, ultimately for the benefit of the person who will eventually become entitled to it.

Practical Example of Maintenance:

Consider a trust established by a grandmother for her grandson, Ben, aged 10. The trust generates £10,000 per year in income. Ben's parents are of modest means and struggle with school fees.

- The trustees have the power to use some or all of the £10,000 annual income to pay for Ben's school fees, living expenses, and music lessons. This would be for his "maintenance, education, or benefit."

- They would consider his needs, his parents' financial situation, and the long-term size of the trust.
- If they decide to pay £8,000 per year towards his school fees, the remaining £2,000 must be accumulated, added to the trust capital, and invested.
- If Ben's parents were wealthy and provided for all his needs, the trustees could legitimately decide to accumulate the entire £10,000 of income each year for his future benefit.

9.2.2 Power of Advancement

If the power of maintenance is about providing for the day to day needs of a minor, the power of advancement is about providing a significant financial boost from the capital of the trust to a beneficiary at an earlier stage in their life. It allows trustees to make premature payments of capital for the long term "advancement or benefit" of a beneficiary.

The statutory power is found in *s.32* of the *Trustee Act 1925*. Its conditions are more specific and restrictive than those for maintenance.

1. **The Source of Funds: Trust Capital**

   This power authorises the use of the trust's capital. This is a more profound intervention than using income, as it directly reduces the fund available for other beneficiaries in the future.

2. **The Quantum: The One-Half Limit**

   A crucial limitation is that trustees cannot advance more than one half of the presumptive or vested share of the beneficiary in question. This is a protective measure. It ensures that even if the advanced money is lost, a substantial portion of the beneficiary's entitlement remains within the protected environment of the trust.

   For example, if a beneficiary, Chloe, is absolutely entitled to £200,000 from the trust fund upon reaching the age of 30, the trustees can advance up to £100,000 (one half of her share) to her at an earlier date.

3. The Purpose: "Advancement or Benefit"

The phrases "advancement" and "benefit" have been given a very broad interpretation by the courts. "Advancement" traditionally referred to establishing a beneficiary in life, such as by:

- Purchasing a house or business premises.
- Setting them up in a profession or trade (e.g., buying a partnership, funding medical school).
- Paying for a substantial educational course.

The concept of "benefit" is even wider. In the landmark case of ***Pilkington v IRC*** [1964] AC 612, the House of Lords confirmed that "benefit" is not limited to financial or material benefit. It can include social, moral, or even spiritual benefit. The case involved a proposal to advance funds to create a new trust for a minor beneficiary to save tax. The court held this was a valid "benefit" because it preserved the value of the inheritance from erosion by taxation.

Other examples of "benefit" could include:

- Paying for medical treatment not available on the NHS.
- Paying off significant, burdensome debts.
- Providing financial support during a personal crisis.

4. The Trustees' Discretion and Considerations

As with maintenance, the power is discretionary. The trustees must carefully and impartially consider the request for an advancement. Key considerations include:

- The likelihood of the beneficiary actually receiving their full share in the future (is their interest contingent on an event that may not happen?).
- The purpose of the advancement and whether it genuinely constitutes a "benefit."
- The effect of the advancement on other beneficiaries. For instance, if the advancement is made to the life tenant, it will directly reduce the capital for the remainderman.

- The age and maturity of the beneficiary. An advancement to an 18 year old might be riskier than one to a 35 year old.

Practical Example of Advancement:

David is a beneficiary under his grandfather's will. He is entitled to a one third share of a £600,000 trust fund when he turns 30. He is currently 25.

- David wishes to buy his first flat, which requires a £75,000 deposit.
- His presumptive share is £200,000 (one third of £600,000).
- The maximum advancement is £100,000 (one half of his share).
- The trustees consider his request. The purpose (buying a home) is a classic example of "advancement."
- They decide to advance £75,000 to him for the deposit.
- This £75,000 is now treated as having been paid on account of his final share. When he turns 30, he will receive the remaining £125,000 of his entitlement (minus any further advancements).

It is vital to note that many modern trust deeds contain express powers of advancement that are wider than the statutory power. They may, for example, allow for the advancement of the whole of a beneficiary's share, not just one half. The trustees must always look to the trust instrument first to determine the scope of their powers.

The powers of maintenance and advancement are essential tools that allow trustees to administer a trust in a humane, responsive, and effective manner. They bridge the gap between the rigid structure of the trust and the fluid, unpredictable needs of human life. While the power of maintenance focuses on the immediate support of minors from income, the power of advancement enables strategic, long-term support for beneficiaries of any age from capital. In both cases, the trustees' role is to exercise their judgment wisely, balancing the immediate needs of one beneficiary against the long-term interests of all.

