

This essay was originally Chapter 36 of the third edition of Equity & Trusts, published in 2003. Its purpose was, at the end of that book, to consider the various forms of trust including public interest trusts and unincorporated associations. I am in the course of attempting to put together an article on the ordering of trusts law which will build on these ideas. In time it will appear on this site.

AN ORDERING OF THE LAW OF TRUSTS

36.1 INTRODUCTORY

The express trust is an equitable institution: one which has hardened over time into something resembling a contract in that the rules for its creation, operation and termination have become concrete.¹ This development is due both to its commercial application and its long-standing use as a means of providing for the welfare of rich families in marriage settlements or will trusts. Both of these contexts required certainty in the use of trusts with the result that the general equitable notions have been pushed into the background.² This chapter suggests that the bright line tendency of much of the law on express trusts towards ever stricter rules means that there is a need for a new division in the categories of the law of trusts. The increasing prominence of pension funds and investment funds based on trusts law principles requires that the existing principles of trusts law be developed to match the regulatory rules applied to such funds. That is aside from the equally difficult developments in the treatment of trusts implied by law.³ This essay attempts to outline some of the ways in which that re-drawing of principles could take effect, once it has re-established the foundations on which trusts law is built in spite of other competing, fashionable notions.

What this discussion illustrates is the one core idea underpinning the entirety of this book: the world is a fundamentally complex place in which it is not possible to develop in advance a rigid grid of detailed rules which are expected to fit all circumstances.⁴ Instead, equity offers us a means of understanding the principles on which we wish our law to work – for example, that equity will look to the conscience of the defendant – with the result that such broad principle can be applied to individual cases. The classical model of equity as a philosophically-valid means by which justice can be meted out in individual circumstances is the only way of rising to the challenge of the multiple applications of the trust in our late modern world.⁵ The circumstances which confront equity are in themselves too fluid to be anticipated with rigid rules – rather, equity offers a principled means of reacting to change once it occurs. Within that argument is bound up an understanding that a contextually valid ordering of the law of trusts must now recognise within the scope of those general principles the distinctions between public-interest and private-welfare trusts; consciously- and unconsciously-made express trusts; familial trusts and commercial trusts; as well the more established divisions between express and implied trusts, or between public and private trusts. This chapter attempts such an ordering, based on the divisions of the subject matter made in this book up to now: express trusts, trusts implied by law, welfare trusts and commercial trusts.

1 Para 7.1.

2 Before the decision of the majority in *Westdeutsche Landesbank v Islington* [1996] AC 669 reclaimed them.

3 Considered in Part 4.

4 See, for example, Birks, 'Equity in the modern law: An exercise in taxonomy' (1996) 26 WALR 1, 4.

5 A line of argument essayed in chapter 37 below.

36.2 ISSUES IN THE FOUNDATIONS OF THE LAW OF TRUSTS

36.2.1 What is a trust?

The question “what is a trust?” is not one we ask too often beyond the first chapter of a trusts textbook. A definition of the term “trust” might run as follows: A trust is created where the absolute owner of property (the settlor) vests the legal title in that property in a person (the trustee) to hold that property on trust⁶ in accordance with terms set out by the settlor for the benefit of another person (the beneficiary) so vesting the equitable interest in that property in the beneficiary.

There is something beautiful in the simplicity of the structure of the express trust. In two dimensions it expresses a familiar trinity of creator, angel and supplicant. The creator is the settlor who creates the trust but then, *qua* settlor, plays no further, direct part in its life. Instead the word of the creator is revealed through the trust instrument (where there is one) or otherwise through the recollections of the parties. Thus the settlor / creator retains a profound influence over the functioning of the trust without having any tangible role *qua* settlor in it. The trustee is an angel, *qua* trustee, because she takes no direct benefit from the trust (beyond that sanctioned by the settlor in advance) but works solely and selflessly for the benefit of the beneficiary. The beneficiary is therefore both volunteer (in the sense that she takes her benefit without having given consideration), rightholder (in that only she has *locus standi* to sue the trustee in the event of any breach of trust) and supplicant (in that, in the vernacular sense of the word “trust”, she is nevertheless always prone to the trustee breaching the trust in such a way that it causes her irrecoverable loss).

The logic of the trust in classical equity theory is that the beneficiary controls the trustee through the courts. Hence the development of the beneficiary principle which requires that there be an identifiable beneficiary so that there is someone in whose benefit the court can decree performance of the trust.⁷ Similarly, the requirements of certainty of the settlor’s intention, of the identity of the beneficiaries and of the identity of the subject matter of the trust are necessary to ensure that the court is able effectively to police the actions of the trustee on behalf of the beneficiary.⁸ It is the beneficiary who is truly Equity’s darling. The roots of the strict liability approach to trustees’ liability for breach of trust even where the loss occasioned to the trust fund was only indirectly the fault of the trustees would appear to be in an almost judicial acceptance of the fact that the wealth and security of the English upper and middle classes was, in the manner of Jane Austen novels, dependent entirely upon the viability of their trust funds, whether containing land, money or valuable chattels.⁹

It is precisely, it is suggested, the collision between the heritage of the trust and its modern usage which have generated all of the questions to follow. In one leading case, Lord Browne-Wilkinson suggested that there might yet need to be a distinction made between commercial trusts on the one hand and traditional trusts on the other.¹⁰ In another leading decision, his lordship also appeared to leave ajar a door on the debate as to whether trusts are institutional or remedial devices which otherwise he might have slammed shut.¹¹ The very core of the law of trusts has been questioned in recent years. The principal questions, beyond those raised by his lordship are these:

1. is the trust based on property or on obligations?
2. is the trust in truth a species of contract?
3. is the beneficiary principle necessary?
4. is there a core, irreducible content of trusteeship?

⁶ Here the term “trust” might have both its technical and its vernacular meaning. Cf. Cotterrell, 1993.

⁷ *Morice v. Bishop of Durham* (1805) 10 Ves 522.

⁸ As considered in chapter 3.

⁹ *Target Holdings v. Redfems* [1996] 1 A.C. 421, [1995] 3 W.L.R. 352, [1995] 3 All E.R. 785.

¹⁰ *Ibid.*

¹¹ *Westdeutsche Landesbank v Islington* [1996] AC 669.

These questions are considered below. After answering them it will be suggested that the proper means of analysing the express trust becomes apparent: that is, as a property relationship under which trustee and beneficiary have a matrix of rights, duties and powers in relation to a fund of property, and furthermore a relationship which is founded on Equity's jurisdiction to act *in personam* in relation to the conscience of the trustee.¹² It will be suggested that it is most helpful to think of Equity as *responding* to given factual situations as part of its mission to observe the trustee's conscience rather than to think of trusts as being abstract entities which stand either as impersonal *institutions* functioning by operation of law or alternatively as *remedies* to be applied as though common law devices like contractual or tortious damages.

