

*This essay was the original version of the essay constituting Chapter 7 of Equity & Trusts; it appeared in this form in the third edition (published in 2003). The current, shorter version was necessitated by the need to limit the size of Equity & Trusts when 200 pages of new material were added to the fourth edition published in 2005. Its purpose is to draw together some of the key themes in express trusts law.*

## ESSAY - THE NATURE OF EXPRESS TRUSTS

### 7.1 CONCLUSIONS ON THE NATURE OF EXPRESS TRUSTS

#### 7.1.1 Giving and time

Moffat suggests, with something of a metaphysical lilt, that 'a private trust is ... a gift projected on the plane of time'.<sup>1</sup> What is meant by this is that the trust constitutes a gift made by the settlor but it is not a gift which is perfected at one moment when possession of absolute title in that property passes to the beneficiary. Rather, an express trust operates over a period of time in transferring title from the settlor, via the stewardship of the trustee, to the beneficiaries of the arrangement. It should be pointed out that Moffat is not intending this remarkable expression to be a definition of the trust. Instead this writer is fixing on it precisely because it is such a powerful image.

At one level Moffat is undoubtedly correct and his reminder of the role of time here is very important. A trust is a stylised means of transferring title which has bound up in it the different roles of trustee and beneficiary. However, there are two aspects of the sentiment which would cause me to take issue with this statement as a definitive expression of the private trust. The first issue is with the term 'gift'. Trusts are often concerned with allocations of title in complex commercial situations. In such situations it would not be correct to say that commercial parties are making gifts (or outright transfers) of property in many of these situations. Rather, they are structuring the holding of title in property which is deployed for their common interaction (as considered in *Quistclose Investments v Rolls Razor*<sup>2</sup> and *Clough Mill v Martin*<sup>3</sup>). Alternatively, express trusts are often concerned with the allocation of property rights in circumstances in which the parties are unaware that they are creating trusts.<sup>4</sup> In any event, a trust is not a gift, properly so-called, precisely because an intention to make a gift will not be perfected by means of a trust.<sup>5</sup> What is true is that there is a general intention to pass title in property - which a lay person might well term a 'gift'.

The second complaint follows on from the first and takes issue with the suggestion that the express private trust operates on the basis of pre-meditated gift and not as a means of policing the conscience of the legal owner of property. As is clear from the leading speech of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington*<sup>6</sup> the trust is founded on the conscience of the legal owner of property. This statement has an awkward provenance. On the one hand it expresses the reason why, in principle, a trust would be enforced on a defendant. However, in many situations the trust arises as a result of a will drafted by a testator creating a trust, or out of a contract which provides that X shall hold identified property for Y until specified contingencies occur: the creation of a trust usually derives from some other action of the parties which the law of property recognises as vesting equitable title in set of claimants and merely legal title in other people as trustees. It is only in relation to breach of such obligations of property law norms or in situations in which the parties do not understand that a trust is the proper analysis of their interaction that an express trust could be said to *arise* on the basis of conscience as opposed to being merely *explicable ex post facto* as a control of conscience.

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1 Moffat, 1999, 92.

2 *Quistclose Investments Ltd v Rolls Razor Ltd (In Liquidation)* [1970] AC 567.

3 [1984] 3 All ER 982.

4 *Paul v Constance* [1977] 1 WLR 527.

5 *Milroy v Lord* (1862) 4 De GF & J 264.

6 [1996] AC 669.

### 7.1.2 The role of Equity as guardian of conscience

And yet, despite all of the above, Moffat is right to remind us of the element of time. Trusts extend equity's control of conscience over time. It also reminds us that there are more elemental forces at work in relation to equity and trusts – elemental forces connected to ground-breaking works of physics in relation to chaos theory. Now that we understand the world to operate on the basis of concepts like simplicity (the idea that complex phenomena often have very simple causes) and complicity (the idea that very simple phenomena may have very complex causes), it is possibly appropriate to expect that our social relationships will conform to similar patterns.<sup>7</sup>

So the law of trusts and equity more generally are required to reconcile parties in conflict from a wide range of causes including wills, commercial contracts, and family disputes. It is suggested that the single idea of 'conscience' will solve all of those various disputes. Evidently the notion of conscience employed will be required to be different in each one of those contexts – but it is not apparent how we decide on the appropriate form of conscience to apply to such cases in the abstract. This ideal of good conscience is possibly a useful way of describing the pattern which equity creates in resolving these disputes; but it is not a means by which the legal system ought to attempt to impose order on that chaos by shoe-horning different social problems into the same ill-fitting boots. As Dr Freud has told us, it is a human response to seek to impose order on chaos but that is occasionally a symptom of some neurosis founded on our frustration at the fact that the world will just not comply with our desire for order.<sup>8</sup> Instead we must, at times, accept that chaos is the way of things and permit our legal norms to reflect this.