9.3 Liability for Breach of Trust

The role of a trustee is one of immense responsibility, and the law imposes serious consequences for failing to meet the required standards. A breach of trust is the legal term for any failure by a trustee to adhere to their duties or to properly exercise their powers. It is the mechanism through which beneficiaries can hold trustees accountable and seek to recover losses to the trust fund. Understanding what constitutes a breach, how liability is calculated, and what defences are available is crucial for both trustees and the beneficiaries they serve.

9.3.1 What Constitutes a Breach?

A breach of trust is not limited to acts of deliberate fraud or dishonesty. It encompasses any deviation from the trustee's duties, whether intentional or negligent. The breach can manifest in three primary ways:

An Act: This involves a trustee taking positive action that is outside their authority or in conflict with their duties. A clear example is making an investment that is expressly forbidden by the trust deed. Another common example is a trustee engaging in self-dealing, such as selling trust property to themselves or to a company they control, which is a breach of the fundamental duty of loyalty. Even if the trustee believes the investment is wise or the sale is at a fair price, the unauthorized nature of the act itself constitutes the breach.

1. **An omission**: Liability can also arise from a failure to act. Trustees have a duty to be proactive in their management of the trust. A passive trustee can be just as liable as an actively malfeasant one. The most significant omission is the failure to invest the trust funds. Leaving a large cash balance uninvested in a low interest account for a prolonged period, thereby causing the trust to miss out on potential growth and lose value to inflation, is a classic breach of duty. Similarly, failing to properly insure trust property or to collect rent from a trust owned property are omissions that can lead to liability if a loss occurs.
2. **A misapplication of trust property**: This occurs when a trustee distributes the trust assets incorrectly. This includes paying the wrong person, for instance, paying a beneficiary who is only entitled to receive funds after a certain condition is met before that condition has been satisfied. It also includes overpaying a beneficiary, thereby

depleting the fund for others. For example, if a trustee has a power to advance capital for a beneficiary's "benefit" and uses it to pay off the beneficiary's gambling debts, a court may later rule that this was not a proper "benefit," making the payment a misapplication and a breach of trust.

9.3.2 The Measure of Liability: Equitable Compensation

When a breach of trust has been established, the primary goal of the court is not to punish the trustee but to make the trust fund whole again. The remedy is equitable compensation, which is fundamentally different from common law damages.

The purpose of equitable compensation is to restore the trust property that has been lost. The focus is on the beneficiary's proprietary interest in the trust fund. The question the court asks is: "What is the value of the asset that was lost to the trust due to the breach?"

Comparison to Common Law Damages

Common law damages are designed to compensate a claimant for a loss suffered by putting them in the position they would have been in had the tort or breach of contract not occurred. This can include consequential losses and can be forward looking. Equitable compensation, by contrast, is backward looking and restitutionary. It is concerned with replacing what was taken from the trust.

The leading case of ***Target Holdings v Redferns*** [1996] AC 421 is essential to understanding this principle. In that case, a firm of solicitors (Redferns) breached their trust by releasing mortgage funds before the security was properly in place. The property market later collapsed, and the lender (Target) suffered a loss. The House of Lords held that the purpose of equitable compensation was to restore the trust fund.

However, they also acknowledged that one must consider the context. The loss had to be caused by the breach. In this instance, even if the correct procedure had been followed, the same loss would likely have occurred due to the market crash. This case highlights that the calculation is not always straightforward, but the core principle remains: compensation is measured by the loss to the trust estate resulting from the trustee's misconduct. The trustee must personally make good any loss, meaning they are required to pay the missing funds or the value of the lost asset back into the trust from their own pocket.

9.3.3 Protection of Trustees

Recognizing the onerous nature of the role, the law provides several avenues through which a trustee may be excused from liability, either wholly or in part.

1. **Exemption clauses**: It is very common for modern trust instruments to include a clause that seeks to exempt trustees from liability for breach of trust. These clauses are strictly construed by the courts against the trustee. They will typically protect a trustee for errors of judgment or negligence. However, no clause can protect a trustee from liability for acts done dishonestly or in bad faith. The phrases "wilful default" or "wilful misconduct" are often used as the threshold; anything involving a deliberate or reckless breach of duty will not be covered by an exemption clause.

2. **Relief by the court**: *Section 61* of the *Trustee Act 1925* gives the court a valuable discretion to pardon a trustee who has breached their trust. The court may relieve the trustee, either wholly or partly, from personal liability if it believes that the trustee "has acted honestly and reasonably, and ought fairly to be excused" for the breach. This is a three-part test:

    - **Honestly**: The trustee must have acted in good faith, without any element of fraud or deceit.
    - **Reasonably**: The trustee's conduct, even if mistaken, must have been that of a reasonable person in those circumstances. Did they take advice? Did they hold meetings? Did they consider the beneficiaries' interests?
    - **Ought fairly to be excused**: This is an overarching requirement of fairness. The court will look at all the circumstances, including the consequences of the breach for the beneficiaries.