36.2.2 The trust is a property relationship

The trust is, in essence, a property relationship. Without property being on held on trust by the owners of the legal title for the benefit of beneficiaries there would be no trust. Any relationship not conforming to that pattern is something other than a trust; by extension only a relationship conforming to that pattern falls to be described as a trust. The trust is, however, a hybrid property relationship: if it were not it would simply be a matter of outright ownership at common law. This hybrid relationship operates at two levels. The first is the one which generates the most confusion: that is, the matrix of obligations which the trustee owes to the beneficiary. In that sense, the trust is comprised both of proprietary rights and of ostensibly personal obligations between trustee and beneficiary. At the second level, the trust enables two (or more) people to have rights in property simultaneously: the trustee has the legal title and the beneficiary the equitable title. It is this feature which marks the trust out not only from common law property relationships but also from civil code concepts of *dominium* by which there is only one person with property rights, the absolute owner, in relation to whom everyone else has purely personal rights.

The case from history

That the trust was intended from its inception to be a property relationship is evident from its history. The earliest 'uses', latterly 'trusts', took effect over land. In consequence, there was little possibility of confusion as to the property which was to be held on trust because the trust fund was readily identifiable. There could be boundary disputes as to which land was held on trust thus raising questions of fact but otherwise the identity of the property would typically pose few intellectual or technical problems. Such early uses over land whereby the common law owner of the land held it to the order of its equitable owner were self-evidently property relationships. The trustee's obligations were predicated on a combination of his ownership of the legal title over that land and equity's recognition that the benefit of that land was to be enjoyed ultimately by the beneficiary.

Greater complexity is introduced when the settlor of this trust over land chooses to appoint a number of beneficiaries, or to make those beneficiaries entitled to the equitable interest in that land in qualitatively different ways, and/or to give the trustees powers as to how that land was to be enjoyed by the beneficiaries.¹³ Therefore, trusts were created to identify, for example, one beneficiary as the life tenant and another beneficiary as remainderman. The trustee might then be given the obligation to maintain the land for the ultimate benefit of the remainder beneficiary but also a power to provide that part of the land might be sold for the benefit of the life tenant in certain circumstances.

That all trustees are fiduciaries – bar none

At this point the position of the trustee is evidently more complex than that of the bare trustee. A bare trustee who is required simply to maintain property for safekeeping – whether as a nominee over land or even as the depositary in relation to collective investment schemes – does not have to balance the competing claims of beneficiaries with claims against the same property albeit that their rights have different incidents and extents. Indeed some would go so far as to say that the bare trustee is not a fiduciary at all because her obligations are similar, in effect, to a bailee of property required to mind it for its true owner.¹⁴ It is said that it is only when a trustee is charged with some discretion or some power in relation to the trust property that she is properly considered to be a fiduciary in relation to it.¹⁵

¹² It will be suggested that this *in personam* concept operates both in relation to express trusts and to trusts implied by law.

¹³ In this sense the trust progresses from being a question of *inter vivos* title into, in Chesterman and Moffat's glorious phrase, 'gifts over the plane of time': Moffat, *Trusts Law*, Butterworths,

¹⁴ Penner, 2002.

¹⁵ *Ibid.*

This view is incorrect. The bare trustee is a fiduciary. There are two forms of fiduciary duty. First, there are *active* fiduciary duties which police the manner in which trustees and others carry out their express powers. Secondly, however, there are *latent* fiduciary duties which apply equally to a bare trustee as to a trustee charged with some power. Such latent fiduciary duties are only evident when the bare trustee performs some act which, even if not mentioned in the express terms of her trusteeship, nevertheless offend against fiduciary law. Examples of such latent fiduciary duties are the rule against self-dealing, the rule against making secret profits from the fiduciary office and so forth. These rule apply to a bare trustee as to any other type of trustee. If the bare trustee behaves properly then no mention of them need be made. However, that does not mean that they do not apply to such a bare trustee. A little like the station platform which slips from view as our train pulls away: just because we cannot see it, it does not mean it is not always there.

36.2.3 The express trust is not a contract

Dealing with the contractarian thesis

The imposition of duties on the trustee by the settlor has led some commentators to suggest that the essence of the express trust¹⁶ is the relationship between settlor and trustee. This issue has already been considered.¹⁷ The question really is whether an express trust is concerned to effect the intentions of the settlor or whether it is concerned merely to police the conscience of the legal owner of property. Under the former analysis we might say that the trust is concerned with a form of contract between trustee and settlor whereby the settlor is required to observe the wishes of the settlor and nothing else. This would mean, for example, that the beneficiary would not be entitled to terminate the trust nor to deal with the property in any way which conflicted with the wishes of the settlor. Alternatively, to focus on the latter approach is to accept that the settlor has no further part to play in the trust and that there is no objection to the beneficiary exercising proprietary rights to deal with the trust and so act contrary to the wishes of the settlor if necessary.

This latter approach treats the trust as a combination of the beneficiary's property rights and obligations borne by the trustee in favour of the beneficiary; whereas the latter approach treats the trust as being simply obligations borne by the trustee to the settlor. Langbein is determined that every trust is part of a contract and therefore that there is no need to consider the nature of the trust in isolation from the contractual matrix of which it forms a part.¹⁸ This fundamental assertion is, however, wrong. Many trusts are not predicated on a contract. In relation to commercial practice it will commonly be the case that there will be a commercial contract which uses a trust as a device to hold security for payment or a contract for services whereby some person will be limiting their liability and identifying their fee in return for acting as trustee, and in that sense there will tend to be a contract. This position, however, fails to provide a complete analysis of even express trusts given that there are express trusts without are recognised as having come into existence without the conscious action of the parties,¹⁹ in situations like that in *Paul v. Constance*²⁰ or *Re Kayford*,²¹ let alone the formation of a contract between settlor and trustee.²²

¹⁶ It can only be the express trust which is intended here. A resulting or constructive trust does not require any contract between 'settlor' and trustee of necessity because either form of trust arises by operation of law and not by means of the consensual act of the parties. There may be agreement between the parties which is the context within which, for example, common intention constructive trusts come into existence, but such agreement is not a necessary pre-condition for the creation of such trusts implied in law in general terms.

¹⁷ Para 21.2.3.

¹⁸ Langbein, "The contractarian basis of the law of trusts", (1995) *Yale Law Journal*, Vol. 105, 625.

¹⁹ E.g. *Paul v. Constance* [1977] 1 WLR 527; *re Kayford* [1975] 1 WLR 279.

²⁰ [1977] 1 WLR 527.

²¹ [1975] 1 WLR 279.

²² Particularly in circumstances in which the settlor is also the sole trustee.

The settlor plays no part once the trust has been declared

The trust is a property obligation under English law, inter alia, in that all of the beneficiaries acting together and constituting the whole of the equitable interest are entitled to direct the trustee how to deal with the property, whether by means of re-writing the trust in effect or of terminating it.²³ That the settlor has no right to be consulted directly qua settlor, in the absence of any express provision in any trust instrument to the contrary, is evident from those cases in which two settlors of marriage consideration have sought to unwind the trust once the marriage had failed: in such circumstances, qua settlors they had no such power and on the cases were not the only beneficiaries having identified other relatives as having equitable interests in the marriage settlement.²⁴ Therefore, on the creation of an express trust, the beneficiaries acquire ultimate beneficial title in the trust fund and the settlor qua settlor relinquishes all property claims against that property. Hence the expression that a trust is, in a sense, a gift over the plane of time in that the settlor transfers away all property rights over the life of the trust.²⁵

For the settlor to retain rights in the trust property requires the settlor to retain either title in the trust property – in the form of a gift with reservation of benefit – or a power to control the manner in which the trustees exercise their powers in relation to the trust. In either case, the settlor holds those rights not as settlor but rather holds any reserved benefit as a beneficiary under the trust or any power to control the trustees' exercise of the trust property as a form of fiduciary. In the latter example, it might be said that the settlor might have a purely personal power in relation to the manner in which the property is applied. However, it is suggested that if the settlor has the ability to override or to direct the actions of the trustees, then the settlor is also acting as a form of trustee with a fiduciary power over the trust property at the very least. It is only if the settlor were seeking to exercise such control over the trustees before the trustees took legal title in the trust property that the settlor could be said to be acting as settlor: however, if the settlor had not vested legal title in the trustees at the time then no trust would then have been in existence over that trust property and therefore the settlor's directions to the trustees would be an act of declaring the trust and not any other. The authorities are clear. If the settlor intended to create a trust, then it is by reference to the law of trusts that any question must be answered; whereas if that person's intention were to do anything other than create a trust, then the law of trusts has no part to play.²⁶ 36.2.4 The significance of the beneficiary principle

²³ *Saunders v. Vautier* (1841) 4 Beav 115.