### 7.1.3 Formality

The principal way in which the law of trusts seeks to impose order on chaos is by means of legal formalities. Most of the formalities relating to the creation and constitution of trusts are based on the 1677 Statute of Frauds which was concerned to prevent fraudulent claims by people asserting rights to property.<sup>9</sup> The main problem identified by this legislation was the lack of evidence as to which person owned which rights unless claimants were required to produce written evidence of their entitlement before their claim would even be entertained by the courts. This approach was the basis for formalities as to declaration of trust over land, conveyance of rights in land, dispositions of equitable interests and the proper creation of wills.

That thinking has also informed much of the caselaw in this area. The rules as to certainty of intention, of objects and of subject matter are all based on the courts' need to be able to understand the settlor's intentions and thus to control the trustees' actions. Similarly, the beneficiary principle was founded such that the courts would be able to enforce the trust through the claims brought before them by beneficiaries. Indeed, for all the squabbling among the judiciary as to the precise scope of the beneficiary principle,<sup>10</sup> the only area on which all of their lordships could agree was the foundation of the principle on the need for there to be some person who could bring the matter before the courts.

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<sup>7</sup> Cohen and Stewart, 1994.

<sup>8</sup> Freud, 1930.

<sup>9</sup> Griffiths, 2003.

<sup>10</sup> *Leahy v Attorney-General for New South Wales* [1959] AC 457; *Re Denley* [1969] 1 Ch 373; *Re Lipinski* [1976] Ch 235.

The cases making up the *Vandervell*<sup>11</sup> litigation together with *Oughtred*<sup>12</sup> and *Grey*<sup>13</sup> all demonstrate the way in which the law of trusts deals with innovative thinking to manipulate trusts law concepts. While the courts remain wedded to principles of certainty, the use of trusts law principle highlights the inherent flexibility in the core ideas. For each potential for tax liability, or for each argument that a trust might be invalid, there are a range of ways and means of avoiding those pitfalls. So, in relation to the void purpose trust, it is possible to validate a trust intended in truth for abstract purposes by making gifts for the benefit of identified individuals,<sup>14</sup> by passing control of capital,<sup>15</sup> by making a transfer to an unincorporated association as an accretion to its funds<sup>16</sup> and so forth. Similarly a disposition of an equitable interest can be avoided by transferring that interest together with the legal title, or by terminating the trust and declaring a new trust, or by passing that interest under a specifically enforceable contract, or by varying the terms of the trust.<sup>17</sup>

What is interesting is the strict adherence to formality and the spirit of the legislation in decisions by Viscount Simonds in *Leahy*<sup>18</sup> and in *Grey v IRC*,<sup>19</sup> when compared with more purposive approaches taken by other judges in later cases. What this illustrates is a movement away from perceiving the law of trusts as being something to do with the strict observance of age-old rules and a shift towards enabling citizens to make use of trusts law techniques to achieve socially-desirable goals. It would be wrong to try to think of the distinctions between these various cases as being capable of reconciliation one with another. The approach taken by Goff J in *Re Denley* and by Oliver J in *Re Lipinski* is simply different from that taken by Viscount Simonds in *Leahy*. Two different generations of judges had different attitudes to the role of the law in exactly the same way that two generations of ordinary people would have different tastes in music. Viscount Simonds is concerned to see observance of the law for the law's sake; the younger judges prefer to permit people to use trusts provided that they do not transgress certain mandatory rules about the possibility of some beneficiary being able to enforce the trust in court.

