I should explain that English courts have not expressly adopted the ideas of Aristotle nor of any other philosopher as part of equity, but it is suggested that the core principles of English equity are in sympathy with this philosophical tradition. The English concept of equity is built on the idea of *conscience* in that the courts consider the conscience of the individual defendant in any particular case. This idea of conscience and the main principles of equity will be considered in this chapter. The trust, as we shall see, developed in turn out of the principles of equity by preventing a defendant from using property in an unconscionable manner.

Let us begin by considering how the Courts of Chancery – which are the principal courts of equity – developed historically. The Chancery was originally a secretarial department of state and not a court at all. It was headed by the Lord Chancellor, who held the Great Seal of England and so could exercise the power of the Crown, making grants of land and so forth. Over time the Chancery acquired the power to exercise a judicial function out of its role in administering the publication of common law writs. The Lord Chancellor was for centuries the monarch's principal minister before the evolution of the post of Prime Minister in Robert Walpole's time. The Lord Chancellor became a very powerful political actor by the 16th century in England – principally by means of the expanding range of writs which were served to bring nobles to account – a fact tacitly acknowledged by Henry VIII's determination to have so many Lord Chancellors executed. The Courts of Chancery evolved to hear petitions that would previously have been made directly to the Crown for clemency or justice. Much of the business of the early Courts of Chancery was procedural: issuing writs of subpoena, collecting fines and so forth.

Nevertheless, by the time of the *Earl of Oxford's Case* in 1615 it had become clear that the principles applied by the Lord Chancellor through the Courts of Chancery were very different from the ordinary common law which had been developed since the creation of the Courts of King's Bench by Henry II. Whereas the common law was concerned with the application of legal rules to individual sets of facts, equity as administered through the Courts of Chancery was concerned to consider the conscience of the individual defendant. As Lord Ellesmere put it in the *Earl of Oxford's Case* in 1615, the role of the Courts of Chancery was 'to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be'. So, the courts of equity would look at the conscience of the individual defendant and make an order which would avoid unconscionable outcomes. Furthermore, the role of equity was to correct any injustice which would result from the rigid application of the common law. As Lord Ellesmere said, the second goal of the Court of Chancery was 'to soften and to mollify the extremity of the law': which means that its second goal was to ensure justice where the common law would have produced unfairness or injustice.

Consequently, it is vital to understand from the outset one feature of English legal procedure. As the Courts of Chancery developed their own principles, there

were clearly two completely separate streams of jurisprudence emerging in English law: the common law on one side and equity on the other. In practice it used to be necessary for the litigant to decide which of these systems of rules would be necessary to decide his case. The common law courts and the courts of equity were completely separate courts in completely separate places in London. Consequently, only courts of common law would hear cases to do with the common law (e.g. whether or not a contract had been created) and provide common law remedies (e.g. damages for breach of contract). Similarly, only the courts of equity would hear cases to do with equitable principles (e.g. the enforcement of a trust) or the award of equitable remedies (e.g. injunctions or specific performance).

If you were to read Charles Dickens's remarkable novel *Bleak House* you would read about the fictional case of *Jarndyce v Jarndyce*. At the start of the book, this case had droned on for such a long time that no one could remember what it was about and no lawyer could even explain it. Dickens himself had worked as a clerk in the now extinct court of Doctors' Commons (depicted in *David Copperfield*) and was therefore well acquainted with the painfully slow pace of English justice at that time. Part of the difficulty in the *Jarndyce* case was that the litigants had to move constantly between the courts of common law and the courts of equity as they tried to find out which court ought to decide on the case. The litigants could be sent back and forth for many years between the common law courts and the courts of equity simply to decide which court should hear the case, even before either court would resolve it.

Therefore, quite literally, common law and equity were physically as well as intellectually separate systems of law. Through the 19th century, as a result of the work of Dickens and others, the scandalous waste caused by the slowness of the courts led to reform. In 1873 the Judicature Act provided that the courts of common law and those of equity should be merged so that any single court could rule on any question, no matter whether it related to principles of equity or to rules of common law. However, that Act only removed the physical distinction between the courts – the intellectual distinction remains even today. The courts still make rigid distinctions between the award of common law remedies and equitable remedies. We will consider the difference between the various doctrines in the remainder of this chapter once we have thought a little more about the philosophical nature of equity in the next section.