²⁴ *Paul v. Paul* (1882) 20 Ch D 742.

²⁵ Subject to what is said below about the failure of the trust, in which case the property may be held on resulting trust for the settlor: *Vandervell v. IRC* [1967]. However, this is not simply *qua* settlor but rather as beneficiary under a resulting trust.

²⁶ *Milroy v. Lord* (1862) 4 De GF&J 264.

The beneficiary principle was considered in detail in chapter 4.²⁷ The impetus towards the dissolution of the beneficiary principle in international trusts law practice was considered in chapter 21.²⁸ There it was observed that offshore sellers of trusts services wish to use trust structures which do not require that their clients be recognised – whether for taxation or other regulatory purposes – as the beneficial owners of the trust property. Instead it has been suggested that a protector could be appointed to stand in the place of the beneficiary so as to satisfy the beneficiary principle.²⁹ What this would do would be reverse the position considered above that the trust is necessarily a property relationship in English law: that is, that the beneficiary necessarily has proprietary rights in the trust fund. Given the title which the beneficiary has in the fund, it can only be that person who is entitled to act to protect that proprietary right. The innovation characteristic of trusts practitioners have muddled that picture slightly, particularly through the use of discretionary trusts models in which it is possible for no beneficiary to have any rights in any specific property held as part as that fund but rather for the trustees to have the power to select which beneficiaries within a large potential class can have property appointed to them. However, even in such situations where it would appear that the property rights of the beneficiary are weak,³⁰ it is nevertheless the case that those beneficiaries have some rights to sue the trustees to ensure that they observe the terms of the trust.³¹ The explanation for the beneficiaries’ right to sue is that the trust contains property which belongs, in whatever precise way, to the beneficiaries. The source of those rights cannot be that the beneficiaries have some form of contractual right because, in many forms of trust, the beneficiaries are merely volunteers.³²

36.2.5 The core of trusteeship: the illusory search for mandatory rules

The nature of trusteeship has, of course, been the subject of this book from chapter 2 through chapter 29, and then again in this Part 10. Particular attention was lavished on this topic in Part 3 on the *Administration of Trusts*. The duties of trustees divide broadly between duties of good management, duties of good faith, and . The identification of any rigid, quasi-statutory notion of “trusteeship” is not possible in English law, even though it may seem desirable to commercial users of trusts. As was discussed in detail in chapter 8, there are cases such as *Armitage v Nurse*³³ which suggest that there is no objective, mandatory core of rules binding on all trustees because trustees are entitled to limit their obligations by means of contract; whereas there are other authorities such as *Walker v. Stones*³⁴ which deny trustees the right to limit their liabilities by contract so as to exclude liability for their own dishonesty. It is suggested that no court of equity would permit dishonesty on the part of trustees in the same way that no common law court would permit ordinary fraud under the tort of deceit.

²⁷ Para 4.1.

²⁸ Para 21.2.5.

²⁹ Hayton, 2000.

³⁰ Para 34.1.3, 31.2.4

³¹ Cf. *Re Ralli's WT* [1964] 2 WLR 144 where a remainder beneficiary with only a prospective right to property assuming she outlived the life tenant and that there was still trust property available was nevertheless held to have a proprietary right before the death of the life tenant.

³² Exceptions to this principle would include pension fund trusts and unit trusts where the beneficiaries provide much of the money making up the initial capital of the trust fund.

³³ [1998] Ch 241: adopting the language of Professor Hayton.

³⁴ [2001] QB 902.

The search for a core to the notion of trusteeship must then focus on the question “how much further can mandatory principles of trusteeship extend?”. The answer to this question is satisfactorily answered by recognising that any trusteeship is predicated on a decision as to whether or not the trustee has acted in good conscience. This is not a sufficient answer for the users of commercial, express trusts nor for restitution specialists who prefer a clearer taxonomy. What neither of these positions recognise is that, respectively, the principles which underpin the law of trusts apply both to trusts implied by law as well as to express trusts, and that a flexible notion of conscience in itself permits equity to develop so as to meet change. It is sufficient for the courts to function by reference to a central notion of conscience by means of asking whether or not the behaviour of the trustee has been conscionable. That this standard appears vague is not objectionable in itself: the role of the court in such situations is to consider the circumstances and to decide whether or not it considers the trustees’ behaviour to have been conscionable by reference to previous precedent on the meaning of that term and on the basis of the arguments raised in that case by the claimant and defendant. This open texture of acceptable for two reasons. First, the notion of conscience is not without content precisely because it is the sum total of all of the decisions reached by courts of equity in the past. Secondly, equity is a means for new blood to penetrate into our legal norms to ensure that they reflect the legitimate aspirations of people outside. It is through claims as to the notion of what constitutes conscionable and unconscionable behaviour in new contexts that the courts can develop equity and that external observers can debate the desirability of each new development. Such an open discourse is essential to the proper development of our law. Unless our case law permits non-legal norms to be discussed in courts, that law will become stagnant. In fact there are many gateways through which non-legal norms can pass into law: through pleas in mitigation in criminal law, through claims based on legitimate expectations in judicial review, through the development of human rights law, and through equitable doctrines like injunction and constructive trust.

In effect, trusts law has reached a perfectly satisfactory compromise between those who want commercial certainty and those who want conscionable fluidity: trustees can limit their liabilities by means of contract except where the courts consider such a limitation to be unconscionable in the circumstances. The mandatory content of the principles governing trusteeship are considered in Part 3 in relation to the trustees’ obligations not to permit conflicts of interest, not to generate secret profits, not to advantage one beneficiary over another, to provide limited categories of information to the beneficiaries, not to breach the terms of the trust and to manage the investment of trust fund in accordance with the Trustee Act 2000 or with the terms of the trust where the latter disagreed with the former. The core of trusteeship is expressed in the mandatory terms of any trust instrument which is supplemented by the ordinary rules of trusts law in the absence of such an instrument. What is more significant is not any “core” of trusteeship but rather any “sense” of trusteeship: that is, the true nature of the trust is contained in the obligations of the trustees to act in good conscience. This notion of good conscience is, by definition, a deliberately open-textured, moral notion. A moral notion which has specific legal and equitable consequences. The reader is referred to the appropriate discussions of trusteeship in the earlier chapters of this book for the detail of trustees’ obligations.³⁵

36.3 TOWARDS A NEW ORDERING OF TRUSTS

36.3.1 A new project

When seeking to understand the genus “trust”, it is common to talk of a “taxonomy” of the subject. This is something of which I have been guilty myself in the past.³⁶ To use the term “taxonomy” suggests a scientific approach which will dissect the various forms of trust and categorise them as though butterflies or beetles or flowers according to their characteristics. Trusts, however, do not correspond well to such a project. The quintessence of the trust is its very unpredictability. It is open-textured. To speak of taxonomy is, perhaps, to miss the point.