    For example, a lay trustee who relies in good faith on the flawed advice of a seemingly competent solicitor might well be granted relief under *s.61*.

3. **Beneficiary consent or acquiescence**: A beneficiary who is of full age and mental capacity, and who has full knowledge of all the material facts, cannot later sue a trustee for a breach of trust to which they consented. This is the principle of "*volenti non fit injuria*" (to one who is willing, no wrong is done). Similarly, if a beneficiary becomes aware of a breach and fails to object for a significant period (acquiescence), they may be barred from bringing a claim later. The key here is that the consent or acquiescence must be fully informed.
4. **Limitation periods**: The *Limitation Act 1980* provides a degree of finality for trustees. Generally, an action for breach of trust must be brought within six years from the date on which the breach occurred. If the breach relates to a fraud or the recovery of trust property from the trustee, the time limit may be different. This limitation period prevents trustees from facing claims over their conduct from the distant past, providing a clear cutoff point for their potential liability.

In summary, the law of breach of trust creates a powerful system of accountability for trustees, centered on the remedy of equitable compensation to make the trust fund whole. However, this is balanced by a series of pragmatic defences that protect well intentioned trustees from liability for honest mistakes, provided they have acted reasonably and in accordance with the law or the informed wishes of the beneficiaries. For any trustee, the best strategy is always meticulous record keeping, seeking professional advice when needed, and transparent communication with beneficiaries.

9.4 Conclusion

The role of a trustee is one of great responsibility, governed by a detailed framework of duties and powers. The statutory duty of care codifies the standard of conduct, while the *Trustee Act 2000* provides a modern investment regime. Discretionary powers like maintenance and advancement provide necessary flexibility. However, a failure to adhere to these standards constitutes a breach of trust, for which a trustee can be personally liable to restore the trust fund, subject to a number of potential defences.

10

THIRD PARTY LIABILITY AND EQUITABLE REMEDIES

The previous chapters have focused primarily on the rights of beneficiaries against trustees and the duties owed by trustees to beneficiaries. However, the integrity of the trust as an institution depends crucially on the law's ability to provide remedies when trust property leaves the hands of the rightful trustee and finds its way into the hands of third parties. If a stranger to the trust could receive misappropriated trust property with impunity, the beneficiary's equitable proprietary interest would be a weak form of protection indeed.

This chapter explores the powerful arsenal of remedies that equity provides to protect beneficiaries when trust property has been wrongfully dissipated. We will examine the circumstances in which third parties, who are not themselves trustees, can be held personally liable for their involvement in a breach of trust. We will then delve into the proprietary process of tracing, which allows beneficiaries to follow and reclaim their property through its various transformations.

Finally, we will analyse the remedies that follow a successful trace and the crucial defence available to an innocent third party. Understanding these principles is essential for any solicitor seeking to recover assets for wronged beneficiaries or defending third parties against such claims.

10.1 Liability of Strangers to the Trust

A "stranger" to the trust is simply any person who is not a trustee. However, a stranger who becomes involved in the misapplication of trust property may incur personal liability, even though they never formally accepted the office of trustee. This liability falls into two main categories: recipient liability and accessory liability.

10.1.1 Recipient Liability (Knowing Receipt)

Recipient liability, now commonly referred to as liability for "knowing receipt," arises when a person receives trust property for their own benefit, but that receipt is inconsistent with the terms of the trust. The recipient can be held personally liable to account for the value of the property received.

The Nature of the Claim

This is a claim based on the receipt of property itself. The claimant must establish three core elements:

1. The disposal of the property in breach of fiduciary duty.
2. The receipt of the property by the defendant, for their own benefit.
3. That the defendant's receipt was unconscionable in the circumstances.

Receipt of Trust Property for Personal Benefit

The defendant must have received property which, in equity, belonged to the claimant. The receipt must be for the defendant's own personal benefit, not merely as an agent or conduit who immediately passes it on to another. For example, a bank that receives funds into a customer's account receives them for the benefit of the customer, not for its own benefit. However, if it uses the funds to reduce the customer's overdraft, it may be receiving for its own benefit.

The Unconscionability Test

The modern test for the mental element required for knowing receipt was established by the Court of Appeal in ***Bank of Credit and Commerce International (Overseas) Ltd v***

Akindele [2000] EWCA 502. The court moved away from older, complicated classifications of "knowledge" and adopted a single test of unconscionability.

The question is: was it unconscionable for the defendant to retain the benefit of the property received? This is a holistic, fact specific inquiry. All the circumstances are relevant, including the nature of the defendant, the nature of the property, the amount paid, the relationship between the parties, and the defendant's reasons for participating.