The philosophical role of equity

Before proceeding to consider some of the core equitable principles I think it would be as well to attempt to convince you, albeit briefly, that equity does have a respectable intellectual pedigree. The final chapter of the book will try to map some of the ways in which equity is likely to become even more sociologically significant in the 21st century than it has been up until now.

Equity acts in personam

The most important equitable principle is that the jurisdiction of the court is to act *in personam*: that is, the court is concerned with the conscience of the individual defendant as much as with any strict rule. That equity acts *in personam* does not mean that it awards purely personal rights, such as damages at common law, as opposed to proprietary rights, because equity also awards proprietary rights in the form of rights under trust and so forth. This particular usage of the expression '*in personam*' refers back to Lord Ellesmere's description of equity in the *Earl of Oxford's Case* in 1615 as being concerned with the conscience of the defendant who appears before the court. In this sense, equity is concerned with that person's particular good behaviour, and thus with what their conscience should have told them.

A court of equity is therefore making an order, based on the facts of an individual case, to prevent that particular person from continuing to act unconscionably. This may relate to the manner in which a trustee is dealing with a beneficiary's property, or to a claimant's fear that the defendant will move their property out of the jurisdiction before judgment in a trial, or to a defendant's refusal to perform their obligations under a contract. Equity will intercede in all three of these circumstances by using principles of trusts, injunctions and specific performance, respectively. In each situation the underlying objective of the court is to make the defendant act in good conscience, by observing the trust, by refraining from taking property out of the jurisdiction, and so on.

One of the themes that we will observe in the modern application of equity is that the great flexibility which is identifiable in a court of equity's inherent jurisdiction to act *in personam* has been superseded in many circumstances by the introduction of more rigid rules to decide when these principles will and will not be deployed. This is true of some equitable doctrines, but not others. For example, the trust has become subject to more rigid principles – as considered in Chapters 3, 4 and 5 – whereas remedies such as injunctions – as considered in Chapter 13 – remain comparatively flexible.

The study of equity is concerned with the isolation of the principles upon which judges in particular cases seek to exercise their discretion. Therefore, it is an intricate task to find common threads between situations in which judges have necessarily been reaching decisions on the basis of particular facts. Bound up with the study of equity is the need to uncover common links or differences between judges. Clearly, if judges are able to reach decisions entirely according to their own discretion there are likely to be some disparities between the ways in which such principles are put into practice. Similarly, we might be concerned that this gives a great amount of power to individual judges to circumvent the wishes of Parliament when applying equitable principles to the interpretation of statute. In the era of human rights law in England – after the enactment of the Human Rights Act 1998 – we will also need to bear in mind the tension between traditional principles of equity and emerging principles of human rights law, in particular in relation to rights in the family home as considered in Chapter 9.

What is important about equity is that it never allows us to forget that people are individual human beings who have their own claims to be taken into account, whom we should not dismiss as just another case to be heard. Equity enables each individual citizen to have their claims for fair treatment heard in the private law context.

Equity never stands still. You will soon come to notice that, as soon as we think we have identified a clear rule, then a novel set of facts will materialise around the corner which call that rule into question, or we will encounter some cunning ruse used by a lawyer to avoid or manipulate that rule. The student of equity must therefore always be on guard. Having considered the principal tenet of equity – that it acts *in personam* – it will be useful to consider some of the other major equitable rules.

The core equitable principles

One thing to appreciate about the historical equitable principles is that they have a marvellously lyrical quality to them. All that has been said so far about the discretionary nature of these principles in the past is clear when you consider both how vague and how moral they are.

The core equitable propositions set out below are culled primarily from *Snell's Equity* (McGhee, 2011), with a few additions of my own which I think must now form part of the established canon. It might be useful if you thought of them as being a little like the Bible or the Koran: they are lyrical prescriptions for the way in which people should behave which are open to interpretation, rather than strict rules in themselves. That is, equitable principles are the basis for the values that the courts should bear in mind when reaching their decisions. This is sometimes known as a 'high-level' principle which governs the application of more detailed rules to particular circumstances. You should not dismiss them because they seem too vague; they are still principles applied by the courts in line with established precedents about the application of those principles.

