

LEWIN  
ON  
TRUSTS

VOLUME I

TWENTIETH EDITION

SWEET & MAXWELL

LEWIN  
ON  
TRUSTS

VOLUME II

TWENTIETH EDITION

SWEET & MAXWELL

TRUSTS, WILLS AND PROBATE LIBRARY

LEWIN  
ON  
TRUSTS

First Supplement  
to the Twentieth Edition

Tucker  
Le Poidevin KC  
Brightwell

SWEET & MAXWELL

Mr Lewin himself had no children. He did not enterprise matrimony unadvisedly or lightly or wantonly, doing so in April 1865 at the beginning of his life. Perhaps his zest for travel had disinclined him to conjugal ties: his antiquarian interests took him to Greece, Asia Minor, Syria and the Holy Land, the last with a view to verifying his work on St. Paul, which went through several editions, and he published papers on those subjects, including contributions to the site of Julius Caesar's landfall in Britain. He was elected F.S.A. in 1862.

Mr Lewin was described as an enthusiast in whatever subject he took in hand. One of his pupils wrote that he was one of the most kind-hearted and generous of men and that to know him was to love him. The author of a brief memoir of Lewin records the view that on his work on St. Paul "his fame as an antiquarian will mainly rest". We express the hope that his obituarist in the *Law Journal* will have shown more perceptiveness in writing that "His name is, however, chiefly famous for his celebrated work on 'Trusts', . . . by the aid of which Mr Lewin will be remembered for years to come in the profession".

CONTENTS  
VOLUME 1

Page  
Foreword v  
Preface vii  
Thomas Lewin xv  
Derivation of Chapters in the 20th from the 19th Edition xxix  
Destination of Chapters from the 19th to the 20th Edition xxxiii  
Table of Cases xxxv  
Table of Statutes cccxxxi  
Table of Court Rules and Practice Directions ccclxxxv  
Table of Statutory Instruments cccxciii  
Table of Legislation of the Commonwealth, the British Islands and Hong Kong cdv  
Table of European and International Conventions, Legislation and Regulations cdxi

PART ONE

DEFINITION, CLASSIFICATION AND CREATION OF TRUSTS

1. DEFINITION AND CLASSIFICATION  
1. Definition of a trust 1-001  
2. Classification of trusts 1-028  
3. Classification of equitable interests under trusts 1-036  
2. PARTIES AND PROPERTY FOR EXPRESS TRUSTS  
1. Requisites for the creation of an express trust 2-001  
2. Who may be a settlor 2-002  
3. Who may be a trustee 2-014  
4. Who may be a beneficiary 2-025  
5. What property may be made subject to a trust 2-034  
3. PRINCIPAL METHODS OF CONSTITUTION OF EXPRESS TRUSTS  
1. Introduction 3-001  
2. Express lifetime declarations of trust 3-004  
3. Transfers to trustees 3-021  
4. When a trust is fully constituted on a transfer to trustees 3-034

Professional Bookshop  
www.pbookshop.com

5. Creation of new settlements in the exercise of powers . . . . . 3-054

6. Testamentary and secret trusts . . . . . 3-065

4. CREATION OF TRUSTS BY CONTRACT . . . . . 4-001

1. Scope of chapter . . . . . 4-001

2. The seller under a specifically enforceable contract . . . . . 4-003

3. Covenants to settle property . . . . . 4-012

4. Mutual wills . . . . . 4-035

5. Other contracts and covenants to make a will . . . . . 4-059

6. Policies written under the Married Women's Property Act . . . . . 4-069

5. REQUIREMENTS FOR ESSENTIAL VALIDITY OF EXPRESS TRUSTS . . . . . 5-001

1. Validity of and challenges to express trusts . . . . . 5-001

2. The requisite intention to create a trust . . . . . 5-002

3. Trusts held to be shams . . . . . 5-020

4. Certainty of objects of the trust . . . . . 5-045

5. Trusts for non-charitable purposes and unincorporated non-charitable associations . . . . . 5-052

6. Rectification and rescission . . . . . 5-068

6. LEGALITY OF OBJECT OF TRUST . . . . . 6-001

1. Introduction . . . . . 6-001

2. Trusts against the policy of the law . . . . . 6-003

3. Perpetuities . . . . . 6-037

4. Accumulations . . . . . 6-144

5. Restrictions on alienation and protective trusts . . . . . 6-179

7. INTERPRETATION OF EXPRESS TRUSTS . . . . . 7-001

1. Introduction . . . . . 7-001

2. Evidence to interpret settlements . . . . . 7-004

3. Interpretation of trusts for children . . . . . 7-020

4. Interpretation of executory trusts . . . . . 7-084

5. Interpretation of executed trusts . . . . . 7-094

6. Referential trusts . . . . . 7-100

7. Statutory trusts . . . . . 7-102

8. TRUSTS ARISING BY OPERATION OF LAW GENERALLY . . . . . 8-001

1. Introduction . . . . . 8-001

2. Classification of resulting trusts . . . . . 8-005

3. Classification of constructive trusts and constructive trusteeship . . . . . 8-008

4. Constructive trusts imposed on certain acquisitions . . . . . 8-027

9. RESULTING AND OTHER TRUSTS ARISING UPON FAILURE OF DISPOSITIONS . . . . . 9-001

1. Scope of chapter . . . . . 9-001

2. Dispositions on trust which fail to exhaust the beneficial interest . . . . . 9-002

3. *Quistclose* trusts . . . . . 9-040

4. Surplus assets of non-charitable unincorporated associations and relief funds . . . . . 9-066

10. TRUSTS ARISING IN RELATION TO THE ACQUISITION OF PROPERTY . . . . . 10-001

1. Scope of chapter . . . . . 10-001

2. Resulting trusts on gratuitous lifetime transfers . . . . . 10-002

3. Purchase in the name of another . . . . . 10-019

4. Beneficial interests of two or more persons . . . . . 10-050

5. Joint bank accounts . . . . . 10-094

**PART TWO**

**FOREIGN ELEMENTS**

11. JURISDICTION, SERVICE AND JUDGMENTS . . . . . 11-001

1. Introduction . . . . . 11-001

2. Jurisdiction of the English court at common law . . . . . 11-004

3. Jurisdiction of the English court under European legislation . . . . . 11-016

4. Jurisdiction clauses . . . . . 11-056

5. Jurisdictional immunities . . . . . 11-090

6. Submission to the jurisdiction . . . . . 11-093

7. Bringing the parties before the court—service . . . . . 11-097

8. Recognition and enforcement of foreign judgments . . . . . 11-132

12. CHOICE OF LAW . . . . . 12-001

1. Introduction . . . . . 12-001

2. Transfers into trusts and choice of law . . . . . 12-008

3. Validity of trusts themselves—choice of law . . . . . 12-063

4. Forced heirship rights . . . . . 12-145

5. Foreign incapacities of beneficiaries . . . . . 12-157

6. "Firewalls" . . . . . 12-165

**PART THREE**

**THE TRUSTEES**

13. BECOMING A TRUSTEE . . . . . 13-001

1. Number of trustees . . . . . 13-001

2. Acceptance and disclaimer of trusts . . . . . 13-007

3. Considerations before acceptance . . . . . 13-028

4. Duties of a new trustee . . . . . 13-032

14. DEATH, RETIREMENT AND REMOVAL OF TRUSTEES . . . . . 14-001

1. Death of trustee . . . . . 14-001

2. Voluntary retirement of trustee . . . . . 14-004

3. Compulsory retirement of trustee . . . . . 14-032

4. Removal of trustee . . . . . 14-065

15. APPOINTMENT OF NEW TRUSTEES . . . . . 15-001

1. Express powers . . . . . 15-001

2. Section 36 of the Trustee Act 1925 . . . . . 15-006

3. General considerations . . . . . 15-047

4. Appointment of new trustees by the court . . . . . 15-080

16. APPOINTMENT OF NEW TRUSTEES IN PLACE OF TRUSTEES LACKING MENTAL CAPACITY 16-001

1. Introduction . . . . . 16-013
2. Appointment under statutory and express powers . . . . . 16-028
3. Appointment at the instance of beneficiaries . . . . . 16-034
4. Appointment by the court . . . . . 16-039
5. Retirement or removal without new appointment . . . . . 16-039

17. VESTING TRUST PROPERTY AND INDEMNITY ON CHANGE OF TRUSTEES 17-001

1. Vesting trust property on a change of trustees . . . . . 17-031
2. Vesting and similar orders . . . . . 17-056
3. Indemnity of former trustees . . . . . 17-056

18. PARTICULAR TRUSTEES 18-001

1. Judicial trustees . . . . . 18-011
2. The Public Trustee . . . . . 18-059
3. Custodian trustees . . . . . 18-068
4. Trust corporations . . . . . 18-068

19. INDEMNITY OF TRUSTEES 19-001

1. Introduction . . . . . 19-001
2. Indemnity out of trust property in respect of administration expenses . . . . . 19-003
3. Personal rights of indemnity against beneficiaries . . . . . 19-057

20. REMUNERATION OF TRUSTEES 20-001

1. General . . . . . 20-001
2. Authorisation by trust instrument . . . . . 20-009
3. Authorisation by statute . . . . . 20-036
4. Authorisation by the court . . . . . 20-047
5. Authorisation by the beneficiaries . . . . . 20-058
6. Remuneration at the end of the trust or trusteeship . . . . . 20-060

PART FOUR

THE BENEFICIARIES AND BENEFICIAL INTERESTS

21. DISCLOSURE TO PERSONS INTERESTED UNDER THE TRUST 21-001

1. Introduction . . . . . 21-001
2. Trustees' duty to notify beneficiaries of their interests . . . . . 21-008
3. Disclosure by trustees to beneficiaries on demand . . . . . 21-020
4. Voluntary disclosure by trustees to beneficiaries . . . . . 21-104
5. Disclosure in trust litigation . . . . . 21-108
6. Disclosure by outgoing trustees to their successors . . . . . 21-119
7. Disclosure by and to settlors and protectors . . . . . 21-123
8. Disclosure under the data protection legislation . . . . . 21-130

22. THE RIGHT TO CALL FOR THE TRUST PROPERTY 22-001

1. Scope of chapter . . . . . 22-001
2. Distribution when one or more beneficiaries absolutely entitled . . . . . 22-003

2. Bringing the trust to an end . . . . . 22-014

23. CAPITAL AND INCOME 23-001

1. Introduction . . . . . 23-001
2. What receipts are capital and what are income . . . . . 23-013
3. Apportionment by time . . . . . 23-072
4. Usual incidence of expenses . . . . . 23-090
5. Fairness as between income and capital beneficiaries generally . . . . . 23-113
6. Implied duty to convert residuary personalty—first branch of the rule in *Howe v Lord Dartmouth* . . . . . 23-118
7. Apportionment of income pending conversion—second branch of the rule in *Howe v Lord Dartmouth* . . . . . 23-136
8. Income of parts of estate later applied to debts and legacies—*Allhusen v Whittell* . . . . . 23-163
9. Life tenant's rights in reversionary interests—*Re Earl of Chesterfield's Trusts* . . . . . 23-174
10. Apportionment of deficient securities—*Re Atkinson* and *Re Bird* . . . . . 23-186

24. DISTRIBUTIONS FROM THE TRUST FUND 24-001

1. Introduction . . . . . 24-001
2. General duty of trustee . . . . . 24-004
3. Advertisement and searches for those entitled . . . . . 24-010
4. Distribution notwithstanding third-party claims . . . . . 24-027
5. Circumstances of beneficiaries affecting distribution . . . . . 24-048
6. Effect of dealings by beneficiaries . . . . . 24-088
7. Manner of payment . . . . . 24-099
8. Final distribution—settling accounts—release . . . . . 24-104

25. HOTCHPOT 25-001

26. ASSIGNMENT OF EQUITABLE INTERESTS AND PRIORITIES 26-001

1. Scope of chapter . . . . . 26-001
2. Assignability . . . . . 26-002
3. Priority and equities affecting assignees of interests . . . . . 26-013
4. Priority from notice—the rule in *Dearle v Hall* . . . . . 26-028
5. Stop orders on funds in court . . . . . 26-064

27. TRUSTS AND INSOLVENCY 27-001

1. Introduction . . . . . 27-001
2. Trusts that prejudice the settlor's creditors . . . . . 27-002
3. Insolvency of a trustee—trusteeship . . . . . 27-016
4. Insolvency of a trustee—effect on trust property . . . . . 27-026
5. Insolvency of a trustee—trustee's right of indemnity . . . . . 27-039
6. Insolvency of a trustee—breach of trust . . . . . 27-061
7. Insolvency of a beneficiary . . . . . 27-084
8. Winding up a trust . . . . . 27-093