In the case of ***BCCI v Akindele***, BCCI, a bank, was involved in a fraudulent scheme to inflate its apparent financial health. It entered into a sham loan agreement with Chief Akindele, an experienced Nigerian businessman. He paid $10 million and, within months, received back $16.7 million. When BCCI subsequently collapsed, its liquidators sued Akindele to recover the profit, arguing he was liable for knowing receipt of money paid in breach of fiduciary duty.

The Court of Appeal held that the test was whether the defendant's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt. On the facts, while Akindele may have been suspicious, his knowledge did not reach the level of making it unconscionable for him to retain the funds. The transaction, on its face, appeared to be a legitimate commercial investment with a high return.

Practical Implications

The ***Akindele*** test provides greater certainty and is generally considered to be more defendant friendly than the previous tests. It focuses on the defendant's conscience, making it difficult for a professional person or a company to plead ignorance where the circumstances are obviously suspicious. However, mere negligence or foolishness is unlikely to be sufficient; there must be a degree of moral reprehensibility.

10.1.2 Accessory Liability (Dishonest Assistance)

Accessory liability, known as liability for "dishonest assistance," arises when a person dishonestly assists in a breach of trust or fiduciary duty, even if they never receive any trust property for their own benefit. The assister is held personally liable to the beneficiary for the losses suffered.

The Nature of the Claim

This is not a proprietary claim; it is a personal claim for compensation. The claimant must establish:

1. A breach of trust or fiduciary duty.
2. Assistance by the defendant in that breach.
3. Dishonesty on the part of the defendant.

Assistance in a Breach of Trust

The defendant must have provided some form of help or facilitation that furthered the breach. This can be active participation (e.g., transferring funds, forging documents) or passive facilitation (e.g., providing a bank account for the receipt of stolen funds). There must be a causal connection between the assistance and the loss.

The Test for Dishonesty

The modern test for dishonesty was clarified by the House of Lords in ***Twinsectra Ltd v Yardley*** [2002] 2 AC 164 and subsequently refined by the Privy Council in ***Barlow Clowes International Ltd v Eurotrust International Ltd*** [2005] UKPC 37.

The test is a hybrid objective/subjective test:

1. **Objective**: What conduct would a reasonable person consider to be dishonest according to the ordinary standards of reasonable and honest people?
2. **Subjective**: Did the defendant themselves realize that their conduct was dishonest by those standards?

It is not necessary for the defendant to have reflected on what those standards were. If a reasonable person would see the act as dishonest, and the defendant's knowledge of the facts makes it so, the defendant will be deemed dishonest. A defendant cannot escape liability by setting their own personal, low standards of honesty.

In ***Twinsectra Ltd v Yardley***, money was loaned to Mr. Yardley for the specific purpose of buying property, creating a ***Quistclose*** trust. The solicitor, Mr. Leach, received the money and paid it out to Yardley without ensuring the purpose was adhered to. Yardley used the money for other purposes and defaulted.

The House of Lords held that Mr. Leach was liable for dishonest assistance. He knew the money was subject to a purpose based trust, yet he released it in a manner that allowed that purpose to be thwarted. His actions, in the context of his knowledge as a solicitor, were dishonest by the standards of ordinary honest people.

Distinction from Knowing Receipt

It is crucial to distinguish the two heads of liability. Knowing receipt is about the unconscionable receipt and retention of property. Dishonest assistance is about the dishonest participation in a breach, regardless of whether one benefits from it. A bank clerk who knowingly processes a fraudulent transfer for a customer may be a dishonest assistant. The customer who receives the funds may be liable for knowing receipt.

10.2 Proprietary Remedies and Tracing

The misapplication of trust property presents a critical challenge to the integrity of the trust institution. While personal claims against trustees or third parties provide one avenue of redress, they are contingent upon the defendant's solvency. The beneficiary's most potent weapon in such scenarios is the proprietary claim. This form of claim asserts that the beneficiary retains an equitable proprietary interest in the misapplied assets themselves, or in assets that have replaced them. This interest, being proprietary in nature, grants the beneficiary priority over the defendant's unsecured creditors in an insolvency, an advantage of profound practical significance.

Tracing is the conceptual process that underpins the proprietary claim. It is not, in itself, a remedy. Rather, it is the forensic methodology by which a claimant demonstrates the continued existence of their proprietary interest through a series of substitutions and transformations. Equity, with its characteristic flexibility and focus on conscience, has developed a sophisticated set of tracing rules that allow a beneficiary to follow their value through complex transactions and into mixed funds. This section provides a comprehensive analysis of the nature of proprietary claims, the detailed rules of tracing both at common law and in equity, and the application of these rules to the most challenging scenarios involving mixed funds.