The proper delineation of the law relating to the trust and that relating to the fiduciary is a vexed business. There are, in truth, many more manifestations of these creatures than there are categories adequate to express their very particular characteristics. The purpose of this essay, if Shakespearians among you will permit me, is to be give to airy nothing a local habitation and a name.

³⁵ In particular see Part 3, chapter 17 on *Human rights, equity and trusts*, chapter 18 on *Breach of Trust*, para 21.2.4 and the discussion to come of the divisions within the law of trusts.

³⁶ Hudson, *Equity & Trusts*, 2nd edn., Cavendish Publishing, 2001, . See now Hudson, *Equity & Trusts*, 3rd edn., Cavendish Publishing, 2003, , with reference to ‘The Ordering of Trusts’.

It is the underpinning conviction of this essay that the law of trusts is now called upon to greet the thousand natural shocks that flesh is heir to: to do that it must break loose from its late 18th century moorings in the law relating to the affairs of propertied families, and instead accept a portfolio which requires it to balance the needs of global commerce, of the splintered post-nuclear family and more. To achieve this transformation some further sub-division of the trust is required beyond the well-established triumvirate of express, resulting and constructive trusts. It is suggested, nevertheless, that the law of trusts is equal to this challenge provided that its established categories are recognised as comprising many sub-categories. This is not a programme of simply cutting trusts law up so that it can be applied in fragments to whoever insists sufficiently loudly that their use of trusts requires differential treatment. Rather it is to accept that there are forms of trusts, such as pensions and unit trusts, which have their own legislative codes which adapt in part the ordinary principles of trusts law, and that there are also areas such as trusts of homes and trusts created as part of a larger commercial contract which have already begun to develop their own norms entirely through the case law while still remaining part of the general law of trusts. Such a mushrooming of species of trusts necessitates the identification of these sub-categories so that the manner in which the general principles of trusts law fall to be applied to them can also be identified. That task is the business of this essay. Allied to that process will be a necessary re-composition of the nature of the concomitant fiduciary responsibilities.

36.3.2 Express trusts

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 an example of a *conscious express trust*. This is a deliberate and institutional act in which people create trusts – similar to the commercial trusts considered in chapter 21 and the pension funds analysed in chapter 26. It is this form of trust which is most obviously an express trust.

Then there is the further situation in which the settlor is not aware that she is acting a settlor but where the court chooses to interpret the creation of a trust as being the proper legal analysis of her intention. A good example would be *Paul v Constance*³⁷ in which a couple, described as 'not sophisticated' people, created a bank account in which they deposited joint moneys with Mr Constance's intention expressed to Mrs Paul to be that as common law owner 'the money be as much yours as mine'. 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. Indeed, this would be the type of trust which could best bear the antique label "implied trust".³⁸

³⁷ [1977] 1 WLR 527.

³⁸ The existence of which, if not its definition, is suggested by the Law of Property Act 1925, s.53(2).

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 in the creation of each whereas they would not need to be a trust implied by law.³⁹ It is only if the unconscious express trust were henceforth recognised as being an implied trust within s.53(2) of the Law of Property Act 1925 that that statute would liberate it from the need to observe the formalities necessary for the creation of express trusts. However, it is also important to know that, under the law as currently understood,⁴⁰ 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: both trusts being imposed by the court, in truth, in recognition of a factor affecting the conscience of the common law owner of the property.⁴¹ 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, (for example, if not all of the equitable title has passed).⁴² 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 identify.

Distinguishing between familial and commercial trusts

The other significant distinction to be made in relation to express trusts is between trusts in the family context and trusts in the commercial context. The genesis of the modern express trust was in the family settlements of the 17th and 18th centuries. The marriage settlements were drafted by lawyers after lengthy consultation between the families supplying the bride and groom: they were nothing less than a bourgeois version of the marriages of convenience effected between princes and princesses. As a result the principles that trustees are required to do the best possible for the beneficiaries⁴³ and that the trustees are not entitled to take any benefit from their office⁴⁴ are founded on the need in the family context to protect the wealth of future generations from the risk of being defrauded by unscrupulous trustees. The continued sensitivity of the courts for beneficiaries constitutes a determination to protect the private property rights of the upper middle classes.

Commercial express trusts do not need to rely on this level of sensitivity for the needs of beneficiaries. Typically trusts created between commercial parties are effected to protect property dealt with as part of a contract. As such the terms of the trust are frequently contained in the contract or are collateral to that contract. There is usually no need for equity to intervene on behalf of the beneficiaries to require that the trustees generate a sufficient investment return for the beneficiaries and so forth because the contract will deal with such matters. Similarly, if the parties are commercial parties acting at arm's length there is no need for equity to prefer one party to the other, for example, by assuming that the beneficiary is always entitled to more sensitive treatment in the way that the law of trusts is prone to do.

The principles which cover the trusts of homes are concerned with questions of social justice which do not apply in the same way in relation to purely commercial contracts. And yet, ironically, it might be thought that doctrines like the common intention constructive trust, created solely for family homes cases, has more to offer in commercial situations where the terms of a contract offer clear evidence of the common intentions of the parties as compared to the search for a phantom common intention which is conducted in trusts of homes cases.⁴⁵ For example, the local authority swaps cases could have been differently decided had it been held that the void contracts between them nevertheless expressed a common intention as to the property rights in the sums of money transferred between the parties.⁴⁶ (That suggestion is not as strange as it may otherwise seem, when one considers that the void contract was nevertheless considered sufficient to vest good title in the money with the local authorities, even though the parties' void contract had set out clearly how the property was to have been dealt with in the event that the contract was held to have been void: the latter being their common intention and the former an unexpected by-product of the invalidity of their contract.⁴⁷)

³⁹ In particular the beneficiary principle and the formal requirements in the Law of Property Act 1925, s 53(1).

⁴⁰ So, in *Re Kayford* and *Paul v. Constance* the courts were clear that the trust which was created was an express trust and not a trust implied by law.

⁴¹ *Westdeutsche Landesbank v Islington* [1996] AC 669.

⁴² *Vandervoell v IRC* [1967] 2 WLR 87; *Westdeutsche Landesbank v Islington* [1996] AC 669.

⁴³ *Cowan v Scargill* [1985] Ch 270.

⁴⁴ *Keech v Sandford* (1726) Sel Cas Ch 61.

⁴⁵ Para 14.8.

⁴⁶ Hudson, 2000:2.

⁴⁷ Hudson, 1999:1.