VOLUME 2

PART FIVE

POWERS

28. POWERS GENERALLY . . . . . 28-001

1. Scope of chapters . . . . . 28-004

2. Classification and terminology of powers . . . . . 28-029

3. Creation of powers . . . . . 28-036

4. Third party power and consents . . . . . 28-061

5. Who can exercise a power . . . . . 28-110

6. Delegation of powers . . . . . 28-138

7. Disclaimer and release of powers . . . . . 28-138

29. EXERCISING POWERS . . . . . 29-001

1. Scope of chapter . . . . . 29-001

2. Duties of donees—preliminary matters . . . . . 29-002

3. Duties of donees—considering exercise of powers . . . . . 29-031

4. Manner of exercise of powers . . . . . 29-066

5. Time for exercise of powers . . . . . 29-084

6. Giving reasons for decisions . . . . . 29-103

30. DEFECTIVE EXERCISE OF POWERS . . . . . 30-001

1. Scope of chapter . . . . . 30-001

2. Defective execution . . . . . 30-002

2. Excessive execution . . . . . 30-016

3. Mistake, misapprehension and inadequate consideration . . . . . 30-030

4. Fraud on a power—ulterior purposes . . . . . 30-066

6. Duress, undue influence and misrepresentation . . . . . 30-095

5. Control by the court . . . . . 30-099

31. POWERS OF MAINTENANCE . . . . . 31-001

1. Section 31 of the Trustee Act 1925 . . . . . 31-001

2. Points in regard to maintenance . . . . . 31-038

3. Vesting orders with a view to maintenance or benefit . . . . . 31-049

32. POWERS OF ADVANCEMENT . . . . . 32-001

1. Express powers of advancement . . . . . 32-001

2. Advancement by the court . . . . . 32-006

3. The statutory power . . . . . 32-011

4. Exercise of the power . . . . . 32-040

33. POWERS OF APPOINTMENT, AMENDMENT AND LIKE POWERS . . . . . 33-001

1. Scope of chapter . . . . . 33-001

2. General powers of appointment . . . . . 33-002

3. Special powers of appointment . . . . . 33-017

4. Intermediate powers of appointment . . . . . 33-044

5. Powers of addition and exclusion . . . . . 33-058

6. Powers of amendment . . . . . 33-071

7. Powers of transfer to other settlements . . . . . 33-085

8. Powers of revocation . . . . . 33-089

PART SIX

ADMINISTRATION OF THE TRUST PROPERTY

34. ADMINISTRATIVE DUTIES OF TRUSTEES . . . . . 34-001

1. Duties of care . . . . . 34-001

2. Getting in the trust property . . . . . 34-015

3. Safe custody of the trust property . . . . . 34-026

4. Management of the trust property . . . . . 34-050

5. Insurance . . . . . 34-063

6. Nominees and uncertificated holdings . . . . . 34-077

7. Income of stocks and shares . . . . . 34-099

35. INVESTMENT BY TRUSTEES . . . . . 35-001

1. Statutory powers of investment . . . . . 35-001

2. Express powers of investment . . . . . 35-009

3. Former statutory powers of investment . . . . . 35-036

4. Auxiliary powers . . . . . 35-040

5. Exercise of powers of investment . . . . . 35-055

6. Investment on mortgage . . . . . 35-079

7. Acquisition of land . . . . . 35-120

36. ADMINISTRATIVE POWERS OF TRUSTEES . . . . . 36-001

1. General . . . . . 36-001

2. Power to employ agents . . . . . 36-009

3. Powers of appropriation . . . . . 36-075

4. Powers of compromise . . . . . 36-091

5. Power to carry on business . . . . . 36-106

6. Powers in connexion with mortgages . . . . . 36-114

7. Powers of borrowing . . . . . 36-120

8. Miscellaneous powers . . . . . 36-129

9. Effect of order for administration . . . . . 36-139

37. TRUSTS OF LAND AND CHATELS . . . . . 37-001

1. Introduction . . . . . 37-001

2. Trusts of land . . . . . 37-004

3. Powers of trustees of land . . . . . 37-013

4. Rights of beneficiaries of trusts of land . . . . . 37-055

5. Chattels . . . . . 37-078

38. SETTLED LAND . . . . . 38-001

1. The Settled Land Act 1925 . . . . . 38-001

2. Who can exercise the Settled Land Act powers . . . . . 38-008

3. The tenant for life of settled land as trustee . . . . . 38-049

4. General provisions affecting the powers of a tenant for life . . . . . 38-063

5. The powers and duties of Settled Land Act trustees . . . . . 38-091

6. Settled Land Act powers of sale and exchange . . . . . 38-108

7. Settled Land Act leasing powers . . . . . 38-117

8. Further Settled Land Act powers . . . . . 38-140

9. Special classes of property under the Settled Land Act . . . . . 38-168

10. Incumbrances on settled land . . . . . 38-182

11. Application of capital money under the Settled Land Act . . . . .	38-189
12. Powers of improvement of settled land generally . . . . .	38-217
13. Procedure for raising capital money for improvements to settled land . . . . .	38-221
14. Incidence of costs of improvements to settled land as between capital and income . . . . .	38-225
15. Improvements to settled agricultural land . . . . .	38-236
16. Miscellaneous provisions affecting improvements to settled land . . . . .	38-243
17. Scheduled improvements . . . . .	38-248

### PART SEVEN

#### PROCEEDINGS AND REMEDIES

39. APPLICATIONS	
1. Scope of chapter . . . . .	39-001
2. Application to court . . . . .	39-007
3. Construction—approval of legal opinion . . . . .	39-080
4. Court's role in connection with powers . . . . .	39-085
5. Payment into court . . . . .	39-111
40. SAFEGUARDING TRUST PROPERTY FROM BREACH OF TRUST	
1. Methods of safeguarding surveyed . . . . .	40-001
2. Securing proper trustees . . . . .	40-003
3. Stop notices and stop orders . . . . .	40-006
4. Injunctions . . . . .	40-010
5. Compulsory payment into court . . . . .	40-018
6. Summary orders for accounts . . . . .	40-029
7. Appointment of a receiver . . . . .	40-033
41. PERSONAL REMEDIES AGAINST TRUSTEES FOR BREACH OF TRUST	
1. Introduction . . . . .	41-001
2. Personal accountability and compensation for breach of trust . . . . .	41-002
3. <i>Locus standi</i> for a breach of trust action . . . . .	41-071
4. Contribution between trustees . . . . .	41-081
5. A trustee's responsibility for others . . . . .	41-094
6. Defence of concurrence, acquiescence or release and confirmation by a beneficiary . . . . .	41-106
7. Defence under exculpatory provisions . . . . .	41-127
8. Power of court to relieve a trustee from personal liability . . . . .	41-148
9. Civil imprisonment and criminal restitution . . . . .	41-156
42. PERSONAL REMEDIES AGAINST RECIPIENTS	
1. Scope of chapter . . . . .	42-001
2. Common law action for recovery of money paid by mistake . . . . .	42-004
3. Equitable recoupment . . . . .	42-010
4. Personal <i>Diplock</i> remedy . . . . .	42-014
5. Knowing receipt . . . . .	42-022

6. Trustee <i>de son tort</i> . . . . .	42-101
7. Inconsistent dealing by lawful recipients of trust property . . . . .	42-111
43. REMEDIES AGAINST ACCESSORIES	
1. Scope of chapter . . . . .	43-001
2. Impounding to indemnify trustees . . . . .	43-002
3. Impounding to indemnify beneficiaries . . . . .	43-007
4. Dishonest assistance . . . . .	43-014
5. Directors of corporate trustee . . . . .	43-063
6. Remedies in tort . . . . .	43-068
44. PROPRIETARY REMEDY AND TRACING AGAINST TRUSTEES AND THIRD PARTIES	
1. Introduction . . . . .	44-001
2. General . . . . .	44-010
3. Mixed substitutions—bank accounts . . . . .	44-063
4. Mixed substitutions—acquisitions and insurance . . . . .	44-074
5. Mixtures and problems of identification . . . . .	44-094
6. Improvements to land and chattels . . . . .	44-100
7. When trust assets become untraceable . . . . .	44-111
8. Purchase without notice . . . . .	44-119
45. UNAUTHORISED PROFITS	
1. The general principle . . . . .	45-001
2. Renewal of leases and purchase of reversion by trustees . . . . .	45-002
3. Profits from transactions with third parties . . . . .	45-032
46. CONFLICTS OF INTEREST	
1. Purchase of trust property by trustees and other self-dealing transactions . . . . .	46-001
2. Interest of trustees in exercise of dispositive powers . . . . .	46-069
3. Purchase of beneficial interest from beneficiary . . . . .	46-091
4. <i>Bona vacantia</i> —adverse title— <i>jus tertii</i> . . . . .	46-097
47. REMEDIES AGAINST THIRD PARTIES OTHERWISE THAN IN RESPECT OF BREACH OF TRUST	
1. The general rule and derivative actions . . . . .	47-001
2. Claims in tort by beneficiaries for negligence . . . . .	47-018
48. COSTS OF PROCEEDINGS	
1. Costs of trust proceedings . . . . .	48-001
2. Costs of proceedings against the trust or the trust property . . . . .	48-089
3. Costs of third-party proceedings . . . . .	48-109
4. <i>Beddoe</i> applications . . . . .	48-130
49. ALTERNATIVE DISPUTE RESOLUTION	
1. Arbitration . . . . .	49-001
2. Mediation . . . . .	49-027
3. Other forms of alternative dispute resolution . . . . .	49-036
50. LIMITATION OF ACTIONS	
1. Scheme of chapter . . . . .	50-001
2. Fraud and retention of trust property . . . . .	50-004
3. Other claims . . . . .	50-018
4. Constructive trusts and similar liabilities . . . . .	50-056

5. Future interests in land . . . . . 50-091

6. Extension and postponement of limitation periods . . . . . 50-144

51. TRUSTS AND DIVORCE . . . . . 51-001

1. Introduction . . . . . 51-001

2. Challenging a trust in English matrimonial proceedings . . . . . 51-020

3. Variation of nuptial settlements . . . . . 51-031

4. Treatment of a trust as a spousal resource . . . . . 51-045

5. Disclosure of information by trustees in English matrimonial proceedings . . . . . 51-052

6. Trustees' conduct in relation to matrimonial proceedings . . . . . 51-067

**PART EIGHT**

**LAWFUL DEPARTURE FROM THE TRUSTS**

52. ENLARGEMENT OF ADMINISTRATIVE POWERS BY THE COURT . . . . . 52-001

1. Inherent jurisdiction . . . . . 52-001

2. Management and administration—section 57 of the Trustee Act 1925 . . . . . 52-008

3. Transactions affecting land—section 64 of the Settled Land Act 1925 . . . . . 52-025

53. VARIATION . . . . . 53-001

1. Scope of chapter . . . . . 53-001

2. By agreement . . . . . 53-003

3. Compromise jurisdiction . . . . . 53-005

4. The Variation of Trusts Act 1958 . . . . . 53-008

**PART NINE**

**TRUSTS, REGULATION AND CRIME**

54. REGISTRATION AND REGULATION . . . . . 54-001

1. Introduction . . . . . 54-001

2. Registration and supervision of trustees . . . . . 54-004

3. Trustee records of beneficial ownership . . . . . 54-014

4. Trusts and registration of persons with significant control over companies . . . . . 54-021

5. Customer due diligence under the money laundering regulations . . . . . 54-035

6. CRS, FATCA and DAC 6 Reporting . . . . . 54-102

55. TRUSTEES INVOLVED WITH CRIMINAL AND TERRORIST PROPERTY . . . . . 55-001

1. Scheme of chapter . . . . . 55-001

2. The legislation . . . . . 55-003

3. Proceeds of crime . . . . . 55-005

4. Property connected with terrorism . . . . . 55-040

5. Duties of disclosure and non-disclosure . . . . . 55-062

6. Guidance for trustees . . . . . 55-076

7. Civil recovery of proceeds of crime . . . . . 55-095

8. Confiscation and similar orders . . . . . 55-123

9. Unexplained wealth orders . . . . . 55-137

*Index* . . . . . 1501

Professional Bookshop  
www.pbookshop.com

1	Trusts and Property for Life	1
2	Trusts and Property for Life	2
3	Trusts and Property for Life	3
4	Trusts and Property for Life	4
5	Trusts and Property for Life	5
6	Trusts and Property for Life	6
7	Trusts and Property for Life	7
8	Trusts and Property for Life	8
9	Trusts and Property for Life	9
10	Trusts and Property for Life	10
11	Trusts and Property for Life	11
12	Trusts and Property for Life	12
13	Trusts and Property for Life	13
14	Trusts and Property for Life	14
15	Trusts and Property for Life	15
16	Trusts and Property for Life	16
17	Trusts and Property for Life	17
18	Trusts and Property for Life	18
19	Trusts and Property for Life	19
20	Trusts and Property for Life	20

Results of failure of secret trusts

3-097

If a secret trust fails because it is void for illegality, there is a resulting trust into residue or, if the trust was declared of residue, for those entitled on an intestacy.<sup>395</sup> If the primary donee accepts the trust, and it fails only because the terms were not properly defined or communicated, the result is the same,<sup>396</sup> likewise where a half-secret trust is not accepted.<sup>397</sup> But if there is no understanding between the testator and the donee, or any communication which can be construed as a trust, then the primary donee will take beneficially in accordance with the terms of the will.<sup>398</sup> This cannot apply in the case of a half-secret trust as the trustee's status as such is clear from the terms of the will and cannot be denied, or in the case of a failed fully secret trust where the primary donee admits that he holds as trustee.<sup>399</sup>

<sup>395</sup> See the previous footnote.