10.2.1 The Nature of Proprietary Claims

A proprietary claim is a legal assertion that a specific asset, currently held by another, in whole or in part belongs beneficially to the claimant. The claim is "proprietary" because it relates to rights *in rem*, rights in a specific piece of property, as opposed to rights *in personam*, which are personal rights against a specific individual. The theoretical foundation of the proprietary claim in a trust context is that the beneficiary's equitable interest, which attached to the original trust property, is capable of shifting to any substitute asset acquired with the proceeds of the original property. This is predicated on the principle that the trustee, or any subsequent holder who is not a bona fide purchaser, cannot, by their own wrongful act, alter the beneficial ownership of the property.

The Critical Advantage: Priority in Insolvency

The paramount practical importance of a proprietary claim lies in its consequence for the defendant's insolvency. If a claimant successfully establishes a proprietary claim over a specific asset in the defendant's possession, that asset is effectively ring fenced from the general pool of assets available to the defendant's unsecured creditors. The claimant is entitled to have that asset returned, or its value paid in full, before the unsecured creditors receive any distribution. In contrast, a successful personal claim merely places the claimant in the queue as an unsecured creditor for the amount of the judgment, often resulting in a recovery of only a small fraction of the loss. This distinction makes the characterization of a claim as proprietary or personal a matter of utmost strategic importance in commercial litigation and recovery actions.

The Link to Tracing

The proprietary claim is dependent upon the successful process of tracing. A claimant cannot simply assert that they own an asset in the defendant's hands; they must demonstrate the transactional pathway that connects their original property to the current asset. Tracing provides the evidence that the defendant's asset is, in substance, the product or representative of the claimant's original property. Without the ability to trace, the proprietary claim cannot be sustained.

10.2.2 Tracing in Equity: The Process of Identifying Trust Property

Tracing is the process of identifying a new asset as the substitute for the old. Equity's rules for tracing are notably more generous and flexible than those at common law, reflecting equity's mission to pursue assets in conscience.

The Requirement of a Fiduciary Relationship

The traditional gateway for invoking the equitable tracing rules is the existence of a fiduciary relationship. The longstanding authority for this requirement is ***Re Diplock*** [1948] Ch 465, where the Court of Appeal held that the claimants, the next of kin of a testator, could not trace in equity because the personal representatives who had mistakenly paid the money to charities were not, in the relevant sense, fiduciaries in relation to the next of kin.

This requirement is, however, often easily satisfied. The relationship between trustee and beneficiary is itself fiduciary. Furthermore, the courts have been willing to find a fiduciary relationship in a wide range of circumstances, and it is now often considered a minimal hurdle. In many cases of misuse of funds, the wrongdoer will be deemed to have assumed fiduciary duties, or the very fact of the misapplication will be sufficient to trigger the equitable tracing rules to prevent unjust enrichment. The modern trend is to downplay the technical requirement of a pre-existing fiduciary relationship and focus instead on the existence of an equitable proprietary base, which a trust, by its nature, provides.

Tracing into Unmixed and Substituted Assets

The fundamental principle of tracing, both at law and in equity, is that a claimant can follow their property into whatever form it takes. If a trustee sells a trust shareholding and uses the proceeds to purchase a vintage car, the beneficiaries can trace from the shares, to the money, to the car. Their equitable interest attaches to the car.

The landmark case of ***Foskett v McKeown*** [2001] 1 AC 102 is the definitive modern authority on the nature of the proprietary claim following a trace. The facts are now familiar: trust money was used to pay two of five premiums on a life insurance policy. The trustee died, and the policy paid out. The beneficiaries claimed a share of the death benefit.

The House of Lords, in a seminal judgment, upheld the claim. The key intellectual contribution came from *Lord Millett*, who drew a clear distinction between tracing and claiming. He explained that tracing is a process of identifying assets; claiming is the assertion of a right to the asset traced.

The claimants in ***Foskett*** were not merely claiming a charge for the amount of the premiums paid. They were asserting a beneficial proprietary interest in the insurance policy itself, and consequently in its product, the death benefit. Because their money had contributed to the acquisition of this asset, they were entitled to a proportionate share of the entire asset. *Lord Millett* famously stated:

"The simplest case is where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset... The beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments, whether simultaneously or sequentially, out of the different funds to acquire a single asset."

This judgment affirms that the tracing process allows the beneficiary to "own the product" of their value, not just a right to be repaid.

10.2.3 Tracing into Mixed Funds

The most complex and practically important tracing rules govern situations where the claimant's money has been mixed with other money, typically that of the wrongdoer, in a bank account. Equity has developed a series of precise rules and presumptions to deal with this scenario.

The Primary Presumptions: *Re Hallett's Estate* and *Re Oatway*

The rules for tracing through a mixed fund are based on fictions regarding the intention of the defaulting trustee. These fictions are consistently applied against the wrongdoer to protect the innocent beneficiary.