The law of trusts as it develops should be seen as a developing literature in exactly the same way that one would study developments in the novel, fashion or film. As time passes new ideas come to the fore and replace old ideas. Many of the core decisions in this subject were settled in the mid-19th century. Consider how many pivotal cases were decided in the reign of Queen Victoria between 1837 and 1901: *Milroy v Lord* (1862), *Saunders v Vautier* (1841), *Fletcher v Fletcher* (1844), *Knight v Knight* (1840); *M'Fadden v Jenkyns* (1842), and in relation to company law *Saloman v Saloman* (1897) which held that companies were separate legal persons and not trusts at all. That timing is no surprise in itself. During the Victorian era it is a commonplace to suggest that the commercial success of the British Empire in taking trade to the furthest corners of the globe had a profound effect on the opinions of the educated classes in England and Wales. As Norman Davies put it in his monumental history of *The Isles*,<sup>20</sup> during this period 'The centralised British Empire was still the largest economic unit on the world map, holding astronomic potential for further growth and development'. It would be churlish to suppose that the great developments in the formalisation of the express trust through certainties and perpetuities rules (which established the trust as a more useful commercial tool and which also identified the company as a distinct legal person better suited to raising capital for entrepreneurs) happened coincidentally during the same period as the British Empire was establishing itself as the world's leading economic power and as English law was establishing itself as the commercial world's lingua franca.

#### 7.1.4 Redistribution of wealth

The law of trusts and the development of equity are two very important means by which the law absorbs more general, social agreements as to the sort of morality to which family and commercial life ought to conform. With the movement into an avowedly free capitalist society in which ordinary citizens are more than mere serfs under a feudal system (and arguably beyond that into a globalised society in which citizens have enforceable human rights) the central point of trusts law has changed. The certainties of the family settlement which devolved title in property down the generations for the landed gentry have given way to rules on perpetuities which prefer the free flow of capital to patriarchal domination.

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11 [1967] 2 AC 291.

12 [1960] AC 206.

13 [1960] AC 1.

14 *Re Denley* [1969] 1 Ch 373.

15 *Re Lipinski* [1976] Ch 235.

16 *Re Recher's WT* [1972] Ch 526.

17 As discussed in chapter 5.

18 [1959] AC 457.

19 [1960] AC 1.

20 Davies, 1999, 642.

In the pre-Victorian era the trust had become an ever more important vehicle for the distribution of wealth between members of families on death or during life. In the late 20th century the trust became an increasingly important means of avoiding liability to tax by obfuscating the true ownership of property for tax purposes or for the purposes of insolvency law. The decisions in *Grey v IRC*<sup>21</sup> and possibly even that in *Leahy*<sup>22</sup> were caught in that gap between social change towards tax avoidance and so forth and a judicial reluctance to validate such arrangements through the agency of trusts law.

Moffat examines the interaction between inheritance tax, trusts and the distribution of wealth in the UK in detail.<sup>23</sup> The real difficulty in attempting to establish a picture of wealth distribution and the extent to which it is tied up in trusts is that express trusts are private and information is available only through the tax system. Similarly, it is not always possible to know whether trusts are created for tax avoidance, for the maintenance of property, for the use of a succession of individuals, or for the maintenance of particular individuals. What is clear is that, even given the rules on perpetuities, trusts do permit those sections of the population sufficiently well informed to organise their affairs both so as to minimise their liability to tax and so as to benefit future generations of their own relations.

### 7.1.5 Questions of technique

What the student should take away from the study of express trusts is an appreciation of the many pliable techniques which exist for the manipulation of trusts law techniques for a number of purposes. Those purposes fall into two general categories. First, as a socially useful means by which ordinary citizens and corporations can organise the terms of their communal use of property. In Part 8 *Welfare Uses of Trusts* we shall consider the ways in which trusts and derivatives of trusts techniques are used to organise charities, pension funds, co-operatives and even (in a very particular manner) NHS trusts. Similar techniques based on the stewardship of property by a trustee for the ultimate entitlement of beneficiaries also form an important part of commercial agreements as considered in outline in chapter 2 and in more detail in Part 7 *Commercial Uses of Trusts*.

Second, as a means of using trusts to elude or avoid problems of law. So, for example, the preceding discussion of the carrying on of dispositions of equitable interests in ways which avoid the provisions of s 53(1)(c) LPA have indicated the manner in which trusts lawyers are able to *structure* their clients' affairs to achieve the desired effect. The same holds true for situations in which the client is not seeking to avoid some legal rule but rather to achieve an identified, desired effect. Therefore, a commercial contract between two multi-national financial institutions dealing in financial derivatives or between two sole traders dealing in used cars can be secured by providing that payment is held on trust until both buyer and seller are satisfied that the contract has been properly performed. The same techniques will apply, with suitable adaptations, to both circumstances.