<sup>396</sup> *Re Boyes* (1884) 26 Ch.D. 531; *Re Keen* [1937] Ch. 236; *Re Pugh's Will Trusts* [1967] 1 W.L.R. 1262; *Re Bateman* [1970] 1 W.L.R. 1463, where a question might have arisen as to making up an abated legacy.

<sup>397</sup> *Re Keen*, above; *Re Bateman*, above; *Re Hawkesley's Settlement* [1934] Ch. 384.

<sup>398</sup> *Wallgrave v Tebbs* (1855) 2 K. & J. 313. The result is probably the same where the testator communicates the trusts to the primary donee, but they are not accepted.

<sup>399</sup> *Re Boyes*, above, at 536.

CHAPTER 4

CREATION OF TRUSTS BY CONTRACT

He had only to say: "I can make no allowance at present, but I'll settle my whole fortune upon Mary and her children after my death, if you'll make a moderate settlement at present," and Walter would certainly fall into this, and not demand accounts from Mary's trustee.

Charles Reade, *A Perilous Secret*, Chapter 10

1.	SCOPE OF CHAPTER	4-001
2.	THE SELLER UNDER A SPECIFICALLY ENFORCEABLE CONTRACT	
	Sale of land	4-003
	General principle	4-003
	Formalities	4-006
	The qualified nature of the trust	4-007
	The nature of the relationship	4-008
	Sale of shares	4-010
3.	COVENANTS TO SETTLE PROPERTY	
	The basic principle	4-012
	The permissible width of a covenant	4-013
	Construction of covenants to settle for marriage	
	consideration	4-014
	The traditional after-acquired property clause	4-015
	Covenant by husband to settle wife's property	4-016
	Life interests and annuities	4-017
	Income of settled property	4-018
	Property subject to restraint on anticipation	4-019
	Property the subject of a general power	4-020
	Gifts by husband to wife	4-021
	Covenant restricted to future property	4-022
	Covenants to settle property by will	4-024
	Covenants of limited effect	4-025
	Evading the covenant	4-026
	Covenant to settle property exceeding a certain value	4-027
	Covenant excluding chattels	4-028
	Covenant to settle a specific interest	4-029
	"As near thereto as circumstances will permit"	4-030
	Immediate trust of other property	4-031
	Enforcement of covenants to settle property—equity	
	and common law	4-032
	Marriage settlements	4-032
	Settlements generally	4-033

	Enforcement of covenants to settle property—under statute .....	4-034
4.	MUTUAL WILLS .....	4-034
	General principle .....	4-036
	Requirements .....	4-038
	Need for agreement .....	4-038
	The “three certainties” .....	4-040
	No need for mutual or similar benefits .....	4-041
	No need for wills to follow agreement in time .....	4-042
	Formalities required .....	4-043
	Obligations of testators—revocability of wills .....	4-045
	Agreement not to revoke without notice .....	4-046
	Agreement not to revoke at all .....	4-047
	Involuntary revocation .....	4-048
	Codicils and similar cases .....	4-049
	Discharge by consent .....	4-050
	Obligations of testators—property affected .....	4-051
	Joint tenancies .....	4-053
	How mutual wills take effect .....	4-055
	Theoretical basis of mutual wills .....	4-058
5.	OTHER CONTRACTS AND COVENANTS TO MAKE A WILL .....	4-059
	General .....	4-061
	Requirements .....	4-061
	Need for distinct agreement .....	4-062
	Formalities .....	4-063
	Obligations of testators—securing succession by will .....	4-064
	Obligations of testators—property affected .....	4-064
	How the trust takes effect .....	4-066
6.	POLICIES WRITTEN UNDER THE MARRIED WOMEN’S PROPERTY ACT .....	4-069
	General .....	4-071
	Requirements of legislation .....	4-073
	Person effecting policy .....	4-074
	Beneficiaries of the policy .....	4-077
	Beneficial interests .....	4-080
	Expression of benefit .....	4-081
	Joint policies .....	4-082
	Form of assurance .....	4-083
	Construction of policy .....	4-083
	Beneficiaries described by relationship .....	4-084
	Multiple interests .....	4-085
	Interest of assured .....	4-085
	Ultimate and resulting trusts .....	4-086
	Powers .....	4-088
	Trusteeship .....	4-089
	Original and subsequent trustees .....	4-092
	Powers and duties of trustees .....	4-093
	Discharge of insurer .....	4-096
	Protection from adverse claims .....	4-097
	Death of assured .....	4-099
	Insolvency of assured .....	

Variation on divorce .....	4-104
Conflict of laws .....	4-105

1. SCOPE OF CHAPTER

This Chapter concerns trusts that arise as a result of contracts. In section 2 we consider the qualified trust for the buyer that arises from a specifically enforceable contract of sale. In section 3 we deal with the trusts that arise without further declaration from covenants for value (especially marriage consideration) to settle property. In section 4 we consider the trusts that arise from contracts to make mutual wills and in section 5 other contracts to make a will. Finally, section 6 contains a discussion of the special provisions of the Married Women’s Property Act 1882. 4-001

Certain other trusts have their origin in some form of agreement which will typically or frequently amount to a binding contract, for example *Quistclose* trusts and trusts founded on a common intention on the acquisition of property; they are considered elsewhere.<sup>1</sup> The creation of trusts of the benefit of contracts is also considered elsewhere.<sup>2</sup> 4-002

2. THE SELLER UNDER A SPECIFICALLY ENFORCEABLE CONTRACT

Sale of land

General principle

The general principle has been expressed as follows: 4-003

“The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.”<sup>3</sup>

There are numerous authorities to the same effect.<sup>4</sup>

<sup>1</sup> *Quistclose* trusts in §§ 9-040 onwards; trusts founded on a common intention in §§ 10-062 onwards.  
<sup>2</sup> See §§ 5-013 onwards. For the question whether, when there is a contract between A and B that B will confer a benefit on C, C holds the benefit on resulting trust for A, see § 10-035.  
<sup>3</sup> *Lysaght v Edwards* (1876) 2 Ch.D. 499 at 506, per Jessel M.R. (and see further at 506–508).  
<sup>4</sup> *Wilson v Clapham* (1819) 1 J. & W. 36; *Rose v Watson* (1862) 10 H.L.C. 671; *Shaw v Foster* (1872) L.R. 5 H.L. 321 at 338; *Frederick Lawrence Ltd v Freeman Hardy & Willis Ltd* [1959] Ch. 731 at 748, CA; *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358; 10 I.T.E.L.R. 689 at [53]; *Cenac v Schafer* [2016] UKPC 25; [2016] 4 L.R.C. 678 at [14], [24]. There is a full discussion in *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch); [2005] 1 W.L.R. 1961 at [40] onwards. If a vendor who is entitled to sell free of an interest in favour of a third party nonetheless contracts to sell “subject to” that interest, the contract may (if so intended) create a trust binding the purchaser to give effect to the interest: see § 8-039.

4-004

It follows<sup>5</sup> that generally speaking the buyer is entitled to have the property kept pending completion in its state, both physical and legal, at the time of the contract. The obligation has been held to include the following duties, for breach of which the seller is answerable to the buyer:

- (1) To maintain the property in a reasonable state of preservation<sup>7</sup> and to take care to prevent damage to it, for example from a trespasser removing quantities of soil<sup>8</sup> or from squatters;<sup>9</sup>
- (2) To keep the property, where its nature so requires, in a proper state of cultivation (reasonable regard being had to incurring a liability on the seller's part)<sup>10</sup> and to farm it in a husband-like manner;<sup>11</sup>
- (3) Not to abandon rubbish on the property;<sup>12</sup>
- (4) To ensure that tenants do not improperly fall into arrear with their rents<sup>13</sup> and to re-let properties of which the tenancy has terminated, whatever the reason for termination, after notice to the buyer, who may prefer to leave them unlet (e.g. because a letting would attract some form of statutory protection) and provide a guarantee for lost rent in case the purchase goes off;<sup>14</sup>
- (5) To avoid any act which may incur a forfeiture of a leasehold interest being sold;<sup>15</sup>
- (6) Not to let a business lapse, where it was being sold with the premises on which it was carried on, though if there is a delay in completion which is the buyer's fault the seller carries on the business at the buyer's risk as long as the seller gives notice with reasonable promptitude of what he is doing;
- (6) Not, after contract, to make a planning application prejudicial to the buyer (as where conditions are imposed to which the buyer could reasonably have taken exception)<sup>17</sup> and, possibly, not to withdraw an existing planning application;<sup>18</sup> and
- (7) Not to do any other injury by the wilful waste or mere neglect of the seller.<sup>19</sup>

<sup>5</sup> See § 4-008.

<sup>6</sup> *Rafferty v Schofield* [1897] 1 Ch. 937; *Englewood Properties Ltd v Patel*, above, at [54].

<sup>7</sup> *Clarke v Ramuz* [1891] 2 Q.B. 456 at 459-460, CA; *Englewood Properties v Patel*, above, at [48].

<sup>8</sup> See cases cited in previous footnote.

<sup>9</sup> *Davron Estates Ltd v Turnshire Ltd* (1982) 133 N.L.J. 937.

<sup>10</sup> *Earl of Egmont v Smith* (1877) 6 Ch.D. 469 at 475-476; *Englewood Properties v Patel*, above, at [48].

<sup>11</sup> *Foster v Deacon* (1818) 3 Madd. 394; *Ferguson v Tadman* (1827) 1 Sim. 530; *Jensen v Jeffery* [1957] N.Z.L.R. 159; *Englewood Properties v Patel*, above, at [48].

<sup>12</sup> *Cumberland Consolidated Holdings Ltd v Ireland* [1946] K.B. 264 at 269-270, CA; *Englewood Properties v Patel*, above, at [48].

<sup>13</sup> *Wilson v Clapham* (1819) 1 J. & W. 36.

<sup>14</sup> *Earl of Egmont v Smith*, above, at 476; *Abdulla v Shah* [1959] A.C. 124, PC, as discussed in *Englewood Properties Ltd v Patel*, above, at [52].

<sup>15</sup> *Palmer v Goren* (1856) 25 L.J. Ch. 841; *Dowson v Solomon* (1859) 1 Drew. & Sm. 1; *Englewood Properties Ltd v Patel*, above, at [49]-[51].

<sup>16</sup> *Golden Bread Co. Ltd v Hemmings* [1922] 1 Ch. 162 at 171-172; *Englewood Properties v Patel*, above, at [48].

<sup>17</sup> *Englewood Properties v Patel*, above, at [57].

<sup>18</sup> *Sinclair-Hill v Sothcott* (1973) 26 P. & C.R. 490; but see the criticism in *Englewood Properties Ltd v Patel*, above, at [56]-[57].

<sup>19</sup> *Clarke v Ramuz* [1891] 2 Q.B. 456, CA; *Phillips v Lamdin* [1949] 2 K.B. 33 (removal of fixtures).