The core principles are set out in italics in the text of the following sections.

Ensuring the claimant will be provided for

It is worth briefly considering each of these principles in turn, to create a narrative of the way in which equity has operated historically. Perhaps the fundamental notion is that *Equity will not suffer a wrong to be without a remedy*, and thus equity establishes its core jurisdiction to ensure that a claimant will be entitled to acquire some redress for a wrong done to her or to protect some right in property. In this way, equity is also very creative in generating new doctrines or in extending existing doctrines into new contexts.

beneficiary because, in that example, he would retain all of the available rights in the property. In that situation we would say that no trust had been created and that Adam simply remained absolute owner of the property. What would be possible would be for Adam to appoint someone, Bernice, to hold property on trust for Adam absolutely. In that situation, Adam would not be trustee.

Because Adam would be the only beneficiary in this example, we would refer to the trust as a 'bare trust' and we would refer to Bernice as being a 'bare trustee' or, more usually, as a 'nominee'. (You may be becoming bemused by all of these synonyms for the same concept. Do not be downhearted for there are clear benefits in it. In practice, your clients will soon come to understand the jargon terms you are using and as a result your allure will fade in their eyes. So think how useful it is to be able to use a synonym for that concept which your client will not understand, with the result that their admiration for your learning will be instantly rekindled and that they will consider themselves very lucky indeed to be paying only a fraction of the fee which a person of your staggering intellect so clearly deserves.)

The rights of beneficiaries

In ordinary circumstances, the settlor transfers the legal rights in the trust property to a trustee so that the trustee will use the trust property in accordance with the settlor's instructions. No rights are owed by the trustee to the settlor (in her capacity as settlor) from that moment. Instead, the courts of equity recognise that the trustee holds the trust fund on trust for the beneficiary. Therefore, all of the beneficial interest resides with the beneficiary.

Division of title

It is a neat trick that the trust performs – two or more people are able to hold rights simultaneously in the same item of property. The trustee is recognised by the common law as being the owner of the property – therefore the trustee is said to have the common law, or 'legal', rights in the property; whereas the beneficiary is recognised by equity as having rights in the property – therefore the beneficiary is said to have the 'equitable interest' in the property. The nature of these equitable rights are considered in more detail in Chapters 5 and 10. In short, the beneficiaries have both proprietary rights in the trust property and also the right to ensure that the trustees observe the terms of their trusteeship.

Multiple beneficiaries

Where there is more than one beneficiary, the proportionate rights of the beneficiaries in the trust fund are dependent on the terms of the trust. It may be that the settlor intends one person to be entitled to enjoy the rights of beneficiary during that person's life and for the equitable interest to pass to another beneficiary on

the death of the first. To achieve that structure the settlor would provide that the trustee 'shall hold the property on trust for A for life, remainder to B absolutely'. That provision means that A is entitled to the income from the trust fund and the use of the fund during her life but without any power to dispose of the trust fund before her death. B has the rights to the capital of the fund after A's death. The interests of these two beneficiaries are clearly at odds with one another: A will want the trustee to generate as much income in the short term as possible, even if that means risking the capital; whereas B would prefer a cautious treatment of the capital so as to preserve as much of it as possible. A is known as the 'life tenant'. B is known as a 'remainderman' (or 'remainder beneficiary') who has sufficient rights to prevent A and the trustee disposing of all of the value in the trust fund before A's death and is then a beneficiary under a bare trust after A's death.

It might be that the beneficiaries are all entitled to income from the trust or to the use of the trust property during their lifetimes. Alternatively, it may be that the income from the trust fund is to be held on trust for the beneficiaries equally – which would mean that the trustee would make a periodical, outright transfer of the income in equal shares between the beneficiaries. This will depend on the terms of the trust.

Discretionary trusts and mere powers of appointment

The trust may be a 'discretionary trust' under which the trustees have the power to make apportionments of the trust property to one or more of the members of the class of beneficiaries in accordance with the terms of the powers given to the trustees by the settlor. An example of such a discretionary trust would be a term in a trust which provided: '*My trustees shall pay £10,000 out of the trust fund to whichever of the beneficiaries achieves the best examination results at university.*' In this example, the trustees are obliged to make an apportionment of property but the decision as to which beneficiaries are to be the recipients will be in the trustees' power alone, provided that they apply it in accordance with the terms of the trust. The trustees therefore have a discretion as to *how* they exercise their power, but they have an obligation to exercise that discretion in favour of one of the objects of that trust.