With the increasing tightening of the formalities relating to the creation of express trusts, the trust is becoming ever more similar to the contract. As will become apparent in Parts 4 to 6, even in relation to trusts implied by law there is a tendency for the courts to generate ever more rigid rules for the recognition of such trusts. As a result, much of the fluidity previously identified with the notion of 'conscience' has been lost. Indeed the rules of equity are becoming ever more reminiscent of the rules of the common law. The formalities necessary to create an express trusts are similar to the three stage test for the creation of a common law contract: offer/acceptance, consideration and intent to effect legal relations.

Equity ought to be about more than merely creating trusts by numbers. While the use of the express trust will become ever more institutionalised with its deployment in commercial contracts, will trusts and so forth, it should not be forgotten that this difficult concept of 'conscience' lies in the background. The question as to what constitutes good and bad conscience in different circumstances is a very real one not necessarily with reference to the *creation* of such trusts but certainly in relation to the *management* and *breach* of such arrangements. The available remedies and equitable responses to contravention of the trust will differ in desirability from context to context. Therefore, this book takes the unusual step of dividing its later discussion between uses of the trust in commercial cases and in welfare-related cases.

In short, equity and trusts have a potentially far broader application than is at present allowed. To achieve this expansion in the light of the passage of the Human Rights Act 1998 and in relation to the area of social and state welfare it will be necessary to create more sensitive concepts of good conscience and of social justice. The development of those principles will be a question of reading and applying the literature of equity and the literature of modern social theory to find the commonalities and dissonances between their shared use of English words like 'equity', 'justice' and 'efficiency'.

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21 [1960] AC 1.

22 *Leahy v Attorney-General for New South Wales* [1959] AC 457.

23 Moffat, 1999, 76 *et seq.*

## 7.1.6 Equitable estoppel and express trusts

One recurrent theme in the law relating to express trusts is the presence of equitable estoppel propping up situations in which express trusts are otherwise not available. These are contradictory currents, in truth. Equitable estoppel, in the form of proprietary estoppel, arises in situations in which the claimant has acted to his detriment in reliance upon an assurance made by the defendant.<sup>24</sup> The remedy supplied is at the discretion of the court. Typically it is such remedy as is necessary to achieve the 'minimum equity to do justice to the plaintiff'.<sup>25</sup> This may result in a remedy which varies between a right to absolute title in the property at issue<sup>26</sup> and a purely personal claim to money.<sup>27</sup> What is most significant is that the purpose of equitable estoppel is to reverse the detriment suffered by the plaintiff. The remedy is therefore not simply that necessary to achieve the 'minimum equity to do justice to the claimant' but more precisely to achieve that justice by compensating the detriment suffered by the claimant.<sup>28</sup> At one level it could be suggested that the estoppel is restitutionary in that it disgorges a benefit from the defendant; but that would be to ignore the fact that the focus is on the detriment suffered by the claimant and not the enrichment gained by the defendant – the two may not be the same in all cases.

It is one of the principle tenets of the law of express trusts that equity will not assist a volunteer.<sup>29</sup> From that proposition flows a number of other rules. First, equity will not complete an incompletely constituted trust.<sup>30</sup> Therefore, a disappointed person who considered themselves otherwise entitled to receive a gift cannot argue that the donor ought to be considered to have declared a trust over that property. That is unless the donor had done everything necessary for them to do to divest themselves of title in the property.<sup>31</sup> Second, no claimant will be entitled to assert title in property unless there has been a declaration of trust and until the trust has been constituted.<sup>32</sup> Third, flowing from the second, no claimant will be entitled to claim rights under a trust unless the formalities necessary for the declaration of the trust have been performed.<sup>33</sup>

In all of these situations the main tenet of trusts law is that it is the intention of the settlor which is enforced by the court. As we have seen, there are issues concerning the interaction between the intentions of the settlor and the rights of the beneficiaries to assert rights under *Saunders v Vautier*<sup>34</sup> to call for the trust property and terminate the trust. However, it is the donative intention of the settlor which is carried out. Cases like *Paul v Paul*<sup>35</sup> and *Re Ralli's WT*<sup>36</sup> indicate that the settlor is not able to unpack the trust once it has been properly constituted, unless he has reserved himself some express power to do so.