On the other hand, any loss not due to the seller's default, as by fire<sup>20</sup> or dilapidations,<sup>21</sup> falls on the buyer as the equitable owner;<sup>22</sup> and he must indemnify the seller against expenses properly incurred on his behalf, as where the seller satisfies an immediate obligation brought about by such damage.<sup>23</sup> Conversely, should the estate by any accident become more valuable, the buyer takes the improvements.<sup>24</sup>

The trusteeship depends on the availability of specific performance,<sup>25</sup> a remedy to which the buyer will ordinarily be entitled to enforce a contract for the sale of land.<sup>26</sup> If, however, the contract is conditional and the condition has not yet been fulfilled, specific performance is not available and the beneficial ownership has not passed to the buyer.<sup>27</sup> (But a contract is not conditional in the relevant sense if fulfilment of the supposed condition is within the control of a contracting party.)<sup>28</sup> Similarly, beneficial ownership has not passed if the contract is merely an option, as yet unexercised,<sup>29</sup> or some approval or consent made necessary by statute has not been obtained.<sup>30</sup> Nor will it do so if the contract is unlawful.<sup>31</sup> The trusteeship likewise ceases if a right to specific performance is lost by the subsequent conduct of the party originally entitled to it.<sup>32</sup>

4-005

<sup>20</sup> *Paine v Meller* (1801) 6 Ves. Jr. 349; *Harford v Purrier* (1816) 1 Madd. 532 at 539; *Acland v Gaisford* (1816) 2 Madd. 28 at 32. See as to the application of insurance money § 4-007(2).

<sup>21</sup> *Minchin v Nance* (1841) 4 Beav. 332.

<sup>22</sup> The present *Standard Conditions of Sale* (5th edn, 2018 revision) confirm the common-law rule by providing that the property is at the risk of the buyer from the date of the contract and that the buyer is under no obligation to insure it except in special cases; see paras 5.1.1, 5.1.2.

<sup>23</sup> *Robertson v Skelton* (1849) 12 Beav. 260.

<sup>24</sup> See *White v Nutts* (1702) 1 Peere Wms. 61; *Spurrier v Hancock* (1799) 4 Ves. Jr. 667; *Paine v Meller*, above; *Harford v Purrier*, above.

<sup>25</sup> *Howard v Miller* [1915] A.C. 318 at 326, PC; *Central Trust and Safe Deposit Co. v Snider* [1916] 1 A.C. 266 at 272, PC. But in *Cenac v Schafer* [2016] UKPC 25; [2016] 4 L.R.C. 678 at [24] it was said that the beneficial proprietary interest warranted the grant of specific performance, so inverting the relationship between the two concepts.

<sup>26</sup> *Broome v Monck* (1805) 10 Ves. Jr. 597; *Re Thomas* (1886) 34 Ch.D. 166; *Ridout v Fowler* [1904] 1 Ch. 658; [1904] 2 Ch. 93, CA. A contract for the sale of specific goods normally passes the legal property, so that no trusteeship will arise even if (exceptionally) specific performance is available: *Sale of Goods Act 1979*, ss.17, 18. For shares, see § 4-010.

<sup>27</sup> *J. Sainsbury Plc v O'Connor* [1991] 1 W.L.R. 693 at 679, CA (shares, but following the rule applicable to land); *First Laser Ltd v Fujian Enterprises (Holdings) Co. Ltd* [2011] HKCA 1; 13 I.T.E.L.R. 599 at [76.6]-[76.7] (land, approving this passage). The same applies to a contract to assign a lease when the assignment is subject to the lessor's consent: *Clarence House Ltd v National Westminster Bank Plc* [2009] EWCA 1311; [2010] 1 W.L.R. 1216 at [45] cf. *Chattey v Farndale Holdings Inc.* [1997] 1 E.G.L.R. 153, CA, holding that though beneficial ownership does not pass, the conditional right to call for the legal estate constitutes an equitable interest in land.

<sup>28</sup> *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104, CA; *First Laser Ltd v Fujian Enterprises (Holdings) Co. Ltd*, above, at [76.8].

<sup>29</sup> *J. Sainsbury Plc v O'Connor*, above; *UBS Global Asset Management (UK) Ltd v Crown Estate Commissioners* [2011] EWHC 3368 (Ch). Once the option has been exercised, an ordinary contract for sale comes into existence and a trust for the buyer arises: *Francis v Vista Del Mar Development Ltd* [2019] UKPC 14 at [44].

<sup>30</sup> *McWilliam v McWilliams Wines Pty Inc.* [1964] HCA 6; 114 C.L.R. 656. cf. *Brown v Heffer* [1967] HCA 40; 116 C.L.R. 344.

<sup>31</sup> *Glover v Willert* [1996] QCA 132.

<sup>32</sup> *Central Trust and Safe Deposit Co. v Snider* [1916] 1 A.C. 266 at 272, PC; *Marchesi v Apostolou* [2007] F.C.A. 986 at [109]-[110].



trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.<sup>52</sup> Though the trusteeship is a qualified one,<sup>53</sup> the authorities thus strongly support the traditional view that the seller is a trustee for the buyer and that the seller's duties described above arise from that trust and are not merely implied terms of the contract.<sup>54</sup>

4-009

The trust relationship between buyer and seller of land has important consequences. The buyer may devise, alienate or charge his interest.<sup>55</sup> If the contracted seller of land transfers it for value to someone else, the original buyer is entitled to the proceeds of the second sale as trust money;<sup>56</sup> and if the seller becomes bankrupt, the contract can be enforced against his trustee in bankruptcy.<sup>57</sup> It has been said to be valuable in imposing duties on the seller between contract and completion.<sup>58</sup> The similar trust that affects a seller of shares in an unquoted company constrains his ability to vote them.<sup>59</sup>

**Sale of shares**

4-010

Unquoted shares in a company are usually unique, so that specific performance can be obtained of a contract to sell them. In such a case, therefore, the title to the shares passes in equity to the buyer<sup>60</sup> and the seller has a lien for the price.<sup>61</sup> The same is true even of quoted shares if the quantity of shares contracted for is not readily obtainable in the market.<sup>62</sup> If the contracting seller of the shares wrongly sells the shares to a third party for a higher price than, as with land, the purchase money

<sup>52</sup> Further quotations are collected in *Englewood Properties Ltd v Patel*, above, at [40]–[41].  
<sup>53</sup> See § 4-007.  
<sup>54</sup> See *Lysaght v Edwards*, above, at 507; *Clarke v Ramuz* [1891] 2 Q.B. 456 at 460, CA (“breach of trust” in two places), at 461 (“breach of trust”), at 462 (“as such trustee”); *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104 at 117B–120E, 120H, CA; *Snell’s Equity* (34th edn), § 24-003.  
<sup>55</sup> *Shaw v Foster*, above, at 338. Sub-contracts have caused difficulties of analysis. In *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52; [2015] A.C. 385 at [66], the decision of the majority in *Berkeley v Poulett* [1977] 1 E.G.L.R. 86 at 93, CA was taken to stand for the proposition that, where there was a contract of sale and a sub-contract, the head seller (though on notice of the sub-contract) owed no duty to the sub-buyer, the head seller not holding on trust for the sub-buyer; and that proposition was approved. But it is difficult to see why the sub-contract was not an assignment of part of the buyer’s rights under the head contract. (The head contract extended to more land than the sub-contract.) There was no question of seeking to create a new interest, as to which see § 4-007. See too *Re Charlotte Street Properties Ltd* [2019] EWHC 1722 (Ch), holding at [65] in the light of *Scott* that the sub-buyer does acquire the head buyer’s equitable interest but only on completion of the sub-contract (though it is difficult to see how that could take place before completion of the head contract).  
<sup>56</sup> *Lake v Bayliss* [1974] 1 W.L.R. 1073.  
<sup>57</sup> *Re Pooley, ex p. Rabbidge* (1878) 8 Ch.D. 367, CA.  
<sup>58</sup> Law Commission Report on *Transfer of Land: Risk of Damage After Contract for Sale* (Law Com. No.191), paras 2.7 to 2.8. For the duties, see § 4-004.  
<sup>59</sup> See § 4-011.  
<sup>60</sup> *Parway Estates Ltd v I.R.C.* (1957) 45 T.C. 135, CA; *J. Sainsbury Plc v O’Connor* [1991] 1 W.L.R. 693, CA; *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104 at 113G–H, CA; *Mills v Sportsdirect.com Retail Ltd* [2010] EWHC 1072 (Ch); [2010] 2 B.C.L.C. 143 at [75].  
<sup>61</sup> *Langen & Wind Ltd v Bell* [1972] Ch. 685; *Mills v Sportsdirect.com Retail Ltd*, above, at [75].  
<sup>62</sup> *Mills v Sportsdirect.com Retail Ltd*, above, at [75], citing *Duncoft v Albrecht* (1841) 12 Sim. 189 at 198; *Sky Motion Holdings Ltd v China Create Capital Ltd* [2019] HKCFI 2408 at [32] (“it may be ... that the title to the shares passes in equity to the buyer”), citing this paragraph. In the case of shares held in uncertificated form, i.e. registered electronically, they are fungible, not being individually

received by the seller is held in trust for the original buyer, subject to an allowance for the price payable by the original buyer.<sup>63</sup> As with land too, if the contract for sale is subject to a condition, then until the condition is fulfilled, specific performance is not available and so the beneficial interest has not passed to the buyer, unless the supposed condition is within the control of a contracting party.<sup>64</sup>

4-011

Just as the seller of land is entitled to retain possession as security for the price until payment, the seller of shares retains the voting rights for the same period and purpose. Like the other rights conferred by the shares, the voting rights are held by the seller in a fiduciary capacity. He is not bound to exercise his votes at the direction of the buyer before payment;<sup>65</sup> he can use his votes to protect his lien for the price but, as he is a fiduciary, he cannot use them for any other purpose that might damage the buyer.<sup>66</sup> It is his fiduciary position that prevents his doing so, not merely an implied term of the contract of sale.<sup>67</sup> Where the seller is a company, the fact that it holds the voting rights in a fiduciary capacity may affect the question whether the company in which it holds the shares is its subsidiary for the purposes of the Companies Act 2006.<sup>68</sup>

**3. COVENANTS TO SETTLE PROPERTY**

**The basic principle**

4-012

Covenants to settle property are now unusual but not unknown and they may remain of significance in older settlements, usually marriage settlements. The basic principle is the same as for contracts to sell property: if specific performance could be obtained, an immediate trust is created<sup>69</sup> if and to the same extent that specific performance would be granted.<sup>70</sup> Specific performance is not available, and so no

identifiable and not appropriated to a particular contract, so there may be some question whether those principles can apply to them: see *Mills* at [76]. We consider, however, that those principles ought to apply nonetheless; cf. *Hunter v Moss* [1994] 1 W.L.R. 452, CA (trust of undifferentiated shares), for which see § 3-006. Uncertificated shares attract the operation of Uncertificated Securities Regulations 2001 (SI 2001/3755, as amended, reg.31(2) of which provides that the transferor retains “title” to the shares until the transferee is entered as holder on the relevant issuer register of securities; but we consider that in context “title” means legal title. For uncertificated shares generally, see §§ 34-079 onwards.  
<sup>63</sup> *Luxe Holdings Ltd v Midland Resources Holdings Ltd* [2010] EWHC 1908 (Ch). Provided that the contract is governed by English law, it makes no difference that the shares are foreign shares indirectly owned through subsidiaries of the seller and that under the law of the country where the shares are situated an indirect sale of them is not permitted or trusts are not recognised: *Luxe Holdings Ltd v Midland Resources Holdings Ltd*, above.  
<sup>64</sup> *Wood Preservation Ltd v Prior* [1969] 1 W.L.R. 1077 (affd on other grounds [1969] 1 W.L.R. 1077, CA); *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781 at [39].  
<sup>65</sup> *Musselwhite v C.H. Musselwhite & Son Ltd* [1962] Ch. 964; *J.R.R.T. (Investments) Ltd v Haycraft* [1993] 1 B.C.L.C. 401; *Baker v Potter* [2005] B.C.C. 855 at [105].  
<sup>66</sup> *Michaels v Harley House (Marylebone) Ltd*, above, at 117B–120E, 120H; *Robinson Healthcare Ltd v Bestlake NV* [2006] EWHC 3026 (QB) at [83].  
<sup>67</sup> See cases cited in previous footnote.  
<sup>68</sup> Under Companies Act 2006, s.1159, Sch.6, paras 5, 6. That was so in *Michaels v Harley House (Marylebone) Ltd*, above, with consequences for the application of Landlord and Tenant Act 1987, Pt 1.  
<sup>69</sup> See § 4-032 and *Finch v Winchelsea* (1715) 1 Peere Wms. 277; *Fremoult v Dedire* (1718) 1 Peere Wms. 429; *Legard v Hodges* (1792) 1 Ves. Jr. 477; *Ravenshaw v Hollier* (1834) 7 Sim. 3.  
<sup>70</sup> *Central Trust and Safe Deposit Co. v Snider* [1916] 1 A.C. 266 at 271–272, PC, approving a state-

immediate trust is created, if the covenant is gratuitous,<sup>71</sup> but the consideration of marriage is valuable consideration for those within it.<sup>72</sup> Whether the formation of a civil partnership is similarly to be regarded as valuable consideration is not certain; the obvious intention of the Civil Partnership Act 2004 to equate civil partnership with marriage for the purpose of entitlement to property<sup>73</sup> suggests that it may. With future property, such as after-acquired property of the covenantor, a covenant for value to settle it imposes a trust when the property comes to the covenantor, but without consideration such a covenant is normally unenforceable.<sup>74</sup> An agreement to hold on trust property not yet owned by the person so agreeing is equivalent to a covenant to settle the property and if supported by consideration the property will immediately become subject to the trust once acquired.<sup>75</sup>