There is a further structural alternative. The trustees may have a power to transfer (or, 'appoint' or 'advance') given amounts of the trust income or capital to an identified class of beneficiaries – this is known as a 'power of appointment' or a 'power of advancement'. An example would be: '*The trustees may appoint £1,000 out of the trust fund to any of the beneficiaries whose bank account is overdrawn.*' In such a situation, the trustees are not obliged to transfer money to any of the beneficiaries; rather, they would have an ability to do so in defined circumstances if they considered it to be appropriate. The trustees also have a discretion as to the recipient of the appointment. It might be that the settlor wanted to give the trustees the flexibility to pay money to one or other of the beneficiaries if they should encounter financial difficulties. When creating a trust, the settlor and her advisors have to build enough flexibility into the trust from the outset to

created in a contract, as considered below, might arise in a number of circumstances. Commercial parties may use a trust to provide for protection of their title in property that is being used for the purposes of their contract as considered in the previous chapter (see p 25). Alternatively, the contract might be for investment purposes (as with pension funds, for example) in which the investor will form a contract with the investment manager to the effect that the investment manager holds funds on trust with an obligation to invest them on behalf of the investor-beneficiary: the contract will provide for the trustee to be paid its fee and for any limitations on the investment manager's liability for losses suffered. In such situations it is the contract which creates the underlying rationale for the existence of the trust; the contract will therefore also contain the terms of the trust in many circumstances.

Trusts are, more traditionally, a means of giving property 'over the plane of time', to borrow Moffat's expression (1999). In other words, rather than simply make an outright gift of property at one time and transfer all of the rights in property absolutely to a donee, a person may prefer to ensure that the gift will continue over a long period of time. So, a grandparent in a will may decide to divide up an estate so that each of their children and grandchildren become beneficiaries under a trust that provides for some to live in the family home and for others to receive a regular cash income during their lifetimes. Thus, a trust is a means of creating more complex relationships than a simple gift.

Bearing some of these different objectives in mind, this chapter will consider the requirements placed on the settlor when seeking to create a trust.

Irrevocability of a trust

One of the key rules in relation to the settlor's interaction with a trust is that once a trust is created the settlor cannot undo that trust. So, in the case of *Paul v Paul* (1882), a husband and wife had entered into a marriage settlement before their marriage. A marriage settlement, as considered in Chapter 2, is a trust created before marriage whereby the parties to the marriage and their families set out which property passes to the married couple and which of their future children and other members of their extended families are entitled to acquire rights in that property in the future. In *Paul v Paul* the marriage settlement created rights for the couple and for others as beneficiaries. The marriage was unsuccessful and the couple therefore sought to undo the trust and recover title in the property for themselves. The court held that the trust could not be undone by the settlors nor anyone else after it had been constituted. Therefore, the trust continued in existence.

This is a salutary lesson for the settlor: be sure of your intentions before creating your trust. Or, at least ensure that you have a power built into the trust instrument to undo the trust if your expectations are not borne out.

The only exception to the general rule in *Paul v Paul* would be if the settlor created some express right in the terms of the trust that she could recover title in the property. No such right was contained in the trust in *Paul*. So, how would such a mechanism operate?

Suppose, for example, that two commercial parties form a contract whereby Industrial Ltd agrees to buy a very large consignment of components from Supplier Ltd over a period of five years. That contract will contain provisions that Industrial Ltd is to pay Supplier Ltd amounts for the components at various stages over the five-year period. However, Industrial Ltd would be nervous of paying for parts in advance of delivery. A trust could therefore be contained in the contract which provided that Industrial Ltd would make payment to Bank so that Bank held those payments as trustee. The terms of the trust would be that Bank would hold the money on trust until Industrial certified that the components were of sufficient quality – from that point in time Bank would hold the payment on trust solely for Supplier. If a term were inserted into the trust to the effect that Industrial was entitled to recover the money from the trust absolutely and terminate that trust, then it would be possible for it to guard against the risk of Supplier going into insolvency or failing to deliver suitable parts.