Where the trust is held to be invalid the claimant may be able to claim rights under proprietary estoppel on the following basis. Where the settlor has not simply expressed a general intention to create a trust at some time in the future but has also made some assurance to the claimant that she would be a beneficiary under that trust, then the claimant would argue that she acted to her detriment in reliance on that assurance. Clearly, it would be necessary for the claimant to demonstrate that she had in fact suffered some detriment in reliance on that assurance – as considered above the appropriate remedy would be dependent on the nature and extent of that detriment. Assuming the court considered that a proprietary remedy was appropriate, the beneficiary may be entitled to a substantially similar right under equitable estoppel to that which would have been available if the trust had been properly constituted. In effect, then, equitable estoppel provides for a discretionary, reactive remedy which counter-balances the rigid rules of certainty required by the law of express trusts. Estoppel therefore fills a gap left by the increasingly institutional law of trusts to provide for justice in individual situations.

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24 *Re Basham* [1986] 1 WLR 1498; *Yaxley v Gotts* [2000] 1 All ER 711.

25 *Crabb v Arun DC* [1976] Ch 179; *Yaxley v Gotts* [2000] 1 All ER 711.

26 *Pascoe v Turner* [1979] 2 All ER 945.

27 *Baker v Baker* [1993] 25 HLR 408.

28 *Lim v Ang* [1992] 1 WLR 113.

29 *Milroy v Lord* (1862) 4 De GF & J 264.

30 *Ibid.*

31 *Re Rose* [1952] Ch 499.

32 *Milroy v Lord* (1862) 4 De GF & J 264.

33 See perhaps *Grey v IRC* [1960] AC 1.

34 (1841) 4 Beav 115.

35 (1882) 20 Ch D 742.

36 [1964] 2 WLR 144.

The law of trusts has developed a range of doctrines which validate trusts even though these general principles have not been obeyed: for example constructive trusts, secret trusts, and the rule in *Strong v Bird*.<sup>37</sup> The doctrines of constructive trusts and secret trusts were developed to prevent unconscionable conduct and fraud. Their intention is distinct from that in estoppel. Estoppel prevents the claimant suffering detriment precisely as a result of the non-performance of some assurance given by the defendant, whereas the constructive and secret trusts doctrines protect the claimant against the defendant's unconscionable behaviour. There is clearly potential for overlap between these doctrines (as considered in *Yaxley v Gotts*).<sup>38</sup> The distinction, as considered in chapter 14 below, is that the constructive trust imposes a retrospective, institutional trust over property whereas the estoppel claim grants either personal or proprietary claims prospectively on a discretionary basis from the date of the court order. Similarly, express trusts are concerned narrowly with property rights over identified property<sup>39</sup> whereas estoppel is concerned more generally with the avoidance of detriment. Within the canon of equity, then, the doctrine of equitable estoppel is considerably more broadly based than the law relating to express trusts.

## 7.2 A FUTURE STRUCTURE OF THE LAW OF TRUSTS?

Thus far we have presented trusts as they are commonly understood by the law. However, in this writer's opinion there will come a time when it will be necessary for trusts to be divided in importantly different ways. As the trust becomes used for ever more complex purposes and purposes different from the conditions in which the underpinning rules of the law of trusts was created, it will be necessary to re-conceptualise the divisions. This issue is taken up in detail in chapter 36.

### 7.2.1 Established divisions

The most commonly understood division between forms of trusts is between express trusts, resulting trusts and constructive trusts. There is another category of trusts mentioned in the Law of Property Act 1925 being the 'implied trust'<sup>40</sup> – however, it is not at all clear what is meant by that term.<sup>41</sup> On reflection it will be acknowledged that there is one more category of trust in the form of the charity. Many authors<sup>42</sup> contest whether or not this form of entity ought to be considered as being a trust at all given its peculiar structure which permits (and generally requires) that there be no beneficiaries<sup>43</sup> and that litigation against the trustees be instigated by the Attorney-General. Therefore, the charitable trust is frequently referred to as a 'public trust'.<sup>44</sup>

### 7.2.2 Conscious and unconscious express trusts

Within the category of express trusts there is scope for division between those trusts which are created deliberately by the settlor and those trusts which arise as a result of the court's interpretation of the true intentions of the settlor. This distinction should be picked apart carefully. On the one hand there are those trusts which are, in the most obvious scenario, drafted by a lawyer and executed as a deed constituting an express declaration of trust. This form of trust I would designate a *conscious express trust*. This is a deliberate and institutional act in which people create trusts – similar to the commercial trusts considered in chapter 22 and the pension funds analysed in chapter 26.