1. **The Rule in *Re Hallett's Estate* [1880] 13 Ch D 696**

   This is the first and most important presumption. When a trustee mixes trust money with their own in a single account and then makes withdrawals for their own purposes, the law presumes that the trustee was spending their own money first, intending to preserve the trust money. This presumption operates to the great benefit of the trust, as it preserves the trust's claim against the remaining fund for as long as possible.

   Example: A trustee pays £10,000 of trust money into an account containing £5,000 of their own money. The balance is £15,000. The trustee then withdraws £8,000 to spend on a holiday. The ***Re Hallett*** presumption is that the trustee spent £5,000 of their own money and £3,000 of the trust money. This leaves £7,000 of trust money and £0 of the trustee's money in the account. The trust thus has a claim over the entire remaining £7,000.

2. **The Rule in *Re Oatway* [1903] 2 Ch 356**

   This rule complements ***Re Hallett*** and deals with the scenario where the trustee uses the mixed fund to purchase an asset. The presumption is that the trustee intended to use their own money for the purchase, preserving the trust money in the account. However, if the trustee then dissipates the remaining cash, this would unjustly enrich the trustee at the expense of the trust. Therefore, the rule in ***Re Oatway*** provides that the trust has a first charge over the purchased asset to secure the recovery of the trust money.

   Example: Using the same initial mix, £10,000 trust plus £5,000 own equals £15,000. The trustee uses £12,000 from the account to buy shares. He then spends the remaining £3,000 on a holiday. The ***Re Oatway*** rule allows the trust to assert a charge over the shares for £10,000, even though the cash in the account has been dissipated. The presumption that the trustee spent his own money first is rebutted to prevent him from profiting from his wrong.

The Lowest Intermediate Balance Rule: *Roscoe v Winder [1915] 1 Ch 62*

This crucial rule limits the reach of the claimant's tracing claim into a mixed fund. It states that a claimant cannot claim against subsequent payments made into the account by the wrongdoer. The trust's claim is limited to the lowest balance the account reached between the time of the mixing and the time of the claim.

Example:

Day 1: Trust money £10,000 is mixed with trustee's £5,000. Balance: £15,000.

Day 2: Trustee withdraws £14,000 for personal use. Balance: £1,000. This is the lowest intermediate balance.

Day 3: Trustee pays in £20,000 of their own legitimate earnings. Balance: £21,000.

Day 4: Trustee withdraws £5,000. Balance: £16,000.

The trust's tracing claim is limited to £1,000, the lowest balance the account held after the trust money was mixed in. The subsequent payment of £20,000 is presumed to be the trustee's own money, and the trust has no claim to it. The trust can therefore trace into the final balance of £16,000, but only to the value of £1,000.

The Rejection of *Clayton's Case* in Modern Contexts

The common law rule in ***Devaynes v Noble, Clayton's Case*** [1816] 1 Mer 572 applies the "first in, first out" principle to payments from a running account. For example, if A, B, and C pay money into an account, and money is withdrawn, the first withdrawal is attributed to the first payment in.

The courts have consistently rejected the application of ***Clayton's Case*** in the context of tracing trust money through a mixed fund. The rule is considered arbitrary and capable of producing grossly unfair results, as the allocation of loss depends entirely on the chronological order of withdrawals, which is often a matter of chance.

In ***Barlow Clowes International Ltd v Vaughan*** [1992] 4 All ER 22, the Court of Appeal was faced with the collapse of an investment scheme where the funds of many thousands of investors had been pooled. Applying ***Clayton's Case*** would have meant that early investors would recover nothing, as their funds were deemed "withdrawn" first by the company's dissipation, while later investors would recover in full. The court rejected this approach, preferring instead to distribute the remaining funds *pari passu*, rateably, among all the investors whose money was in the pool at the relevant time. This "rolling charge" or "proportionate share" approach treats each withdrawal from the mixed fund as being made rateably from all the contributions to the fund.

10.2.4 Other Major Forms of Tracing

The principles established above form the core of equitable tracing. However, the doctrine has been adapted and applied to a variety of other specific contexts.

Tracing through Electronic Funds and Modern Payment Systems

The principles of tracing apply with equal force to electronic bank transfers and digital payment systems. The process involves following the value from one bank account to another. The same rules for mixed funds apply when funds are transferred into an account that already contains other money. The key is identifying the value, not the specific physical currency.