#### The permissible width of a covenant

- 4-013 Covenants of considerable width have been enforced, including covenants to charge all lands that the covenantor may possess at a particular time,<sup>76</sup> or at any time,<sup>77</sup> to settle all the personal estate that the covenantor may acquire during the marriage,<sup>78</sup> or by a husband to settle all his after-acquired property except business assets.<sup>79</sup> Where a covenant for settlement comprises the covenantor's whole future property, it may be doubted whether it can be enforced in equity,<sup>80</sup> but if it contains specific words the court will, if necessary, construe it divisibly, and enforce it as to classes of property falling within the specific words.<sup>81</sup>

#### Construction of covenants to settle for marriage consideration

- 4-014 The law on the construction of covenants in marriage settlements to settle after-acquired property remains in a very embarrassing state.<sup>82</sup> Owing to the great variety of language and some variety in the circumstances to be found in marriage settlements, the cases are not very helpful in furnishing a general guide to the construction of covenants of this kind, for they appear to be somewhat conflicting and not easy to reconcile. In construing a covenant of this kind the court can look at the surrounding circumstances.<sup>83</sup>

ment to that effect in the 12th edn of this work.

<sup>71</sup> *De Mestre v West* [1891] A.C. 264, PC.

<sup>72</sup> See § 4-032.

<sup>73</sup> See Civil Partnership Act 2004, ss.65–72.

<sup>74</sup> See §§ 4-032 to 4-035.

<sup>75</sup> *Ng Cho Chu Judy v Chan Wing Hung* [2016] HKDC 31; [2016] 1 H.K.L.R.D. 1073 at [129] (on appeal [2017] HKCA 309; [2017] 4 H.K.L.R.D. 396).

<sup>76</sup> *Wellesley v Wellesley* (1839) 4 Myl. & Cr. 561. As to the proper construction of the particular covenant in that case, see *Countess of Mornington v Keane* (1858) 2 De G. & J. 292.

<sup>77</sup> *Lyster v Burrows* (1837) 1 Dr. & Wal. 149; *Stack v Royse* (1861) 12 Ir.Ch.Rep. 246, affd (1862) 13 Ir. Ch.Rep. 213.

<sup>78</sup> *Lewis v Madocks* (1810) 8 Ves. Jr. 150; (1817) 17 Ves. Jr. 48; *Lord Churston v Buller* (1897) 77 L.T. 45.

<sup>79</sup> *Re Reis* [1904] 2 K.B. 769, CA.

<sup>80</sup> See *Re Turcan* (1888) 40 Ch.D. 5, CA.

<sup>81</sup> *Re Clarke* (1886) 35 Ch.D. 109; (1887) 36 Ch.D. 348, CA; *Tailby v Official Receiver* (1888) 13 App. Cas. 523; *Re Turcan*, above; *Re Kelcey* [1899] 2 Ch. 530; *Syrett v Egerton* [1957] 1 W.L.R. 1130.

<sup>82</sup> See *Re Clinton's Trusts* (1871) L.R. 13 Eq. 295 at 304; *Re Bland's Settlement* [1905] 1 Ch. 4 at 7.

<sup>83</sup> *Re Peel's Settlement Trusts* [1964] 1 W.L.R. 1232 at 1239.

*Williams v Mercier* (1884) 10 App. Cas. 1 at 8, HL.

#### The traditional after-acquired property clause

The old-fashioned type of marriage settlement usually contained a proviso or declaration, and the husband covenanted with the trustees that, in case the wife or the husband in her right should, at any time during the life of the husband, become possessed of or interested in or entitled to any property in possession, reversion, remainder, or expectancy, the husband and wife should and would transfer and assign the same to the trustees. Such a proviso and declaration formally bound all parties to the deed, including the wife,<sup>84</sup> as explained below.

4-015

#### Covenant by husband to settle wife's property

Before 1883 when a husband was entitled to settle property which, if his wife had been single, would have been hers, it was common for the husband alone to covenant that property becoming hers, or his in her right, should be settled. At any time before 1908<sup>85</sup> such a covenant would bind the wife<sup>86</sup> whether or not she executed the settlement,<sup>87</sup> and that was so in spite of the Married Women's Property Act 1882, which broadly speaking destroyed the husband's *jus mariti*, because by section 19 of that Act he was treated as having it still for the purposes of after-acquired property clauses.<sup>88</sup> From 1908 to 1935 inclusive such a clause bound the wife only if she executed the settlement or confirmed it on attaining 21.<sup>89</sup> Since 1935, however, no husband has had any *jus mariti* over property acquired by his wife,<sup>90</sup> and accordingly no covenant by a husband could bind his wife unless she executed or confirmed the settlement, and we consider that, even if she did, it would not do so unless it could be construed as a covenant by her also.<sup>91</sup>

4-016

<sup>84</sup> *Townshend v Harrowby* (1858) 267 L.J. Ch. 553.

<sup>85</sup> i.e. before Married Women's Property Act 1907, s.2.

<sup>86</sup> *Butcher v Butcher* (1851) 14 Beav. 222; *Re De Ros' Trust* (1885) 31 Ch.D. 81; *Lee v Lee* (1876) 4 Ch.D. 175; *Re Haden* [1898] 2 Ch. 220. But not if the property concerned was not specific and the covenant did not mention the doing of any act by the wife; *Daves v Tredwell* (1881) 18 Ch.D. 354, CA; *Re Smith* [1900] W.N. 75.

<sup>87</sup> *Stevens v Trevor-Garrick* [1893] 2 Ch. 307.

<sup>88</sup> *Hancock v Hancock* (1888) 38 Ch.D. 78, CA; *Stevens v Trevor-Garrick*, above; *Re Whitaker* (1887) 34 Ch.D. 227, CA; *Re Crook's Settlement* [1923] 2 Ch. 339; and see *Buckland v Buckland* [1900] 2 Ch. 534.

<sup>89</sup> Married Women's Property Act 1907, s.2.

<sup>90</sup> Law Reform (Married Women and Joint Tortfeasors) Act 1935, s.2. That Act does not repeal s.19 of the 1882 Act or s.2 of the 1907 Act, but it is thought that neither can have effect now as ss.2 and 5 of the 1882 Act, which they modified, were repealed by s.5 of the 1935 Act.

<sup>91</sup> Of course, the wife has usually executed the settlement since 1908, at any rate where there was an after-acquired property clause.

*Life interests and annuities*

4-017 A covenant to settle other or after-acquired property does not bind an interest in a fund bequeathed to the husband for life<sup>92</sup> or an annuity given to a wife<sup>93</sup> unless such limited interests are described and expressly included in the covenant.<sup>94</sup>

*Income of settled property*

4-018 Where a wife covenants to settle after-acquired property, it is clear that the income which she receives from the settled property itself is not bound by the covenant. And under a similar covenant, a wife is not liable to settle property which she has purchased out of the savings of such income.<sup>95</sup>

*Property subject to restraint on anticipation*

4-019 Where, before December 16, 1949,<sup>96</sup> a woman was restrained from anticipating or alienating property which would otherwise have been caught by her covenant then, unless she was restrained only while her interest remained reversionary, it was not caught.<sup>97</sup>

*Property the subject of a general power*

4-020 If the covenantor becomes the donee of a general power of appointment over property, he is not obliged to exercise the power in favour of herself or the trustees,<sup>98</sup> but if he does exercise such a power in favour of himself, the covenant to settle after-acquired property will apply to it.<sup>99</sup>

*Gifts by husband to wife*

4-021 Whether gifts made by the husband to the wife are caught by the wife's covenant to settle after-acquired property appears to be left in doubt by conflicting decisions.<sup>100</sup> If such trusts are purely executory,<sup>101</sup> and are to be construed like marriage articles so as to answer the presumed intentions of the parties, the court has perhaps a clue to that intention from the very nature of the settlement, the object of which is to make a provision for the issue of a marriage, though James L.J.

<sup>92</sup> *Lewis v Madocks* (1817) 17 Ves. Jr. 48; *St. Aubyn v Humphries* (1856) 22 Beav. 175; *Townshend v Harrowby* (1858) 27 L.J. Ch. 553. See too *Churchill v Denny* (1875) L.R. 20 Eq. 534, where a capital sum for which a naval officer had commuted his pension was held not to be liable under a similar covenant.

<sup>93</sup> *Re Dowding* [1904] 1 Ch. 441.

<sup>94</sup> *Scholfield v Spooner* (1884) 26 Ch.D. 94; *Beatty v Vance* [1916] 1 Ir.R. 66.

<sup>95</sup> *Finlay v Darling* [1897] 1 Ch. 719 (disapproving *Re Bendy* [1895] 1 Ch. 109); followed in *Clutterbuck's Settlement* [1905] 1 Ch. 200.

<sup>96</sup> Married Women (Restraint upon Anticipation) Act 1949 abolished restraints on anticipation as from that date. See too Law Reform (Married Women and Joint Tortfeasors) Act 1935, s.2, which forbade the creation of such restraints after 1935.

<sup>97</sup> *Re Currey* (1886) 32 Ch.D. 361; *Re Parkin* [1892] 3 Ch. 510; *Re Bankes* [1902] 2 Ch. 333.

<sup>98</sup> *Townshend v Harrowby* (1858) 27 L.J. Ch. 553. But see *Re O'Connell* [1903] 2 Ch. 574.

<sup>99</sup> *Re Beaumont* [1913] 1 Ch. 325.

<sup>100</sup> *Re Ellis's Settlement* [1909] 1 Ch. 618 (Swinfen Eady J.—caught); *Coles v Coles* [1901] 1 Ch. 711 (Joyce J.—not caught).

<sup>101</sup> *Re Plumpre's Marriage Settlement* [1910] 1 Ch. 609.

stated<sup>102</sup> that the primary object of such covenants was to protect the wife against the old common-law doctrine which handed her chattels to her husband absolutely and her lands to him for his life. The conflicting decisions on the question appear to have been caused by the different views taken as to the primary object of such covenants, but it is submitted that the language of the covenant itself is the only sure guide to the intention of the parties at the time of joining in it, and in the absence of any expression showing that the covenant was intended to exclude property acquired by the wife, either from the husband or from any other particular source, it should be construed so as to include property acquired from the husband and all other sources.

*Covenant restricted to future property*

Where the covenant is restricted to future property to which the wife shall become entitled,<sup>103</sup> it is aimed at some future change of ownership and operates only where there is either a change of title or a change of condition in the interest or an expansion of the interest.<sup>104</sup> Thus, where the wife is entitled to a vested remainder at the date of the marriage which does not fall in during the marriage it is not bound by the covenant.<sup>105</sup> Neither is it bound if she has a contingent interest at the date of the marriage which does not vest during the marriage,<sup>106</sup> nor if she has a contingent interest at the date of the marriage which becomes vested during the marriage but falls into possession only after the determination of the marriage.<sup>107</sup> But an interest which is contingent at the date of the marriage and falls into possession during the marriage is caught by such a covenant.<sup>108</sup>

The covenant may include property to which the wife becomes entitled in possession during the coverture, although at the date of the marriage she is entitled to a reversionary interest. Apparently such property is included where the context points to that conclusion, or even where that conclusion is more consistent with all the circumstances than the other.<sup>109</sup>

<sup>102</sup> *Re Edwards* (1873) 9 Ch. App. 97 at 100; but see *Re Peel's Settlement Trusts* [1964] 1 W.L.R. 1232 at 1241–1242.