There are two ways in which Industrial could recover its money. First, the term contained in the trust could be to the effect that Industrial *as settlor* would be entitled to recover property from the trust. Alternatively, Industrial could be expressed to become entitled to the money absolutely *as a beneficiary* under a bare trust: that is, as though Supplier's equitable interest was terminated if it failed to deliver suitable components.

Suppose then that a parent wanted to create a trust for a child but was concerned that the child might use the money in an inappropriate way. The parent acting as settlor might express the child's equitable interest as being subject to a power held by the settlor to terminate the trust in the event that the child performed one of a specified type of action. Alternatively, it might be that the settlor created a trust with the provision 'so that my child shall acquire no rights as a beneficiary unless and until' certain actions were performed: a kind of condition precedent. As we shall see in Chapter 4, it is not always easy for the settlor to prevent the beneficiaries from attempting to rewrite the trust after it has been created. In some (non-commercial) situations, there may be tax disadvantages if the settlor retains an interest under a trust fund.

The trust as an institution

As was considered in Chapter 2, the express trust is something that is becoming ever more important in modern commercial life, despite its heritage as a means for families to organise the way in which their property will be made available to future generations. This chapter considers some of the detailed rules concerning the creation of express trusts with the intention both of summarising those rules and also of providing a map of the legal treatment of express trusts at this stage. This chapter divides then between the rules relating to certainties, the rules relating to perpetuities and the rules relating to formalities.

he had not done everything necessary *for him to do* to transfer the shares because he did not have the Treasury's consent. In *Re Rose* a husband intended to transfer shares to his wife and at the material time all that remained to be done was for the board of directors to agree to the transfer: importantly, Mr Rose had done everything that was required of *him* to effect a valid transfer. As a result, the Court of Appeal in *Re Rose* held that equitable title ought to be deemed to transfer to Mrs Rose as soon as Mr Rose had finished the formalities.

Now, the reader may be thinking: what is the difference between Fry needing to get the Treasury's consent and Rose still awaiting the consent of the directors? The answer is probably revealed by the context. In *Rose* the board of directors did eventually give consent to the transfer: the only reason for the case to come to court was because, under tax law at that time, if Mr Rose could be shown to have transferred his equitable interest in the shares to his wife as soon as he completed the forms there would have been no inheritance tax to pay on the shares after his death, whereas there would have been tax to pay if the court had held there was no transfer until the date of the directors' agreement. Therefore, the court was looking at the surrounding factors in the case of *Rose*. This is something the student of trusts law should never forget: courts of equity will always be sensitive to context and therefore it may be difficult, occasionally, to reconcile the logic of one decision with the logic of another decision entirely in the abstract: only a close reading of the cases will make sense of these points.

The Privy Council has subsequently accepted that when a man lying on his deathbed sought to declare a trust over his own property with himself as one of nine trustees, a valid trust was created over that property even though the dying man did not transfer the legal title in the trust property to the other eight people who were to have acted as trustees (*T Choithram International SA v Pagarani* (2001)). There would have been no issue of formality had the deceased simply declared himself to be sole trustee of that property because transfer of title would have been necessary to constitute the trust. However, in that instance, he had purported to create nine people trustees. Subsequently, the Court of Appeal has applied this principle so as to perfect a gift of shares in circumstances in which the donor had neither effected a declaration of trust over the shares nor done everything that was necessary for him or her to do to effect a transfer of the shares (*Pennington v Waine* (2002)). This decision extended the *Re Rose* principle beyond its former boundaries where it could be demonstrated that the donor had indeed done everything necessary for her to finalise the transfer. In that case Clarke LJ accepted that the principle operated in general terms and that the equity identified by the Court of Appeal in *Re Rose* was capable of such general application.

In *Curtis v Pulbrook* (2011) Briggs J held that where a man had not completed the formalities for transferring shares to his wife and daughter then the *Re Rose* principle could not be relied upon because he had intended to make a gift and yet had not done everything necessary for him to do. His Lordship also expressed concern at the lack of apparent principle in the decisions in *Pennington* and in *Choithram*. Similarly, in *Kaye v Zeital* (2010) the Court of Appeal refused to

accept *Re Rose* had been satisfied where the transferor had failed to do everything necessary for him to do to transfer property.