The 'complex commercial trust'

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 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 participants⁴⁸ and therefore necessarily constitute express trusts. Similarly, in considering eurobonds the investor⁴⁹ is concerned to acquire a speculative return on her investment and the existence of a trust is collateral to that intention.⁵⁰

In consequence, these forms of trust are not formed on the basis of conscience in the manner set out in *Westdeutsche Landesbank v Islington*⁵¹ but rather arise out of commercial convenience or regulatory requirement. Akin to the *Quistclose* trust,⁵² it is not easy to categorise these trusts alongside ordinary express trusts. Rather, in commercial situations, the trust device is used either by the judiciary or by commercial practice to reach a commercially desirable result. The trust is most frequently used to provide security for complex financial transactions.⁵³ In this context, the trust structure made generally available by the law is co-opted into the structure of commercial contracts to allow for assets to be transferred to secure a range of transactions. In such situations, the form of conscience which the courts are apt to provide ought to recognise both the contractual understanding reached between the parties and also the capabilities of such professionals to assess and allocate the risks of such transactions between them. The conscience of the trustee in commercial contexts can be identified in the observance of the terms of that contract and in the prevention of the trustee taking any benefit from that arrangement not sanctioned by the contract. Therefore, it might be argued that the strict liability under breach of trust⁵⁴ and constructive trust⁵⁵ principles which was generated by the courts of equity in the mid-19th century to protect family wealth from unscrupulous trustees ought perhaps to be applied to commercial trusts only where the contractual context permits it.

The question arises whether such a liberal application of the principle would operate effectively in commercial contexts, such as investment contracts, where there is an inequality of bargaining power between the contracting parties. The property relationships expressed by *complex commercial trusts* in the most general terms are still those of trustee and beneficiary – albeit that the trust is subsidiary in the eyes of the parties to the main commercial purpose whether in an investment contract, the sale of goods or otherwise. Indeed, the trust component of an investment trust such as a unit trust⁵⁶ may be performing one of two purposes collateral to the main investment contract: either providing security for the participants' underlying obligations or expressing the investor's participation in a mutual fund which is held on trust for the investors in common by the scheme manager or, in the case of a unit trust, by the trustee. In this latter case it is not consciously intended by the parties that the investors will seek to establish title in the underlying investments.⁵⁷

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

49 Hudson, 2000, chapter 6.

50 Although the trust created to hold the benefit of a eurobond transaction is required by the listing rules and forms no part of the common intention of the parties beyond compliance with those regulations: *ibid*.

51 [1996] AC 669.

52 [1970] AC 567.

53 Hudson, 1998, 265; Benjamin, 2000.

54 *Re Massingberd' Settlement* 91890 63 LT 296; *Re Dawson* [1966] 2 NSW 211.

55 *Keech v Sandford* (1726) Sel Cas Ch 61; *Boardman v Phipps* [1967] 2 AC 46.

56 As analysed in chapter 24.

57 Rather, having selected their level of risk appetite, the investors are typically content to leave it to the scheme manager to select investments within the confines of the prospectus which marked out the fund's investment purposes. The investors are the ultimate rentier capitalists in this sense: they hand their capital over to a manager who acts as their fiduciary in selecting the investments whereas the capitalists themselves take no interest at all in the nature, extent or effects of the investment provided that it generates sufficient income for them and is performed without any breach of duty on the part of the fiduciary. However, their distance from the precise composition of the fund is of no matter because they retain proprietary rights in it no matter what.

What is most important here is that the investor still requires the protection of trusts law from exploitation by the trustees. That investors require such protection is evident from the panoply of financial regulation which has been erected under the auspices of the Financial Services Authority and the other forms of regulator created in relation to pension funds. In these contexts the suggestion must be that the ordinary law of trusts is not sufficient to protect ordinary investors. Nevertheless, it is important that ordinary principles of trusteeship are enforced in circumstances in which there are inequalities in bargaining power between the parties. This can be displaced by the terms of a contract between the parties only if those parties were operating at arm's length, if there are no regulatory principles breached in the performance of that contract, and if the parties were of equal bargaining strength. Therefore, there can be no general assertion that there is a law of commercial trusts entirely separate from the ordinary law of trusts: rather, some commercial contexts may deserve different treatment from others.

Consumer-orientated, suitability express trusts

This form of trust is an extrapolation from the discussion of the *complex commercial trust* in that the beneficiary under the *consumer trust* is comparatively inexpert in the particular form of investment which the trust is proposing to make and where the beneficiary is not seeking to bear the risk of the trust investment. An example of such a trust might be an ordinary pension fund in which the investor is compelled by economic circumstance – primarily the withdrawal of state pensions maintained at the level of a living wage – to make an investment. In financial regulatory practice it is now required that sellers of financial instruments assess their clients with regard primarily to their expertise in the instrument which is being sold. The manner in which the product is sold and the risk explained to the client is something which the seller is obliged to consider, as well as the intrinsic suitability of the product for that particular client. Unlike the complex commercial trust, it is not possible to bind the parties to notions of freedom of contract and typical market procedures. Rather, the beneficiary/investor is necessarily uneducated in the milieu and so dependent on the trustee who operates not in accordance with ordinary trusts law theory as an impartial fiduciary but rather as someone who necessarily stands to earn a fee (at the very least) from its fiduciary office.

Financial regulation and ombudsmen have replaced trusts law theory's understanding that the beneficiary will protect herself by means of litigation enforcing the terms of the trust. Rather, financial regulation is required to maintain the integrity of markets and the beneficiary's role is reduced to that of an infant awaiting gifts from on high. The necessary limitation on ordinary trusts law principles is due in no small part to the trustee/seller's limitation of its own liabilities by means of the investment contract entered into with the client. Contract, in this context, connotes the allocation of risk away from the fiduciary to the beneficiary.

In relation to trusts in which one party is acting in a professional capacity and the other party in a purely personal capacity as a consumer, then equity needs to be sensitive to the need for the fiduciary to act suitably. This notion of "suitability" is borrowed from financial regulation and requires a financial institution selling financial products to consider not only the suitability of the product for the buyer – deciding whether the risks posed by that product are appropriate to the investor's situation – but also to ensure that the manner in which the product is sold is also suitable in the context – deciding whether that person has sufficient expertise to understand the risks involved with it, for example.⁵⁸ What is needed in this sense is an understanding that equity will need to balance not only the need to protect the beneficiary in a position of dependence on the trustee, but also the contractual context in which consumers will generally acquire rights, *inter alia*, under s.137 of the Consumer Credit Act 1974 in relation to exorbitant credit bargains. It is suggested that a notion of suitability is the only means by which the protection of the consumer can be balanced with the contractual rights of the supplier.

Quasi-trusts One form of trust considered in detail in chapter 22 is the *Quistclose* trust.⁶⁰ This form of trust, in my opinion, is explicable as a form of commercial trust relating specifically to loan contracts under which the loan is made for an identified purpose.⁶¹ The separation of this form of trust into a distinct form of trust relating to commercial situations may require the recognition of 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. They can be thought of as quasi-trusts in the sense that the trust relationship itself will only come into existence on the happening of some contingency, such as the failure to use loan moneys for the prescribed purpose.⁶² The sentiments of many of their lordships in *Westdeutsche Landesbank v Islington*⁶³ indicate a similar understanding of a need for distinct principles to deal with non-family situations.

⁵⁸ Hudson, 1999:2, 78, 200; Hudson, 1999:3, 84.

⁶⁰ *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567.

⁶¹ On which see Worthington, 1996, 43.

⁶² *Twinsectra Ltd v. Yardley* [1999] Lloyd's Rep. Bank 438.