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<sup>37</sup> (1874) LR 18 Eq 315.

<sup>38</sup> [2000] 1 All ER 711.

<sup>39</sup> *Re Goldcorp* [1995] 1 AC 74.

<sup>40</sup> Law of Property Act 1925, s 53(2).

<sup>41</sup> See Chambers, 1997

<sup>42</sup> Penner, 1999; below at chapter 27.

<sup>43</sup> *Re Scarisbrick* [1951] 1 All ER 822 in relation to trusts for the relief of poverty, the most contentious category in relation to the possibility of a nexus between the settlor and the objects of the charitable purpose; and *Re Compton* [1945] Ch 123 and *Dingle v Turner* [1972] AC 601 asserting the need for an absence of a personal nexus and the need for a genuine charitable intent respectively – in either case refusing to accord charitable status to *de facto* private trusts.

<sup>44</sup> Para 27.1.



Then there is the further situation in which the settlor is not aware that she is acting a settlor. A good example would be *Paul v Constance*<sup>45</sup> in which a couple, described as ‘not sophisticated’ people, created a bank account in which they deposited joint moneys with the intention that ‘the money be as much yours as mine’. The bank account was created in the sole name of Mr Constance. It was clear that neither person had any understanding of the concept of the trust when they created this arrangement. However, the court was prepared to hold that their true intention was to create an express trust. This form of trust I would dub the *unconscious express trust* because the settlor does not understand (or is unconscious of) the legal nature of her actions. Nevertheless, the court attaches the label of ‘express trust’ to them because the substance of the parties’ intentions equates to the legal category of trust as understood by equity.

It is important to understand that these two categories of express trust exist. Between the two clear cases considered above will fall a range of deliberate acts in which the protagonists may or may not have intended to create a trust. That they are both express trusts is significant because the formalities and certainties attaching to an express trust will have to be observed.<sup>46</sup> However, it is also important to know that these trusts are distinct from constructive trusts, even though there is clearly a narrow dividing line between the unconscious express trust and the constructive trust in many cases because both trusts are being imposed by the court, in truth, in recognition of a factor affecting the conscience of the common law owner of the property.<sup>47</sup> Similarly, there may be contexts in which A seeks to dispose of her rights in property which she had previously held absolutely in circumstances in which a resulting trust might arise, perhaps if not all of the equitable title has passed:<sup>48</sup> in such a situation the dividing line between a resulting trust and an unconscious intention to create an express trust may be similarly difficult to distinguish.

One form of trust which will be significant in this discussion is the *complex commercial trust* which combines ordinary investment contracts (frequently similar to partnerships being used for business purposes in the sharing of losses and profits) with an express trust. The unit trust, a form of mutual investment fund considered in chapter 24, combines an investment contract between the investor (or participant) and the investment manager. However, the unit trust is required to vest equitable interest in the scheme property in the participants<sup>49</sup> and therefore necessarily constitute express trusts.

In consequence, these forms of trust are not formed on the basis of conscience in the manner set out in *Westdeutsche Landesbank v Islington*<sup>50</sup> but rather arise out of commercial convenience or regulatory requirement. The trust device in such contexts is being used to achieve a commercially desirable goal.

### 7.2.3 The new landscape

The upshot of the foregoing is either that the legal usage of the term ‘trust’ should be restricted to those institutions which are currently recognised by the law as constituting trusts, or that a new category of fiduciary duties must be encompassed by the jurisprudence to deal with new forms of trust. Once it is understood that within the category of express trusts there is room for sub-division, then the way is open for a broader redefinition. For example, in relation to unconscious express trusts and to constructive trusts, it is not clear at what point the general fiduciary duties to act fairly or the duties to generate an investment return for the beneficiary ought to bite given that the trustee will typically be unaware of her fiduciary office until the date of the court order. Similarly, it is not clear whether or not such obligations ought to apply at all. In consequence, I would suggest that such redefinition is both important and timely.