<sup>103</sup> The word "become" in its usual and proper acceptation imports a change of condition, that is, the entering into a new state or condition by a change from some former state or condition. The word "entitled" may mean entitled in possession or entitled in reversion or remainder depending on the context, see *Re Williams' Settlement* [1911] 1 Ch. 441 at 450; *Re Peel's Settlement Trusts* [1964] 1 W.L.R. 1232 at 1238–1241.

<sup>104</sup> *Re Crook's Settlement* [1923] 2 Ch. 339; *Re Williams' Settlement*, above.

<sup>105</sup> *Re Jones' Will* (1876) 2 Ch.D. 362.

<sup>106</sup> *Re Cazenove* (1920) 122 L.T. 181.

<sup>107</sup> *Re Michell's Trusts* (1878) 9 Ch.D. 5, CA; and see *Lloyd v Pritchard* [1908] 1 Ch. 265.

<sup>108</sup> *Archer v Kelly* (1860) 1 Dr. & Sm. 300 at 304, 305; *Re Williams' Settlement* [1911] 1 Ch. 441; *Re Peel's Settlement Trusts* [1964] 1 W.L.R. 1232.

<sup>109</sup> Such property was caught in *Re Clinton's Trust* (1871) L.R. 13 Eq. 295; *Archer v Kelly* (1860) 1 Dr. & Sm. 300; *Re Williams' Settlement*, above; *Re Crook's Settlement* [1923] 2 Ch. 339. But such property was not caught by the covenant in *Re Bland's Settlement* [1905] 1 Ch. 4; *Re Capel's Trusts* [1914] W.N. 378; *Re Maltby Marriage Settlement* [1953] 1 W.L.R. 765; *Re Peel's Settlement Trusts*, above.

*Covenants to settle property by will*

4-024 The construction of covenants to settle property by will is considered elsewhere, in conjunction with contracts to make a will.<sup>110</sup>

*Covenants of limited effect*

4-025 If a person covenants to settle such property as he shall die seized of, he may dispose of his property as he pleases in his lifetime, and the covenant will affect only such property as he may leave after payment of his just debts.<sup>111</sup> If a person covenants to secure an annuity, either by charge on freeholds, or by investment in the funds, or by the best means in his power, it will not create a charge on the covenantor's property generally.<sup>112</sup>

*Evading the covenant*

4-026 Where a covenant has been entered into for settlement of future acquired property and a gift is afterwards made to the covenantor of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it should not be settled will exclude the operation of the covenant.<sup>113</sup> But the covenant has no application where its effect would be to destroy or forfeit the gift at its creation<sup>114</sup> or where it provides that property shall be exempt if an intention is expressed to that effect and such an intention is expressed even inferentially.<sup>115</sup>

*Covenant to settle property exceeding a certain value*

4-027 A covenant to settle property exceeding a certain value does not refer to the actuarial value of the interest which the covenantor takes in the property, but to the value of the property in which the interest subsists, just as we should say that a man was entitled to an estate of the value of £100,000 on the death of his father, merely to describe the value of the estate, and not the value of his present interest in the estate.<sup>116</sup> It is the actual value of the property when it falls into possession after deducting tax that the covenant refers to.<sup>117</sup> Such a covenant binds two or more funds derived from the same source if the aggregate value of the two funds exceeds the prescribed value, although singly they are of insufficient amount.<sup>118</sup> Two legacies derived from the same testator are derived from the same source.<sup>119</sup> The two or more funds which make the aggregate value in order to be bound must all be

<sup>110</sup> See §§ 4-059 onwards, especially §§ 4-063 to 4-065.  
<sup>111</sup> *Rowan v Chute* (1861) 13 Ir.Ch.Rep. 168; *Re M'Kenna* (1861) 13 Ir. Ch. Rep. 239. See *Re Bennett* [1934] W.N. 177; reversed 78 S.J. 876.  
<sup>112</sup> *Countess of Mornington v Keane* (1858) 2 De G. & J. 292; and see *Stack v Royse* (1861) 12 Ir.Ch.Rep. 246 (affd (1862) 13 Ir. Ch.Rep. 213).  
<sup>113</sup> *Scholfield v Spooner* (1884) 26 Ch.D. 94; and see *Re Dowding* [1904] 1 Ch. 441.  
<sup>114</sup> *Re Crawshaw* [1891] 3 Ch. 176; *Re Smith* [1928] Ch. 10.  
<sup>115</sup> *Re Thorne* [1917] 1 Ch. 360.  
<sup>116</sup> *Re Mackenzie's Settlement* (1867) 2 Ch. App. 345 at 349, per Lord Cairns L.J.  
<sup>117</sup> *Re Pares* [1901] 1 Ch. 708; *Re Hughes' Settlement* [1924] 2 Ch. 356. But see *Re Harcourt* (1911) 105 L.T. 747.  
<sup>118</sup> *Re Mackenzie's Settlement*, above.  
<sup>119</sup> *Re Hughes' Settlement*, above.

derived from the same source,<sup>120</sup> but the same source does not necessarily mean under the same title.<sup>121</sup> Where the covenant was to settle property exceeding a certain value which the wife should acquire "at any one time", several funds which were all derived from the same source were not bound because they were not acquired by her at the same moment.<sup>122</sup>

*Covenant excluding chattels*

Where the covenant expressly excluded chattels, it was nonetheless held to include the whole of a sixth share of a residuary estate which included chattels, because the covenantor's only right was to have the estate administered, not to demand any chattel.<sup>123</sup>

4-028

*Covenant to settle a specific interest*

A covenant to settle a definite interest in property which subsequently becomes enlarged does not comprise the enlarged interest. Nor will such a covenant bind the property if the covenantor becomes possessed of the property by a title different from that described in the covenant.<sup>124</sup>

4-029

*"As near thereto as circumstances will permit"*

The expression "as near thereto as circumstances will permit" in an after-acquired property clause have effect only where the after-acquired property cannot be settled on the precise trusts of the original settlement. Thus the mere fact that the ultimate beneficiary under the original trusts has died by the time that the after-acquired property is caught by the clause is irrelevant and the property will pass under his will or on his intestacy.<sup>125</sup>

4-030

*Immediate trust of other property*

Where there is not only a covenant to settle after-acquired property but also an independent immediate declaration of trust, the latter will take effect according to its terms, so that the declaration may be enforceable in favour of persons who would not have been able to enforce the covenant;<sup>126</sup> whether the declaration has that effect is a question of construction.<sup>127</sup>

4-031

**Enforcement of covenants to settle property—equity and common law**

*Marriage settlements*

A covenant to settle property upon the trusts of a marriage settlement<sup>128</sup> may be specifically enforced in equity at the instance of those within the marriage

4-032

<sup>120</sup> *Re Hughes' Settlement*, above.  
<sup>121</sup> *Re Mackenzie's Settlement*, above.  
<sup>122</sup> *Bower v Smith* (1871) 19 W.R. 399; L.R. 11 Eq. 279.  
<sup>123</sup> *Vanneck v Benham* [1917] 1 Ch. 60.  
<sup>124</sup> *Smith v Osborne* (1857) 6 H.L.C. 375; *Sweetapple v Horlock* (1879) 11 Ch.D. 745.  
<sup>125</sup> *Re Bennett-Stanford Settlement Trusts* [1947] 1 All E.R. 888.  
<sup>126</sup> See §§ 4-032 onwards.  
<sup>127</sup> *Re Ralli's Will Trusts* [1964] Ch. 288, distinguishing *Re Anstis* (1886) 31 Ch.D. 596, CA.  
<sup>128</sup> i.e. a settlement made before and in consideration of the marriage, or a settlement made after the

consideration,<sup>129</sup> namely the husband and wife and the children<sup>130</sup> and (perhaps) remoter issue<sup>131</sup> of the marriage, but not other persons;<sup>132</sup> such persons are not treated as volunteers. Moreover, in favour of a person who is within the marriage consideration, any property caught by the covenant will at once become subject to the trusts of the marriage settlement under the maxim "equity looks on that as done which ought to be done".<sup>133</sup> If civil partnership is to be regarded as consideration,<sup>134</sup> the civil partner of the covenantor will be within it.

#### Settlements generally

4-033 Other rules as to the enforcement of covenants to settle property may be stated as follows:

- (1) The covenant will not be specifically enforced in equity at the instance of a mere volunteer beneficiary of the settlement,<sup>135</sup> except possibly in the case of a volunteer beneficiary of a marriage settlement whose interest is closely interwoven with the interests of those who are within the marriage consideration.<sup>136</sup> Nor may a volunteer beneficiary claim an interest in the property caught by the covenant in reliance on the maxim "equity looks on that as done which ought to be done", at any rate where there is no one in existence within the consideration of the covenant who would be benefited by its enforcement.<sup>137</sup>
- (2) But those disabilities of the volunteer do not prevent a person who is within the consideration of the covenant from seeking specific performance in favour of the volunteer,<sup>138</sup> and if the property caught by the covenant comes into the hands of the trustees of the settlement, the covenantor cannot seek to recover it on the ground that the beneficiaries of the settlement are volunteers.<sup>139</sup>
- (3) Moreover, a volunteer beneficiary of the settlement may, if a party to the covenant, sue upon the covenant for damages at common law.<sup>140</sup>
- (4) A covenant to settle property upon the trusts of a settlement, whether or not a marriage settlement, may also, we consider, at least in some circum-

marriage in pursuance of an ante-nuptial agreement, note *Re Holland* [1902] 2 Ch. 360. A post-nuptial settlement not made in pursuance of such an agreement is not a marriage settlement for these purposes, and although there may be valuable consideration passing between the husband and wife who are parties to it, the beneficiaries of the settlement who are not parties will be mere volunteers. See *Green v Paterson* (1886) 32 Ch.D. 95, CA.

<sup>129</sup> See *Re Cook's Settlement Trusts* [1965] Ch. 902 at 916.

<sup>130</sup> *Re Cook's Settlement Trusts*, above, at 916.

<sup>131</sup> *Macdonald v Scott* [1893] A.C. 642 at 650, HL Sc; see *Att.-Gen. v Jacobs Smith* [1895] 2 Q.B. 341 at 351 and *Re D'Avigdor-Goldsmid* [1951] Ch. 1038 at 1053 (reversed on other grounds [1953] A.C. 347) where the expression "issue" was used without in the context being restricted to children.

<sup>132</sup> *De Mestre v West* [1891] A.C. 264, PC.

<sup>133</sup> *Pullan v Koe* [1913] 1 Ch. 9 (see now Limitation Act 1980, s.21(1)); cf. *Smith v Lucas* (1881) 18 Ch.D. 531 at 543; *Collyer v Isaacs* (1881) 19 Ch.D. 342 at 351.

For which see § 4-012.

<sup>134</sup> *Re D'Angibau* (1880) 15 Ch.D. 228, CA; *Re Plumtre's Marriage Settlement* [1910] 1 Ch. 609.

<sup>135</sup> *Att.-Gen. v Jacobs Smith*, above, at 351-352; *Re Cook's Settlement Trusts*, above, at 917.

<sup>136</sup> *Re Anstis* (1886) 31 Ch.D. 596.

<sup>137</sup> *Davenport v Bishopp* (1843) 2 Y. & C.Ch. 451 at 460-461; *Beswick v Beswick*, above; *Coulls v Bagot's Executor and Trustee Co. Ltd* [1967] HCA 3; 119 C.L.R. 460.

<sup>138</sup> *Re Bowden* [1936] Ch. 71; *Re Ralli's Will Trusts* [1964] Ch. 288.

<sup>139</sup> *Cannon v Hartley* [1949] Ch. 213.

stances, be specifically enforceable at the instance of a party to the covenant who provides valuation consideration for the covenant,<sup>141</sup> whether or not he is himself a beneficiary.

- (5) On the other hand, trustees of a settlement in favour of volunteers were directed at first instance not to sue for damages at law upon a covenant made with them to settle after-acquired property upon the trusts of the settlement, on the ground that the court would not give the volunteer beneficiaries by indirect means what they could not obtain directly.<sup>142</sup> The reasoning in those decisions is not easy to support and their correctness as a matter of principle is controversial.<sup>143</sup> They are however binding at first instance.<sup>144</sup>
- (6) It is not clear whether such a direction, even if correct in principle in the cases where it has been made, would also be made in a case where the subject-matter of the covenant was existing property<sup>145</sup> or money,<sup>146</sup> or in a case where the instrument containing the covenant also contains an express

<sup>141</sup> See *Beswick v Beswick* [1968] A.C. 58, HL; and see *Coulls v Bagot's Executor and Trustee Co. Ltd* [1967] HCA 3; 119 C.L.R. 460. A person who sought to rely on *Beswick v Beswick* would need to establish that damages would not be an adequate remedy, a matter that has not as yet been considered by the courts in the context of covenants to settle property. In *Re Cook's Settlement Trusts* [1965] Ch. 902, (decided before and not cited in *Beswick v Beswick*) the possibility that the executors of the father might obtain specific performance was not considered by the court.