⁶³ [1996] AC 669.

36.3.3 Trusts implied by law

Resulting trusts

The resulting trust operates in two different contexts, considered in chapter 11. First, as a long-stop in the law of property to ensure that there is no gap in the ownership of property.⁶⁴ That is, a resulting trust will arise automatically so as to declare that an equitable interest continues to be vested in a settlor where that settlor had failed to dispose effectively of the entire beneficial interest.⁶⁵ Secondly, a resulting trust will be presumed to exist where a person contributes to the acquisition of property: that presumption will stand unless it can be demonstrated that the parties had some other intention, such as that the money should have construed as a loan acquiring only personal rights to be repaid.⁶⁶ The presumptions bound up with resulting trusts also arise where property is transferred by a man to his wife or to his child – again, the purpose being to explain who takes title in that property when the evidence adduced by the parties is inconclusive of the matter. Whereas the restitution lawyers sought an expanded role for the resulting trust, its purpose has been limited to this narrow objective of filling gaps in the allocation of title.

Constructive trusts

The constructive trust exemplifies the equitable jurisdiction as a means of ensuring good conscience. When a person deals with property in a way which is deemed to be unconscionable, a court of equity will *construe* that person to be a trustee of it. The effect of the imposition of this constructive trusteeship is that the defendant will be required to hold the property in his hands on trust for the claimant⁶⁷ or to account in cash for the loss caused to the claimant if there is no property left in his hands.⁶⁸ The former context is a proprietary constructive trust, whereas the latter is a personal liability to account as a constructive trustee: the former was analysed in detail in chapter 12 and the latter in chapter 18.⁶⁹ The constructive trust's greatest strength is its flexibility and therefore one explains the constructive trust by reference to this central principle and by observation of the ways in which that principle has been put to work. The categories of circumstance in which a constructive will arise are: generally where the defendant has knowledge of some factor affecting her conscience; unconscionable dealings with land; contracts to convey land; profits from unlawful acts such as receiving bribes, theft or killing; fiduciaries making unauthorised profits; common intention in relation to the acquisition of land; secret trusts and mutual wills (arguably); intermeddling with trust property; dishonest assistance in a breach of trust; and knowing receipt of property in breach of trust. This general statement needs to be broadened out to distinguish between those cases which are concerned with punishing defendants for their wrongful behaviour, those which are concerned to protect beneficiaries and those which are concerned with the allocation of property rights.

First, we could categorise constructive trusts as falling into three broad categories of claim which exist solely to punish the defendant. First the liability of one who receives bribes to make good personally any loss made when investing those bribes,⁷⁰ the personal liability of a knowing recipient of property in breach of trust to account to the beneficiaries,⁷¹ and the personal liability of a dishonest assistant to a breach of trust to account to the beneficiaries.⁷² While the courts refer to these actions as being 'constructive trusts' it would be better to consider them actions for equitable wrongs because there is no property held by the defendant on trust for the claimant. The only difference then between these claims and, for example, the constructive trust imposed on someone who kills another person unlawfully and profits from that killing is that the killing constructive trust concerns identified property held on trust whereas the other claims are purely personal liabilities to account.

Second, constructive trusts imposed to protect the defendant include unconscionable dealings with land; trustees making unauthorised profits; and intermeddling with trust property. In relation to all of these forms of constructive trust the court's focus is on protecting the beneficiaries' property rights above all else. As such the constructive trust supports the equitable rights and obligations bound up with some pre-existing express trust or fiduciary relationship.

⁶⁴ Ricketts and Grantham, 2000.

⁶⁵ *Westdeutsche Landesbank v Islington* [1996] AC 669.

⁶⁶ *Westdeutsche Landesbank v Islington* [1996] AC 669.

⁶⁷ *Ibid.*

⁶⁸ *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

⁶⁹ Para 18.4.

⁷⁰ *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

⁷¹ *Re Montagu* [1987] Ch. 264.

⁷² *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

Third, constructive trusts imposed to allocate rights in property are again concerned primarily to avoid unconscionable conduct but they operate as an extension of property law primarily. They include contracts to convey land, common intention in relation to the acquisition of land, 'doing everything necessary' to transfer title, secret trusts and mutual wills. In each of these contexts, the categorisation as a constructive trust is contested by the commentators. The common link is the intervention of equity to enforce a trust relationship such that title is allocated between the protagonists on the basis of good conscience.

The only general definition of conscience in this context is one based entirely on observation of the decided cases: no more certain principle exists in the case law than a description of the decided cases. A discussion of the concept is set out in the next chapter.⁷³ Elias explains the three aims of constructive trusts as being: perfection, restitution and reparation.⁷⁴ The constructive trust discussed by Elias is one that explicitly speaks in the language of gifts and which is of less use in commercial context.⁷⁵ The 'perfection aim' is identified most clearly in *Re Rose*,⁷⁶ on the basis that the settlor's intentions should be given effect to.⁷⁷ The perfection aim concentrates on using the constructive trust as a means of perfecting the choices and contracts which individuals had sought to make but which have been found to be ineffective.⁷⁸ In Elias' view, the restitution aim is inherently less 'harsh' than the perfection aim and the reparation aim because the restitution aim does no more than 'remove superfluities in the defendant's hands' by transferring them back to their more justified owner.⁷⁹

The more useful way to think of constructive trusts, it is suggested, is as an equitable response to a wrong – such wrongs being decided on the basis of a case-by-case approach in which the judge considers the morality of the defendant's behaviour and awards a response in accordance with the justice of the case. It is acknowledged that this is to advocate a remedial constructive trust – akin to the range of remedies awarded in cases of proprietary estoppel – in place of the purportedly institutional constructive trust currently favoured under English law.⁸⁰

36.3.4 Public trusts

Charitable trusts

The only well-established form of public trust at the time of writing is the charity: itself a collection of very specific rules relating to a particular form of institution formalised in Elizabethan period in the 1601 charities statute. These charities were administered predominantly by religious bodies and were accepted by the common law as being valid charitable purposes where they sought to alleviate the poverty of the peasant class, to provide education effectively for an emergent middle class and to do other works for the general public benefit. The question of conscience does not apply in these contexts: instead their common feature is perhaps a desire to act in the public service.⁸¹

73 Para 37

74 Elias, 1990, 4.

75 Elias, 1990, 14.

76 *Re Rose* [1952] Ch 499; [1952] 1 All ER 1217.

77 The issue arises as to how this analysis would work with reference to collateral contracted for but not actually delivered. Eg, in the case of bankruptcy, would a trust be imposed over such collateral? In any event, would that be a constructive trust or a species of express trust?

78 Elias, 1990, 9 n 2; Fried, 1981.

79 Elias, 1990, 75.

80 Para 36.4 below.

81 In relation to poverty, that public service is effectuated by relieving the poverty even of close relatives.

Welfare trusts

The development of charities filled the gap left by a lack of effective state provision for the poor, for education and for the public benefit before the creation of the welfare state in 1945. That development asserted the responsibility of the state to provide for citizens and replaced the need for private capital to bridge that gap. Equally importantly it ensured that structured state provision would meet social needs rather than the uncoordinated impulses of charities and their subscribers. At the time of writing the wheel looks set to turn again: welfare state provision is being rolled back and citizens are required to provide for their own welfare after retirement and also before in many instances involving private healthcare and so forth. Thus, 'welfare trusts' in this sense refer to pension funds and co-operatives which provide for the welfare of individuals by virtue of the voluntary contribution of their own property and also to bodies corporate like NHS trusts which provide welfare services within the welfare state. It is suggested that the fiduciary principles developed for these forms of trust ought to reflect a need to maintain the welfare of their objects and not concerned to maximise investment return (as with private express trusts).