Certainty in express trusts

Whereas the trust began life as a means of achieving justice in relation to the treatment of property held by one person ultimately for the benefit of others, it is now an institution that has lost much of its flexibility. Part of that loss of flexibility was due to the development of the principles of certainty and the rules of formality in the creation of trusts.

As long ago as *Knight v Knight* (1855) it was held that there must be three forms of certainty in the creation of an express trust: certainty of intention; certainty of subject matter (or, the trust property); and certainty of objects (or, beneficiaries). Each of these three is considered in turn in the three sections that follow.

Certainty of intention

No formality, but evidence of sufficient intention

Certainty of intention requires that the settlor intended to create a trust rather than to achieve some other end. There is no particular formula that has to be used in the creation of an express trust – that is, there is no form of abracadabra that will bring a trust into existence. The clearest means of creating a trust would be for a settlor to visit a solicitor and prepare a deed of trust that began with the words: 'I hereby declare that the following property shall be held on trust by the following trustees on the terms of this trust . . .' However, that level of formality is not required by the law of trusts, even though it may be desirable to make your intention as clear as possible. The courts will be prepared to infer an intention to create a trust from the circumstances in which the settlor deals with the property.

In many situations it will be difficult to know quite what the settlor intends. For example, in relation to wills, aside from straightforwardly making ordinary gifts of property to legatees, it is common for people to leave property subject to some obligation as to how the property is to be used: for example, 'this money is to be left to my wife in the hope that she will use it to take care of the children'. In such a situation it may not be clear whether the testator intends that the legatee should hold that property as a trustee for someone else or whether the legatee is merely under a moral obligation to use the property in a particular way. In this context, to be under a merely moral obligation means that there is no trusteeship imposed by the court – the obligation is therefore not a legally enforceable one.

In the interesting case of *Paul v Constance* (1977), a claim was brought by Mr Constance's widow arguing that money left in a bank account after Constance's death ought to pass to her as next of kin. Constance had previously left his wife to live with Mrs Paul. The bank account had been intended by Constance and Paul

not trusts, of the paintings. Therefore, a little lateral thinking saved the bequest because a gift is not dependent on the same requirement of certainty as a trust.

There is a definite lack of enthusiasm among the judiciary for holding trusts invalid if it is possible to validate that trust. This idea is pursued in more detail in relation to the beneficiary principle in Chapter 4.

Another important approach is to decide between the various forms of uncertainty that may assail a trust. As considered above, where the *concept* that describes the class of beneficiaries is uncertain, then the trust will be invalid. So, for example, if the trust terms provided that 'the trustees shall distribute £1,000 annually to any nice people I have known', the concept 'nice' would be so uncertain as to make it impossible to validate the trust. Suppose, however, a trust for 'my trustees to distribute £1,000 to each of my first cousins' would be sufficiently certain because the concept 'first cousin' is sufficiently certain. Whereas if it were merely a question of any individual claimant being unable to *prove* as a matter of evidence that she was, for example, one of the settlor's first cousins then that would not invalidate the entire trust, although it would mean that that particular claimant would not be able to demonstrate an entitlement. Similarly, if one of the first cousins could not be found because she had moved home without leaving a forwarding address, that would not invalidate the trust but it would make it impossible for the claimant to establish any entitlement.

One further concept that has arisen on the cases is that of 'administrative unworkability' (*per* Lord Wilberforce in *McPhail v Doulton*). This principle demonstrates the pragmatism that underpins the law of trusts. It is said that if it is impossible for the trustees to carry out the task set them by the settlor, then the trust will be declared void for uncertainty. For example, if trustees are required to distribute property to the 'inhabitants of West Yorkshire', it will be held to be an unworkable (or, impracticable) task for the trustees and so the trust would be invalid (*Re West Yorks* (1986)). The law relating to express trusts has developed pragmatically in this way – only validating trusts if it is possible to do so in practice. So, if there were a trust for the benefit of 'all past and present mineworkers in County Durham' that would be an administratively unworkable task for ordinary citizens acting as trustees, but it might not be unworkable if the trustees were also trustees of the mineworkers' pension fund for County Durham because they would have access to lists of all those people who would fall within the class.