<sup>142</sup> *Re Pryce* [1917] 1 Ch. 234; *Re Kay's Settlement* [1939] Ch. 239; followed in *Re Cook's Settlement Trusts* [1965] Ch. 902. These cases came before the court as *Beddoe* applications (as to which see §§ 48-130 onwards) but nonetheless decided questions of substantive law.

<sup>143</sup> See Elliott (1960) 76 L.Q.R. 100; Hornby (1962) 78 L.Q.R. 228; Maudsley in R. Pound (ed.), *Perspectives of Law*, p.239; Matheson (1966) 29 M.L.R. 397; Scott (1966) 8 Mal. L.R. 153; Davies [1967] A.S.C.L. 387; Lee (1969) 85 L.Q.R. 213; Barton (1975) 91 L.Q.R. 236; Friend [1982] Conv. 280; Macnair (1988) 8 LS 172; Goddard [1988] Conv. 19. It might be argued that the decisions in *Re Pryce*, above, and *Re Kay's Settlement*, above, are wrong on the grounds that: (i) even though the court will be slow to infer a trust of a chose in action (as to which see §§ 5-013 onwards) the court should in the context infer that the trustees (who plainly do not contract for their own personal benefit) hold the benefit of the covenant upon a trust in favour of the beneficiaries of the settlement, thereby enabling the trustees or, if they refuse to act, the beneficiaries, to sue for substantial damages and (ii) alternatively, even if there is no trust of the benefit of the covenant, there is a clear conceptual distinction between specific performance in equity and damages at law, and there is no reason why the trustees should not sue at law if in their discretion they decide to do so. As against this, it might be argued that those decisions are right on the grounds that: (i) the benefit of a covenant to settle future property is not capable of being subjected to a trust, or even if it is capable of being subjected to a trust, no trust should be inferred; (ii) it is undesirable that the effective enforcement of the covenant should be a matter for the discretion of the trustees; and (iii) the damages would (if there is no trust of the benefit of the covenant) be nominal.

<sup>144</sup> *Re Cook's Settlement Trusts* [1965] Ch. 902.

<sup>145</sup> cf. *Watson v Parker* (1845) 6 Beav. 283; *Re Cavendish-Browne's Settlement Trusts* [1916] W.N. 341; *Re Cook's Settlement Trusts* [1965] Ch. 902 at 914. An argument that the trustees ought to be directed to sue might be based upon the ground that, whatever is the position of a covenant to settle after-acquired property (as to which see the second footnote to § 4-033(5)), the benefit of the covenant, where existing property is involved, is undoubtedly capable of being subjected to a trust and such a trust should be inferred.

<sup>146</sup> Note *Fletcher v Fletcher* (1844) 4 Hare 67; *Lloyds v Harper* (1880) 16 Ch.D. 290; *Re Cook's Settlement Trusts* [1965] Ch. 902 at 914. An argument that the trustees ought to be directed to sue might be based upon the ground mentioned in the second footnote to § 4-033(5), or alternatively upon the ground that equity has always allowed volunteer covenantees to recover debts and that that principle should avail trustee covenantees; see *Beard v Nuttall* (1686) 1 Vern. 427; *Williamson v Codrington* (1750) 1 Ves. Sen. 511 (cited in *Re Cook's Settlement Trusts*, above); *Fletcher v Fletcher*, above; but cf. *Colyear v Countess of Mulgrave* (1836) 2 Keen 81.

declaration of trust of the chose in action constituted by the covenant in favour of the volunteer beneficiaries of the settlement.<sup>147</sup>

#### Enforcement of covenants to settle property—under statute

4-034

The law has been modified by the Contracts (Rights of Third Parties) Act 1999,<sup>148</sup> some account of which is given elsewhere.<sup>149</sup> It allows a third party who has given no value to enforce a contract intended to be for the third party's benefit.<sup>150</sup> The remedy of specific performance is available.<sup>151</sup> How far it extends the enforceability of covenants to settle property is unclear. The 1999 Act applies to a "contract",<sup>152</sup> a term which is not defined and is not a term of art. Although a contract may be made by deed, it does not follow that every covenant under seal is a contract and in general usage the term does not extend to a wholly voluntary covenant. If that is correct, the 1999 Act has made no change in the enforceability of such a covenant. If it is not, then beneficiaries who are not parties can presumably sue for damages in respect of their own loss, in the same way as they could before the 1999 Act if they were parties to the covenant.<sup>153</sup> It is a different matter whether the 1999 Act enables third party beneficiaries to obtain an order for specific performance of a voluntary covenant, thereby placing them in a better position than the trustees or other parties, and that seems doubtful. Nor is it clear what effect the 1999 Act has on the position of trustees who are parties to the covenant. We consider that trustees would be well advised to consider making a *Beddoe* application<sup>154</sup> for directions whether they should sue for damages if the covenantor failed to perform a voluntary covenant made after commencement of the 1999 Act, and not to rely on past decisions in which they have been authorised or directed not to sue.<sup>155</sup>

4-035

Where the covenant is not wholly voluntary but is supported by marriage consideration, it may well be that it qualifies as a contract within the 1999 Act.<sup>156</sup> If so,

<sup>147</sup> For trusts of a contract, see § 5-013.

<sup>148</sup> The Act applies to (i) a contract entered into on or after May 11, 2000 and (ii) a contract entered into on or after November 11, 1999 in which the parties have expressly provided that the Act is to apply, see s.10(2), (3).

<sup>149</sup> See § 5-016.

<sup>150</sup> Contracts (Rights of Third Parties) Act 1999, s.1(1), (2).

<sup>151</sup> Contracts (Rights of Third Parties) Act 1999, s.1(5).

<sup>152</sup> Contracts (Rights of Third Parties) Act 1999, s.1(1).

<sup>153</sup> *Cannon v Hartley* [1949] Ch. 213. Note that the contract must "expressly" identify the third party by name, as a member of a class or as answering a particular description: see s.1(3). That requirement will ordinarily be fulfilled in the case of a covenant to settle property if the covenant is comprised in the settlement, as it commonly will be, but if not it may not be.

<sup>154</sup> See §§ 48-130 onwards.

<sup>155</sup> *Re Pryce* [1917] 1 Ch. 234; *Re Kay's Settlement Trusts* [1939] Ch. 239; *Re Cook's Settlement Trusts* [1965] Ch. 902, referred to in § 4-033. We consider that the only ground on which these cases might possibly be supported in relation to covenants made after the 1999 Act is that the trustees would arguably, not be able to recover substantial damages, and there is nothing in the 1999 Act which affects that, and therefore, if that argument were correct, it would be pointless for the trustees to sue. The beneficiaries' damages would be limited to their own loss, which might be modest, for example in the case of a discretionary beneficiary, and so it would be better for the beneficiaries as a whole if the trustees could sue for damages and recover for the trust damages equal to the value of the property which the covenantor failed to settle in accordance with the covenant.

<sup>156</sup> Such a covenant was called a "voluntary contract" in *Re D'Angibau* (1880) 15 Ch.D. 228 at 242.

beneficiaries outside the marriage consideration can now enforce the covenant in the same way as those within the marriage consideration.<sup>157</sup>

#### 4. MUTUAL WILLS

##### General principle

Where two persons make wills in a given form, or make a single joint will,<sup>158</sup> and agree that the survivor should not revoke his will or his part of the will, the one of them who dies first without having revoked his will or his part of the will does so with the promise of the survivor that the arrangement shall hold good.<sup>159</sup> The property affected becomes subject to a trust in favour of the intended beneficiaries on the death of the first to die, enforceable by them even if the promise is broken. It is convenient for purposes of exposition to call the first to die T1 and the survivor T2.

4-036

##### Examples

Mutual wills have been held to exist in the following circumstances:

4-037

- (1) Where the testators were husband and wife and agreed that, subject to pecuniary legacies to different relatives, each would leave his or her entire estate to the other, with a gift over in equal shares to or for the benefit of T2's three children;<sup>160</sup>
- (2) Where the testators were husband and wife and agreed that each would leave his or her entire estate direct to their two children in equal shares;<sup>161</sup>
- (3) Where the testators were husband and wife and agreed that each would leave his or her entire estate to the other, with a gift over in favour of various individuals and charities, but on terms that one-half of the aggregate estate in T2's hands should be treated as having derived from T1 and should go to those beneficiaries and the other one-half should be at T2's free disposal;<sup>162</sup>
- (4) Where the testators were husband and wife and agreed that each would leave his or her entire estate to the other for life, with certain absolute remainders over;<sup>163</sup>
- (5) Where the testators were two sisters and agreed that each would leave her interest in certain leasehold property, until then held by them as joint tenants, to the other for life, with remainder to agreed beneficiaries;<sup>164</sup> and
- (6) Where the testators were husband and wife, each having two children from a previous marriage, and agreed that each would leave his or her residue to T2 for life, with remainder to his or her own children, but with

CA, per Cotton L.J. (dissenting but not on this point).

<sup>157</sup> For civil partnership as consideration, see §§ 4-012, 4-032.

<sup>158</sup> As in *Dufour v Pereira* (1769) 1 Dick 419, 2 Harg. Jurid. Arg. 304. Joint wills are highly unusual nowadays.

<sup>159</sup> *Stone v Hoskins* [1905] P. 194.

<sup>160</sup> *Re Cleaver* [1981] 1 W.L.R. 939.

<sup>161</sup> *Re Dale* [1994] Ch. 31. The fact of the agreement was assumed for the purpose of a preliminary issue.

<sup>162</sup> *Re Green* [1951] Ch. 148.

<sup>163</sup> *Re Hagger* [1930] 2 Ch. 190.

<sup>164</sup> *Re Wilford's Estate* (1879) 11 Ch.D. 267.

a gift over (if he or she was the survivor) of the residue of realty to all four children.<sup>165</sup>

It is possible that a similar principle will cause a trust to arise where a testator agrees to make (and refrain from revoking) a will benefiting a particular beneficiary if that beneficiary persuades another testator to make a will in a given form.<sup>166</sup>

## Requirements

### Need for agreement

- 4-038** The agreement between T1 and T2 must amount to a definite agreement, in recent authority referred to as a “contract at law”,<sup>167</sup> that the wills are to be mutually binding, such that T2 is not to be free to interfere with the succession provided for by the two wills.<sup>168</sup> The fact that the wills are in the same form and were executed at the same time does not of itself establish such an agreement.<sup>169</sup> A mere agreement that the wills are to be in the same form is not enough; nor is an understanding or expectation that neither testator will alter his will.<sup>170</sup> The requisite agreement may be found in the wills themselves or established by extrinsic evidence.<sup>171</sup>
- 4-039** If such an agreement is made, then a solicitor or other professional preparing the wills who is aware of the fact ought to record it either in the wills themselves or in a separate memorandum.<sup>172</sup> Where land is concerned, until the law becomes clear the agreement should be reduced to writing and signed by both parties.<sup>173</sup> The solicitor ought also to advise on the consequences of the agreement, in particular the

<sup>165</sup> *Re Newey* [1994] N.Z.L.R. 590.

<sup>166</sup> *St Clair v King* [2018] EWHC 682 (Ch) at [80]–[81]. But the element of mutuality appears to be lacking unless both testators agree with the beneficiary not to revoke their wills (or not to do so except upon notice); and even then the absence of agreement between the testators themselves may be fatal.

<sup>167</sup> *Re Dale* [1994] Ch. 31 at 38B; *Re Goodchild* [1997] 1 W.L.R. 1216 at 1224F–G, 1229F–G, CA; *Baird v Smees* [2000] NWSCA 253 at [26]; *Campbell v Campbell* [2015] NSWSC 784 at [104]–[110].

<sup>168</sup> *Re Oldham* [1925] Ch. 75; *Gray v Perpetual Trustee Company Ltd* [1928] A.C. 391, PC; *Re Cleaver* [1981] 1 W.L.R. 939; *Re Newey* [1994] 2 N.Z.L.R. 590; *Re Goodchild*, above; *Lewis v Cotton* [2000] NZCA 399; 3 I.T.E.L.R. 447; *Edell v Sitzer* (2001) 4 I.T.E.L.R. 149 Ont SCJ; *Osborne v Estate of Osborne* [2001] VSCA 228; 4 I.T.E.L.R. 804; *Birch v Curtis* [2002] EWHC 1158 (Ch); [2002] 2 F.L.R. 847; *Kennedy v Griffiths* [2011] QSC 369 at [25]–[26].