Public interest trusts

The division between public and private trusts has not been the only division recognised by the law of trusts. In *Kinloch v Secretary of State for India*, Lord O'Hagan advanced a division between two forms of trust, private trusts and trusts in a 'higher sense':⁸²

... the term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction but also other relationships such as the discharge under the direction of the Crown of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind are described ... as being 'trusts in the lower sense' trusts of the latter kind ... 'trusts in the higher sense'.

Thus a division is made between ordinary private trusts (that is, trusts of the lower kind) and trusts in which some person is entrusted in a general sense with the use of some public property (trust in the higher sense). As considered in chapter 29 *Public Interest Trusts*, the case law has generated a notion that public bodies providing a service may owe fiduciary duties not only to those who pay for the service (for example, through local taxation) but also to anyone who might use that service.⁸³ In consequence, the fiduciary duties which might be owed by the officers of public bodies (of fairness between categories of 'beneficiary', not to breach the trust, etc) extend to an uncertainly broad category of person. It appears that, for example, a transport authority must take into account the needs of regular commuters but it is not clear whether those same duties extend to anyone who might use that service only very occasionally or even to tourists using that transport system. All that could be said for this extension of fiduciary rights is that it might generate a concept of 'acting in the public interest' when officers of public bodies consider the exercise of their powers. This would equate roughly to the obligations of private trustees to consider the nature of their trust power and the manner in which it should be exercised.⁸⁴

⁸² (1882) 7 App Cas 619, 625-26, 630. See also the support lent to this analysis in *Tito v Waddell (No 2)* [1977] Ch 211, 216, *per Megarry V-C*; and *Bartlett v Barclays Bank* [1980] Ch 515.

⁸³ *Bromley v GLC* [1983] AC 768.

⁸⁴ See *Re Hay's ST* [1981] 3 All ER 786 in which Megarry J distinguished variously between personal powers, mere powers, fiduciary powers, discretionary trust powers, and fixed trust powers.

36.4 THINKING OF THE TRUST AS AN EQUITABLE RESPONSE

36.4.1 The trust as a response to conscience

Distinguishing between a remedy and a response

Perfectly possibly many readers familiar with the debates about trusts law have already read this sub-heading as “the trust as an equitable *remedy*” and not “the trust as an equitable *response*”. If it were said that the trust were an equitable *remedy*, then that would be to argue with clear authority to the effect that trusts are institutional and not remedial.⁸⁵ Rather, to describe a trust as an equitable response is to suggest that trusts are only capable of being understood as responses to situations in which Equity considers it necessary to act. Indeed, this essay does not argue that all forms of trust correlate neatly within this notion of responsiveness, rather it is suggested that it offers a more comprehensive means of understanding trusts as being orientated around the conscience of the trustee and not around any extraneous conceptual categories such as institutional or remedial trusts, voluntary and involuntary acts, and so forth.

The binary division between institutional trusts, favoured in England for example, and remedial trusts, favoured in New York in relation to constructive trusts, is an unfortunate one.⁸⁶ These concepts are not exact opposites in the manner that is often thought: the category of institutional trusts applies to all trusts whereas that of remedial trusts applies only to constructive trusts. In both conceptions, however, there is a suggestion that the trust is an active device rather than a reactive one. This, it is suggested, is an error. Trusts are neither always active nor always reactive but to understand them as being frequently merely “responsive” is in itself a means of better understanding their nature.

What is meant by the term “response”

By “responsive” is meant that the law of trusts is reactive to the good conscience of the trustee. The cases in trusts law all constitute responses to the behaviour of the legal owner of property. In some circumstances it is considered appropriate to recognise that the claimant ought always to have had property rights in identified property, perhaps because the legal owner of that property acquired it from the claimant in circumstances which the court considers to have been unconscionable. This is the foundation of an institutional trust. Examples of such unconscionable activity would be where the legal owner seeks to take beneficial entitlements from property which she knew she was to hold on trust for the claimant,⁸⁷ or where the legal owner has received a payment of money from the claimant in circumstances in which she knew that payment to have been made mistakenly,⁸⁸ or where the legal owner has stolen property from the claimant.⁸⁹ The usual explanation of such situations is that the unconscionable activity created an institutional trust automatically by operation of law and without the discretionary intervention of the court. A competing analysis is that property so dealt with ought to have been transferred to the claimant immediately and therefore any benefit derived from the property by the wrongdoer ought similarly to be treated *as though it had been transferred to the claimant*. This is recognised by courts of equity as transferring equitable title immediately.⁹⁰ In truth, it is suggested, what is happening in both contexts is that the court is evaluating the conscionability of the actions of the legal owner of the property and responding to it.

⁸⁵ *Westdeutsche Landesbank v. Islington* [1996] AC 669.

⁸⁶ *Westdeutsche Landesbank v. Islington* [1996] AC 669.

⁸⁷ E.g. *Fletcher v. Fletcher*; *Blackwell v. Blackwell* on secret trusts.

⁸⁸ *Chase Manhattan v. Israel-British Bank*, as explained in *Westdeutsche Landesbank v. Islington* [1996] AC 669, *per* Lord Browne-Wilkinson.

⁸⁹ *Lennox v. The Queen*; *Westdeutsche Landesbank v. Islington* [1996] AC 669.

⁹⁰ *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 1.

The underlying question in this context is normative even though the issue is stated differently. In relation, for example, to cases like *re Goldcorp*⁹¹ the claimant was attempting to establish title in property which would constitute it a secured creditor in the insolvency of a bullion exchange. It was held that there was no such entitlement for the claimants to any property because it had not been segregated on trust for the claimant in advance of the insolvency. From the perspective of the claimant the argument was made that the contracts between customer and exchange obliged the exchange to segregate bullion to the account of each customer order and that there ought therefore to be a recognition that the exchange bore duties under the *Walsh v. Lonsdale*⁹² doctrine that equitable title be deemed to have passed automatically on the creation of the contract. The normative prescription in *Goldcorp* was in response to the context of insolvency and the perceived injustice of breaking the *pari passu* principle of insolvency law by giving secured creditor status to someone who had not, as a matter of fact, had property segregated to their account, even if under the terms of their contracts they were entitled to have had that happen.

By contrast, the decision to recognise the existence of a constructive trust in *Attorney-General for Hong Kong v Reid*⁹³ was reached by using the *Walsh v. Lonsdale* principle to argue that a public official who took bribes not to prosecute criminals ought to have handed the bribes over to his employers immediately and therefore that equitable title in those bribes was deemed to have been transferred automatically to them. In *Reid*, the normative analysis was that the defendant was culpable of corruption and that everything should therefore be construed against him. That is a different moral context from the orderly distribution of the assets of an insolvent person (as in *Goldcorp*). In *Reid* there was no question as to which property was at issue: rather, the only question was whether or not the defendant be entitled to retain property acquired by his own unconscionable actions. The logical problem was that the claimant had no specific claim to that property because the claimant had never had title in it before: therefore the Privy Council worked hard to justify how, in property theory, the claimant could establish a property right in that money.