As the law of trusts encounters novel factual situations it develops commonsensically. The problem which then follows is how these pragmatic principles are to apply systematically to future situations. As ever, the tension between flexibility and certainty in the law of trusts arises.

Incompletely constituted trusts

So far we have considered how trusts are formed and how to distinguish a trust from a gift. The other problem that arises then is how to deal with trusts that have not been properly constituted. The core principle in this area is that *Equity will not assist a volunteer*. A volunteer is a person who has not given consideration or who does not have a valid trust declared in their favour. The following two sections consider some of the significant ways in which it may be possible to circumvent this general principle. As ever, for the trusts lawyer the challenge is first to identify the general rule and then to look for a means of circumventing it so that you can create a valid trust.

Perfecting imperfect gifts in some circumstances

There are three contexts in which a gift will be perfected: *donatio mortis causa*, the rule in *Strong v Bird* (1874), and the doctrine of proprietary estoppel.

The doctrine of *donatio mortis causa* relates to gifts made during the donor's lifetime, made in expectation of immediate death, and that are intended to take effect on the donor's death. For example, the Court of Appeal in *Sen v Headley* (1991) dealt with a couple who had lived together for 10 years, but had separated more than 25 years before the man's death. He died of a terminal illness but before death told his former partner (the plaintiff) that the house (with unregistered title) was hers and that: 'You have the keys . . . The deeds are in the steel box.' While it was argued against the plaintiff that she had always had keys to the house, such that the lifetime gift could have no further effect by way of gift, the claimant was successful in establishing her claim to the house because title deeds were essential in establishing title to unregistered land. There was no retention of dominion in this case because the deceased had not expected that he would return to the house nor that he would have been able to deal with it in any way before his death.

The rule in *Strong v Bird* (1874) provides that if a debtor is named by the testator as an executor of the estate of the one to whom he owed the debt, that chose in action is discharged – in effect a gift is made of the amount of the debt. The assumption is that if a person is made executor of an estate, the deceased must have intended to free the executor from any outstanding debts between them. This rule also has a pragmatic basis: the executor acquires all the deceased's rights to sue others – therefore, the executor would be required to sue herself to recover the debt. In relation to incomplete gifts, the rule in *Strong v Bird* means that, where a deceased person intended to make a gift of property to another person without ever making a complete gift of it, if that intended recipient is named as executor of the deceased's estate then the gift is deemed to have been completed. This might be considered surprising, given what is said in Chapter 5 about the obligations on a trustee to avoid conflicts of interest.

The third way in which an incomplete gift may be indirectly perfected is by virtue of the doctrine of proprietary estoppel. This doctrine is considered in detail in Chapter 8. In short, where a representation is made to the claimant in reliance on which she acts to her detriment, the court will estop the defendant from going back on that representation. The remedy available to the court is potentially very broad. So, in *Pascoe v Turner* (1979) a man left a woman with whom he had been in a relationship, but told her that the house and all its contents were hers. The

requiring that the identity of the beneficiaries be made sufficiently clear by the settlor. The point we are considering here is slightly different. In relation to certainty of objects we were concerned to ensure that the identity of the beneficiaries would be sufficiently certain so that the trustees could know (and also so that the court could know) for which persons the trustees were holding the property on trust. The issue here is more fundamental than that: without there being a person expressed as being a beneficiary there cannot be a valid trust at all.

So, the simple proposition is this: no beneficiary, no trust. What the trusts lawyer must be astute to avoid is the situation in which property is purportedly held on trust for some abstract purpose that does not benefit any human being. For example, a trust to maintain a much-loved pet cat, or a trust to polish the gravel in the grounds of Buckingham Palace. In either of these cases there is no human beneficiary who would take a *direct* benefit from the trust purpose.

That much seems simple enough but there are a number of cases on the margins of these rules. Most of the trusts which we have considered so far have been created for the benefit of identified individuals. We have come across some situations in which the settlor had ulterior motives: to prevent the child acquiring rights in the property until she is old enough to be responsible, to pay for the child's medical care, and so forth. So where is the line between having a desire to benefit a person and having a desire to carry out some abstract purpose that is not directly for the benefit of any person?