That redefinition should be, in my view, along the following lines. There should be a fourfold division between express private trusts, public charitable trusts, public interest trusts, and trusts implied by law. Private trusts are trusts as ordinarily understood in chapter 3 of this book. The two forms of public trusts are as considered above and in chapter 29. The final form of trust is that imposed by general principles of equity to police or regulate the conscience of the legal owner of property, being trusts imposed by law in the form of constructive trusts or resulting trusts.<sup>51</sup> This category should also encompass the various equitable doctrines of estoppel, set-off, waiver and tracing, as well as the equitable remedies of subrogation, rescission, specific performance and so forth. It is suggested that this form of trust can be imposed on any person regardless of their relationship to any claimant if the circumstances coincide with those general principles.<sup>52</sup>

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45 [1977] 1 WLR 527.

46 In particular the beneficiary principle and the formal requirements in Law of Property Act 1925, s 53(1).

47 *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

48 *Vandervoell v IRC* [1967] 2 WLR 87; *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

49 Financial Services and Markets Act 2000, s 237(1).

50 [1996] AC 669.

51 *Westdeutsche Landesbank v Islington LBC* [1996] AC 669, HL.

52 A theme pursued in chapter 36.

One form of trust considered only in outline above is the *Quistclose* trust.<sup>53</sup> This form of trust, in the author's opinion, is explicable as a form of commercial trust relating specifically to loan contracts under which the loan is made for an identified purpose.<sup>54</sup> The separation of this form of trust into a distinct form of trust relating to commercial situations may require an expanded category of commercial trusts which relate specifically to situations relating to title in assets used as part of a transaction between commercial people. The sentiments of many of their lordships in *Westdeutsche Landesbank v Islington*<sup>55</sup> indicate a similar understanding of a need for distinct principles to deal with non-family situations.

The utility of the development of the public interest trust as a form of trust incorporating those applicable fiduciary duties is to develop that facet of the law on which this book places much reliance:<sup>56</sup> its ability to generate models which can be used by policymakers and by ordinary citizens to facilitate their social interaction.<sup>57</sup> In this way, social welfare initiatives like housing action trusts and NHS trusts<sup>58</sup> can enable effective service provision and also enable users of their services to effect some control over them.

#### 7.2.4 Trusts as a central tool of global capitalism

Perhaps the clearest indication of this school of express trusts and wealth-holding vehicles can be found in the following statement from Cooke and Hayton: 'Trusts are created to preserve and to generate wealth, whether they are family trusts providing alternatives to the law of succession ... or commercial trusts, furthering financial interests in the financial world.'<sup>59</sup> The trust is placed within the context of a broader victory for the property-based capitalism which the institutional express trust personifies so clearly: 'With the late twentieth century triumph of capitalism over communism and encouragement of citizens to have proprietary stakes in the development of their countries' economies so as to further private and public interests, it follows that there is a very rosy future for trusts as flexible property-owning vehicles.' The form of conscience bound up with such trusts is straightforwardly a conscience based on the reliability of the trustee as a guardian of another's wealth, sometimes for remuneration and sometimes not.

In relation to the trend of globalisation in the use of money, the following positivist approach conceives of the manner in which the express trust is likely to be used in the future: '... the pressures of globalisation will lead to the English trust concept becoming more flexible than is currently understood to be the case.'<sup>60</sup> It is suggested that there will be some influence on the rules governing express trusts in English law if the trust as used by actors in other jurisdictions (whether under English law or not) to create different principles of express trusts law.<sup>61</sup> What this approach does not account for is the cultural relativism involved in equity: that equity is a system of justice developed in any one legal jurisdiction and therefore will be an expression of the broader culture bound up in that system of rules. The institution of the express trust is the feature which the global economic community wishes to take away: hence the lack of enthusiasm considered in chapter 22 for discretionary equitable remedies. The following Part 3 considers the means by which beneficiaries are able to hold trustees to account: again an expression of the culture in which trusteeship has developed in the law of trusts but which is frequently excluded by express contractual provision.

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53 *Quistclose Investments Ltd v Rolls Razor Ltd (In Liquidation)* [1970] AC 567.

54 On which see Worthington, 1996.

55 [1996] AC 669.

56 As considered in chapter 29.

57 Possibly akin to those in *Bromley v GLC* [1983] AC 768.

58 Whether you approve of them politically or not: a larger question deferred until chapter 36.

59 Cooke and Hayton, 2000, 442.

60 *Ibid.*

61 Hayton, 1999; Hayton, Kortmann and Verhagen, 1999.