<sup>169</sup> *Gray v Perpetual Trustee Company Ltd*, above, at 399–400; *Re Cleaver*, above, [1981] 1 W.L.R. at 945A–G; *Baird v Smees* [2000] NWSCA 253 at [6], [7], [27], [71]; *Brynelson Estate v Verdeck* [2002] BCCA 187; 4 I.T.E.L.R. 857; *Fry v Densham-Smith* [2010] EWCA Civ 1410; [2011] W.T.L.R. 367 at [3]; *Webb v Smith* [2011] NZHC 1512; *Legg v Burton* [2017] EWHC 2088 (Ch); [2017] 4 W.L.R. 186 at [32].

<sup>170</sup> *Re Goodchild*, above [1997] 1 W.L.R. 1216 at 1225H; *Baird v Smees* [2000] NWSCA 253; *Charles v Fraser* [2010] EWHC 2154 (Ch); 13 I.T.E.L.R. 455; *Hussey v Bauer* [2011] QCA 91.

<sup>171</sup> *Dufour v Pereira* (1769) 1 Dick 419; 2 Harg. Jurid. Arg. 304; *Re Green* [1951] Ch. 148; *Baird v Smees*, above, at [6], [7], [30] (where the wills themselves contained a declaration against subsequent revocation); *Legg v Burton* [2017] EWHC 2088 (Ch); [2017] 4 W.L.R. 186 at [54] onwards; *Campbell v Campbell*, above, at [110]; *Darragh v Darragh* [2018] IEHC 427 at [66]. Evidence from those interested in the outcome should be approached with caution: *Legg v Burton*, above, at [40] onwards.

<sup>172</sup> *Re Newey* [1994] 2 N.Z.L.R. 590 at 594–595; *Baird v Smees*, above, at [16].

<sup>173</sup> See § 4-044.

constraints it will place on T2 in dealing with supervening contingencies such as remarriage or the death or bankruptcy of the intended beneficiaries of the arrangement, and may risk a claim for negligence if he does not.<sup>174</sup> Since the existence of “mirror wills” tends to raise a suspicion that such an agreement was made and to create dissension, it may similarly be desirable to record that no such agreement was intended where that is so.

### The “three certainties”

In principle a trust said to arise out of mutual wills must satisfy the three certainties in the same way as any other trust.<sup>175</sup> Certainty of words, or of intention to create a trust, is satisfied by the requirement of a definite agreement not to revoke the wills. It has been said that there cannot be a difficulty about the other two certainties, namely of subject-matter and of objects, unless it is in the terms of the wills themselves.<sup>176</sup> Where, however, the agreement is that T1’s estate, or a share in it, will go to T2 on terms that it will be passed on to other beneficiaries by T2’s will, it is not easy to say precisely what the subject-matter of the trust is. Unless T2 is confined to a life interest, it can only be whatever is left on his death; but though a bequest in such terms would be problematical<sup>177</sup> the trust is nonetheless valid.<sup>178</sup> The same no doubt applies if the agreement extends, as commonly it will, to T2’s estate.

### No need for mutual or similar benefits

The usual form of mutual wills is that each testator is to take an interest under the will of the other, with other beneficiaries taking in substitution or (if each is to take only a life interest) in remainder. But there is no requirement that each should benefit under the other’s will, so that wills which benefit only third parties will be within the doctrine if its other elements are present.<sup>179</sup> Nor, therefore, should the doctrine be excluded merely because T2 disclaims any benefit he was to receive under T1’s will. Equally, although the wills are typically in similar form, there seems no reason why the doctrine should not apply when they are in quite different form and benefit different beneficiaries if there is the requisite agreement not to revoke.<sup>180</sup>

### No need for wills to follow agreement in time

It is a matter of indifference whether the agreement is to make wills in a particular form and then not to revoke them or merely not to revoke existing wills.<sup>181</sup> But in

<sup>174</sup> *Baird v Smees* [2000] NWSCA 253 at [16]; *Charles v Fraser*, above, at [66].

<sup>175</sup> *Re Cleaver* [1981] 1 W.L.R. 939 at 947F–H. For the “three certainties”, see §§ 5-003 onwards.

<sup>176</sup> *Re Cleaver*, above, at 947F–H.

<sup>177</sup> *Theobald on Wills* (18th edn), § 26-090.

<sup>178</sup> *Re Goodchild*, above, [1997] 1 W.L.R. 1216 at 1250C–E, per Morritt L.J.

<sup>179</sup> *Re Dale* [1994] Ch. 31; *University of Manitoba v Sanderson Estate* (1998) 155 D.L.R. (4th) 40;

*Osborne v Estate of Osborne* [2003] VSCA 228; 4 I.T.E.L.R. 804 at [25], [30].

<sup>180</sup> In *Re Newey* [1994] 2 N.Z.L.R. 590 the wills were not mirror wills.

<sup>181</sup> *Dufour v Pereira* (1769) 1 Dick 419; 2 Harg. Jurid. Arg. 304; *Edell v Sitzer* (2001) 4 I.T.E.L.R. 149

at [68], Ont SCJ.

the former case it seems that the doctrine does not apply unless the wills are actually executed in accordance with the agreement.<sup>182</sup>

#### Formalities required

**4-043** No formality is required if the agreement between T1 and T2 concerns personally

**4-044** It is not settled how far the agreement, if concerning land, must comply with the formal requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which obliges contracts for the disposition of an interest in land to be in writing and signed by the parties. The trust which arises on the death of T1 is a constructive trust<sup>183</sup> and the creation of such a trust is exempt from the formal requirements.<sup>184</sup> But it is a pre-requisite for the imposition of the constructive trust that there should be a contract at law,<sup>185</sup> and if the agreement constitutes one for the disposition of an interest in land but fails to comply with the formal requirements, it may be contended that that pre-requisite is not satisfied. Where the subject-matter of the agreement is the whole estate of one or both of the parties, or the whole estate less specific gifts or legacies, or a share in the estate,<sup>186</sup> there appears to be no contract for the disposition of an interest in land within the 1989 Act merely because T1 or T2 happened to own an interest in land at the date of his death, not even if the interest was also owned at the date of the agreement.<sup>187</sup> But the agreement may be that particular land, or an interest in land, will be left by will in a particular way (even if the agreement extends to other assets or to the whole estate).<sup>188</sup> Grounds for considering that the 1989 Act does not interfere with the existence of a trust in such a case are these:

- (1) The agreement may be, and usually will be, that neither testator is free to revoke his will without notice to the other, rather than that neither will revoke at all.<sup>189</sup> In such a case, there is not even a conditional commitment when the agreement is made to make a testamentary gift of the property, either is free to resile from the agreement. Although T2 ceases to be free to resile from it on T1's death, if neither has previously done so, the character of the agreement is not thereby changed. Hence the agreement appears to be outside the 1989 Act.
- (2) Even if that is not so, with the result that the agreement is not enforceable

<sup>182</sup> *Fry v Densham-Smith* [2010] EWCA Civ 1410; [2011] W.T.L.R. 387 at [3]. We do not consider that the court intended in that decision to deal with a case in which the agreement was not to revoke existing wills.

<sup>183</sup> *Birmingham v Renfrew* [1937] HCA 52; 57 C.L.R. 666; *Re Cleaver* [1981] 1 W.L.R. 939; *Re Goodchild* [1997] 1 W.L.R. 1216, CA.

<sup>184</sup> Law of Property (Miscellaneous Provisions) Act 1989, s.2(5), as to which see *Yaxley v Gotts* [2000] Ch.162, CA.

<sup>185</sup> See § 4-038.

<sup>186</sup> For the property subject to the agreement, see §§ 4-051 onwards.

<sup>187</sup> *Birmingham v Renfrew*, above (a decision on the Victorian equivalent of Law of Property Act 1925 s.40 (repealed by Law of Property (Miscellaneous Provisions) Act 1989, s.4, Sch.2)); *Healey v Brown* [2002] EWHC 1405 (Ch); [2002] W.T.L.R. 849 at [19]; *Walters v Olins* [2007] EWHC 3060 (Ch); [2008] W.T.L.R. 339 at [30]–[31] (point not taken on appeal, *sub nom. Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212); *Shovelar v Lane* [2011] EWCA Civ 802; [2012] 1 W.L.R. 637 at [48] (a "bad point").

<sup>188</sup> A contract to leave land by will is a contract to dispose of land or an interest in land, see § 4-062.

<sup>189</sup> See §§ 4-045 onwards.

as a contract, there may still be a valid trust. The requirement that there should be a contract at law is a requirement that there should be a distinct understanding as to the contents of the wills and not merely an agreement or basis for the imposition of a trust, not to establish a basis for the grant of contractual remedies.<sup>190</sup> The non-enforceability of the agreement should therefore be immaterial to the existence and enforceability of a trust.

In the only decision which discussed the point,<sup>191</sup> it was held that non-compliance with the 1989 Act did not prevent the existence of a trust of T1's share in the land but did prevent the existence of a trust of T2's share. The reason for distinguishing between the two was that although, so it was held, no trust of either share could arise under the doctrine of mutual wills because of the requirement of a contract at law,<sup>192</sup> that did not preclude a trust of T1's share on the different ground that there had been an arrangement or understanding coupled with reliance on it by T1;<sup>193</sup> but that ground was inapplicable to T2's share because he already owned it.<sup>194</sup> Nonetheless, the reasoning is doubtful<sup>195</sup> and the law is not settled.<sup>196</sup> Until it is, it is prudent to assume that the 1989 Act may apply.

#### Obligations of testators—revocability of wills

A distinction has in principle to be drawn between an agreement between T1 and T2 that neither will revoke his will without notice to the other and an agreement that neither will revoke his will at all.<sup>197</sup> The practical difference, however, may often be small.

4-045

<sup>190</sup> *cf. Birmingham v Renfrew* [1937] HCA 52; 57 C.L.R. 666 at 690, *per* Dixon J. ("It is the constructive trust and not the contract that they [sc. the intended beneficiaries] are entitled to enforce").

<sup>191</sup> *Healey v Brown*, above.

<sup>192</sup> *Healey v Brown*, above, at [23]. In *Walters v Olins*, above, at first instance, *Healey v Brown* was treated (so it appears) as deciding that a contract to make a will disposing of specific property had to comply with the formalities required by the 1989 Act, s.2, see [2007] EWHC 3060 (Ch) at [31] (point not taken on appeal, [2008] EWCA Civ 782).

<sup>193</sup> Following *Lloyds Bank Plc v Rosser* [1991] A.C. 107 at 132, HL, *per* Lord Bridge, as applied in *Yaxley v Gotts* [2000] Ch.162, CA (see §§ 8-037, 10-052, 10-062 onwards).

<sup>194</sup> As it had been specifically stated in *Re Goodchild* [1997] 1 W.L.R. 1216 at 1231, CA, *per* Morritt L.J., that Lord Bridge's principle was inapplicable in cases of mutual wills to property already owned by T2.

<sup>195</sup> In *Healey v Brown*, above, Morritt L.J.'s *dictum* in *Re Goodchild* (see previous note) may have been misunderstood: Morritt L.J. was concerned simply to exclude the possibility that anything less than an express agreement against revocation would suffice for the purpose of the doctrine of mutual wills. The two grounds canvassed in the text, above, for thinking that the 1989 Act does not interfere with the existence of a trust were not considered; the first (that the agreement was only an agreement not to revoke without notice) was excluded on the facts, as the wills themselves contained an unequalled declaration against revocation. The reasoning in *Healey v Brown* was also doubted in *Legg v Burton* [2017] EWHC 2088 (Ch); [2017] 4 W.L.R. 186 at [21] onwards, where it was suggested that the trust arising out of mutual wills might depend on proprietary estoppel.

<sup>196</sup> For a discussion of the extent to which s.2 of the 1989 Act precludes a constructive trust (or a proprietary estoppel) when there is an agreement between the parties, see *Whittaker v Kinnear* [2011] EWHC 1479 (QB).

<sup>197</sup> *Bigg v Queensland Trustees Ltd* [1990] 2 Qd.R. 11; *Re Newey* [1994] 2 N.Z.L.R. 590 at 593; *Lewis v Cotton* [2000] NZCA 399; 3 I.T.E.L.R. 447 at [43].