Tracing into and through Dissipated Funds: The "Swollen Assets" Theory

A difficult problem arises when trust money is paid into an overdrawn or empty account. Has the trust money simply disappeared, extinguishing the proprietary claim? The orthodox view is that if the money is immediately dissipated, there is nothing left to trace into. However, a more nuanced view, sometimes called the "swollen assets" theory, suggests that if the trust money is used to pay down a debt, the trustee's estate has been "swollen" by the amount of the debt reduction, and the trust may be able to assert a charge over the trustee's general assets to that value. This remains a contentious area, but it was given some support in ***Foskett v McKeown***, where *Lord Millett* indicated that the use of trust money to pay a debt could be seen as preserving the debtor's other assets from being used to pay that debt, thus benefiting the estate as a whole.

Tracing into Cryptocurrency and Digital Assets

Tracing through blockchain based cryptocurrencies like Bitcoin presents new challenges and opportunities. The blockchain provides a public, immutable ledger of all transactions, making the process of identification, tracing, potentially more straightforward than with traditional money. A claimant can, in theory, follow a specific Bitcoin from one digital wallet to another. The major complication arises with "mixing" services designed to obfuscate the trail, which can be analogized to a mixed fund. The equitable rules for tracing through mixed funds are likely to be applied by courts to determine the proprietary interests in mixed cryptocurrency holdings.

Backwards Tracing

The orthodox view of tracing is that it is a forward looking process: from asset A, to asset B, to asset C. "Backwards tracing" is the concept that a claimant may be able to trace into an asset acquired before the trust money was received, if the acquisition was made in anticipation of receiving the trust money to pay for it. For example, if a trustee buys an asset on credit, and then uses trust money to pay off the loan, can the beneficiaries trace into the asset?

English law has cautiously recognized the possibility of backwards tracing. In ***Relfo Ltd v Varsani*** [2014] EWCA Civ 360, the Court of Appeal suggested that if there is a "coordinated scheme" or a "direct causal connection" between the incurring of a debt and the subsequent use of trust money to discharge it, tracing may be permitted..

The law of tracing represents one of equity's most ingenious and powerful creations. It gives real, substantive force to the beneficiary's equitable proprietary interest by allowing that interest to persist through a series of transformations and mixtures. The rules, from the straightforward following of unmixed assets to the complex presumptions governing mixed funds, are designed to protect the innocent beneficiary and hold the wrongdoer to account.

The modern application of these principles to new forms of property like cryptocurrency demonstrates their enduring vitality. For the practitioner, a deep understanding of tracing is not merely an academic exercise; it is an essential tool for locating and recovering assets in a world where value is constantly moving and changing form. The ability to successfully trace is often the difference between a full recovery for a client and a worthless judgment against an insolvent defendant.

10.3 Remedies Following a Successful Trace

The process of tracing is ultimately a means to an end. Successfully identifying trust property through its various transformations is of little value without a corresponding remedy that allows the beneficiary to recover their property or its value. Once a beneficiary has successfully traced their property into a specific asset or fund, the court has at its disposal a range of proprietary remedies.

These remedies are powerful because they give the beneficiary rights in the property itself, which are enforceable against the holder and, crucially, in the event of that holder's insolvency, against their general creditors. The choice of remedy depends on the circumstances and the nature of the asset into which the property has been traced.

Constructive Trust

The court may impose a constructive trust over the identified asset. This is the most potent proprietary remedy available. A declaration that the defendant holds the asset on constructive trust for the claimant effectively makes the claimant the beneficial owner of that asset in equity. The defendant becomes a mere trustee, obligated to hold and manage the asset for the claimant's benefit.

The profound consequence of this remedy is that the claimant gains the full benefit of ownership. This includes any increase in the value of the asset. The seminal case of ***Foskett v McKeown*** [2001] 1 AC 102 perfectly illustrates this principle. Trust money was used to pay some of the premiums for a life insurance policy. When the policy paid out on death, the beneficiaries were entitled to a proportionate share of the entire death benefit, not merely a return of the premiums paid with their money.

They were entitled to the fruits of their property. A constructive trust is typically the preferred remedy where the traced property remains in a discrete, identifiable form, such as shares or a bank balance, and where the claimant wishes to assert full beneficial ownership.

Equitable Lien

In some situations, imposing a constructive trust and granting full ownership to the claimant would be inappropriate or disproportionate. The alternative remedy is an equitable lien. This is not an ownership right but a security interest. It gives the claimant a right to have the specific asset sold and to be paid the amount of their claim from the proceeds, ahead of other unsecured creditors.

This remedy is particularly apt in two common scenarios. First, where the trust money has been used to acquire an asset that is already owned by the defendant, such as using stolen funds to pay off a mortgage on the defendant's house. The claimant may not want to own a share of the house, but they rightly want their money back. An equitable lien over the property secures that repayment.

Second, an equitable lien is useful where the value of the asset has fallen. A constructive trust would give the claimant a share of a depreciated asset, whereas a lien for the amount of the original input ensures they can recover the value of their initial contribution upon a sale.