In *Westdeutsche Landesbank v. Islington*⁹⁴ the normative question here was whether or not there was any effect on the defendant's conscience when it received and spent money under a contract which was subsequently held to have been void *ab initio* such that it could have been construed to have become trustee of that money. Interestingly, it was said that there could not have been an institutional trust because there was no effect on its conscience at the time the money was spent. The manner in which a trust operates here is clearly by reference to the lack of blameworthiness of the defendant and not by reference to the abstract justice or injustice suffered by the claimant. It was suggested by Lord Browne-Wilkinson that a remedial trust might have had the effect of measuring the liability of the defendant by reference to the loss suffered by the claimant not simply by reference to the level of culpability of the defendant.⁹⁵

In either situation, the role of the court is to *answer* the question asked of it by the parties. It would be, at the most banal level, a remarkable suggestion that in situations in which courts are asked to address issues relating to private law questions which have arisen without the intention of the parties that the courts were doing anything other than responding to those events. Therefore, the courts are necessarily seeking to express, through institutional trusts, the way in which they would have wanted the parties to act and to deal with property between them. They do not have the luxury of setting out for the parties *in advance* the way in which they should behave in the future – unless they are asked to decide on a question of injunctive relief. The decision in *Westdeutsche Landesbank* is necessarily predicated on the institutional basis of the trust but it is more particularly on a retrospective basis that the House of Lords decides.⁹⁶ In *Goldcorp* the concern was more specifically with the economic effects of insolvency and the identity of property being subjected to secured rights. In *Reid*, by further contrast, the Privy Council found a constructive trust which reached outwith the normal ambit of such institutions by means of holding the defendant personally liable for any loss which might have been suffered if the investment of the bribes had fallen in value. It is suggested that this model of constructive trust goes further than the other two because it borrows from the law on breach of express trusts to attach personal liability to the defendant to compensate the claimant. In *Reid* the court was concerned not only to allocate equitable title in property but also to punish the defendant for corrupt practices.

⁹¹ [1995] 1 A.C. 74.

⁹² (1882) 21 Ch D 9.

⁹³ [1994] 1 AC 324.

⁹⁴ [1996] AC 669.

⁹⁵ In any event, a remedial trust would have operated in that case such that the defendant bore no culpability and therefore ought not to have been liable for the claimant's loss. That is, it is suggested, because the defendant had no knowledge that the money paid to it voluntarily by the claimant was transferred under a void contract.

⁹⁶ Fortunately, as Lord Goff expresses the matter, the court was simply dealing with a question of the value to be recorded on the cheque which the local authority was to be required to write in favour of the bank.

When the doctrine of proprietary estoppel is added to this matrix it is clear that representation, reliance and detriment give rise to the estoppel⁹⁷ but that the precise remedy which the court will impose differs from case to case. Those remedies vary from absolute title in the property⁹⁸ to mere personal rights to money.⁹⁹ That proprietary estoppel is remedial arises from this large range of remedies being made available to claimant. However, the constructive trusts – to which proprietary estoppel is occasionally compared¹⁰⁰ – also arise in line with principle but nevertheless in response to context. In *Goldcorp* the claimants were perfectly entitled, as a matter of pure contract, to a constructive trust in the same manner that constructive trusts have been held in other contexts in which a contract for the transfer of property has been created over land¹⁰¹ or over personalty.¹⁰² However, the availability of that constructive trust was limited by the context of the defendant's insolvency: that is, the trust will be capable of disapplication where the context so requires.

In these ways, it is suggested, the trust is responsive to context. Between cases of remedial uses of equitable doctrine and institutional uses of trusts, the term "response" is nevertheless a useful collective term for the way in which equity operates through the trust.

36.4.2 Trusts law acting *in personam* against the legal owner

The trustee is always posited as being the defendant in trusts law theory. So it is that the questions of certainty of subject matter and of objects are targeted at the need for the court to ensure sufficient certainty for it to be able to police the responsibilities of the trustee in carrying out her duties in relation to the trust fund. Similarly, even the beneficiary principle, which might otherwise be thought to focus attention on the beneficiary, is expressed in *Morice v. Bishop of Durham* in terms of the need for there to be a beneficiary in existence who can bring the trustee to court in the event of any breach of trust.¹⁰³ Even the principle in *Saunders v. Vautier*¹⁰⁴ which most clearly expresses the English law concept that it is the beneficiary, or beneficiaries acting collectively, who control the ultimate destiny of the trust, is nevertheless framed in terms of the right of such beneficiary to direct the trustee how to deal with the trust property: that is, the principle is ultimately focused on the trustee-as-defendant. That the settlor has no role *qua* settlor under English law is clear from *Paul v. Paul*¹⁰⁵ whereby the settlor *qua* settlor is not entitled to control the trust. Instead it is necessary to construct a trust so that the settlor retains some right *qua* trustee or *qua* beneficiary in relation to the trust property to ensure that that person has some control over the trust.

Thus the law of express trusts is, in its theory, directed entirely at the obligations incumbent on the trustee. In that sense the trust is truly an equitable device because it acts *in personam* against the conscience of the trustee. It is suggested that it is by reference to the same matrix that constructive and resulting trusts are to be analysed. They are ostensibly incoherent if analysed at the level of common law categories such as voluntary and involuntary behaviour; rather they only cohere if they are understood as responses in general terms by the courts to the individual defendant's behaviour in those particular circumstances. In that sense their more efficient comparator is the award of an injunction in equity rather than the creation of a contract at common law.

⁹⁷ *Gillett v. Holt* [2000] 2 All ER 289; *Yaxley v. Gotts* [2000] 1 All ER 711.

⁹⁸ *Pascoe v. Turner* [1979] 2 All ER 945.

⁹⁹ *Baker v. Baker* (1993) 25 HLR 408

¹⁰⁰ *Yaxley v. Gotts* [2000] 1 All ER 711.

¹⁰¹ *Lysaght v. Edwards* (1876) 2 Ch D 499.

¹⁰² *Chinn v. Collins* [1981] 2 WLR 14.

¹⁰³ Cf. financial regulation which displaces the primacy of the trustee's role and represents a reversal in part of the trust theory relationship, as considered above.

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36.5 CONCLUSIONS – 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. Once it is understood that within express trusts there is room for sub-division, then the way is open for a broader redefinition. Understanding the distinctions between the categories will be important so that the trustee will know which obligations will come into existence at which stage. 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.

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: its ability to generate models which can be used by policymakers and by ordinary citizens to facilitate their social interaction.¹⁰⁶ In this way, social welfare initiatives like housing action trusts and NHS trusts¹⁰⁷ can enable effective service provision and also to enable users of their services to effect some control over them. Equitable estoppel is the natural counterpoint in equity as a flexible tool of justice, as compared to the ever more institutional express trust and constructive trust.¹⁰⁸ In consequence, such a re-definition and re-ordering of trusts law concepts would be important and timely.

¹⁰⁶ Possibly akin to those in *Bromley v GLC* [1983] AC 768.

¹⁰⁷ Whether you approve of them politically or not: a larger question deferred until the concluding chapter.

¹⁰⁸ Para 15.1.