Subrogation

Subrogation is a unique remedial tool that operates by placing the claimant into the legal shoes of another creditor. The term means "to substitute." This remedy is invoked when trust money is used to discharge a debt or security interest owed by the wrongdoer.

A classic example is where trust funds are misappropriated to pay off a mortgage on a property. The beneficiaries can be subrogated to the position of the original mortgagee whose loan was repaid. This means the beneficiaries can step into the mortgagee's shoes and assert a charge over the property for the amount of their money that was used to pay off the loan. They effectively "revive" the security that was discharged with their funds.

This gives them the priority and rights of a secured creditor over the property, which is a powerful position, especially if the property owner becomes insolvent. Subrogation is a highly flexible remedy designed to prevent the unjust enrichment of the defendant who would otherwise have had a debt cleared at the expense of the trust.

10.4 The Ultimate Defence: Bona Fide Purchaser for Value Without Notice

The powerful proprietary claims and remedies available to beneficiaries are not absolute. They meet their ultimate limit in the defence of the bona fide purchaser for value without notice. This defence is a cornerstone of property law, carefully balancing the demands of conscience against the need for commercial certainty. It provides that where an innocent purchaser acquires a legal estate in property without knowledge of a prior equitable interest, the purchaser's title will prevail, and the equitable interest will be extinguished.

Definition and Rationale

A bona fide purchaser for value without notice is a person who purchases a legal estate in property for valuable consideration, in good faith, and without notice of the claimant's pre-existing equitable interest. If all these elements are satisfied, the purchaser takes the property completely free from the beneficiary's claim. The policy behind this defence is fundamental to the security of transactions.

It allows a purchaser to rely on the title they see without having to fear hidden equitable claims that would render their ownership unstable. The law has decided that in this specific scenario, the interest of the innocent purchaser who has given value and acted properly outweighs the interest of the innocent beneficiary whose property was misappropriated.

The Elements of the Defence

For the defence to succeed, the defendant must rigorously prove each of its constituent parts:

1. **Purchaser of a legal estate**: The defendant must have acquired a legal estate in the property. This means they must have the full legal title, such as the freehold or a legal lease. A person who only acquires an equitable interest, such as a beneficiary under a trust, cannot use this defence against a prior equitable interest. It is a defence that protects the legal estate.

2. **For value**: The purchase must be for valuable consideration. This typically means money or money's worth, but can also include marriage consideration. The key is that

the purchaser must have given something of substance. A volunteer, such as someone who receives the property as a gift or through an inheritance, cannot avail themselves of this defence. They are not considered to have a sufficient claim to override a pre-existing equitable owner.

3. **In good faith** (*Bona fide*): The purchaser must have acted honestly throughout the transaction. Any element of fraud, collusion, or sharp practice will defeat the defence.

4. **Without notice**: This is often the most complex element. The purchaser must have no knowledge of the equitable interest at the time of the purchase. "Notice" is divided into three categories:

    - **Actual notice**: This is direct knowledge of the equitable interest. If the purchaser knew about the trust, the defence fails.
    - **Constructive notice**: This is knowledge that the purchaser would have discovered if they had made all the inquiries and inspections that a reasonable and prudent purchaser would have made. For example, if a reasonable purchaser would have inspected a property and discovered someone in occupation who might have an equitable claim, failure to make that inspection results in constructive notice of any rights that inquiry would have revealed.
    - **Imputed notice**: This is knowledge possessed by the purchaser's agent, such as their solicitor, which is deemed in law to be the knowledge of the purchaser themselves.

The case of ***Pilcher v Rawlins*** [1872] LR 7 Ch App 259 is the classic authority, where *James LJ* famously stated that the court will not "destroy the safety which arises from the possession of the legal estate" for a bona fide purchaser. This defence is the ultimate guarantee of marketability of title. It represents the critical point where equity's intervention stops to allow commerce to function with security.

For a claimant beneficiary, the successful invocation of this defence by a defendant is fatal to their proprietary claim, leaving them with only a personal claim against the trustee who misapplied the funds, which is of little value if that trustee is insolvent. Therefore, establishing this defence is the complete and final answer to a tracing claim.

10.5 Conclusion

This chapter has outlined the sophisticated and powerful mechanisms equity employs to protect beneficial interests against the world at large. The combination of personal claims against third parties (knowing receipt and dishonest assistance) and proprietary claims through the process of tracing provides a robust framework for asset recovery. These remedies ensure that a beneficiary's interest is not merely a right against a trustee, but a right in the property itself, which can be vindicated against all but the most innocent of purchasers.

For the solicitor, strategic thinking is paramount: should one pursue a personal claim against a deep pocketed but possibly innocent assistant, or a proprietary claim against specific, traceable assets? The answer depends on a careful analysis of the facts, the defendants, and the path the property has taken.

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