Illustrations of the beneficiary principle

The traditional approach

The approach that the law takes is to provide that where the settlor intended only to carry out some abstract purpose (for example, 'constructing some useful memorial to myself' – *Re Endacott* (1960)), which does not directly benefit any individual beneficiary, then that trust will be void and unenforceable. The most useful leading case on establishing the boundary here is that of *Leahy v Attorney General for New South Wales* (1959), which concerned a bequest to be held by trustees, amongst other things, for 'such order of nuns' as the trustees should select. The property to be left on trust was a sheep station (that is, a very large plot of agricultural land) that consisted of a large amount of grazing land for sheep and a single homestead in New South Wales, Australia. The question arose whether that purpose was an abstract purpose (and so void as a trust) or a purpose that would benefit some people as beneficiaries.

Viscount Simonds gave the leading opinion in the Privy Council and held that the bequest created only a void purpose trust. There were two main planks to his reasoning. First, the terms of the bequest were to 'such *order* of nuns' as the trustees should select. In his Lordship's view, giving the bequest to an order of nuns rather than to any individual nuns meant that the property could be held on trust for future members of the order as well as present members. Therefore, there was

a risk that the trust would continue indefinitely and offend the rules against perpetuities (considered below). Furthermore, the gift to the order of nuns, as opposed to any individual members of the order personally, meant that it would be the abstract purposes of the order that would benefit and not individual beneficiaries. For example, none of the nuns would have been entitled to take any property away personally.

Secondly, there was a practical point that concerned the fact that the homestead would only sleep seven or eight people, whereas the order of Carmelite nuns selected by the trustees was made up of many thousands of nuns around the world. In consequence, Viscount Simonds could not see how it could possibly have been the testator's intention that the individual members of the order take individual, beneficial rights in the property. His Lordship considered that a beneficiary was a person who would go into 'immediate possession' of his rights, and not someone who only had an indirect right.

The rationale behind this rule is to prevent trusts lasting in perpetuity. For example, the courts in the Victorian era became concerned that the vibrant and explosive British economy, in the white heat of the Industrial Revolution, would be starved of capital while it was possible for money and other property to be bound up in trusts for abstract purposes without ever being spent and thus passed back into the economy. Therefore, it was thought, if money was tied up for the maintenance of a 'useful memorial' it was not being used for the benefit of people as part of the economy. It was thought that an efficient economy required that capital should circulate and be used by whoever would make the best use of it.

The perpetuities rules

As a consequence, the rules on perpetuities and accumulations were developed to require that property could not be dedicated to abstract purposes so that no individual could take a benefit from it (the so-called 'rule against inalienability') and also to require that property held on trust must vest in some beneficiary within an identified period of time (the so-called 'rule against remoteness of vesting'). The purpose of this principle is to prevent property from being tied up in perpetuity without being able to be used for any other purpose. If a trust operates beyond the perpetuity period, then it will be void. The old case law would find that any trust without a perpetuity period would simply be void from the outset. The Perpetuities and Accumulations Act 1964 was introduced to save such trusts.

The perpetuities rules for the future are governed by the Perpetuities and Accumulations Act 2009. The 2009 Act saves trusts without a perpetuity period by creating a statutory perpetuity period of 125 years (s 5(1)) which applies if the trust does not terminate before that date (s 7). If the trust is still in existence at the end of that period then the 2009 Act closes the class of beneficiaries at that point in time so that no one else can become entitled to the trust property (s 8).

The 2009 Act takes effect in relation to trusts created on or after 6 April 2010. For trusts created before that date the Perpetuities and Accumulations Act 1964

directors would not use black-and-white film, we see a different approach to film-making in the 21st century to that used in the first half of the 20th century. In the same way approaches to law will adapt and change – particularly in a common law system. It is only by accepting that idea that any student of equity and trusts will be able to understand why some judgments are different from other judgments, rather than trying to reconcile one judgment with another judgment in all circumstances.

Understanding the role of express trusts

What the student should take away from the study of trusts is an appreciation of the many pliable techniques that exist for the manipulation of trusts techniques for a number of purposes. Those purposes fall into two general categories. The first is as a socially useful means by which ordinary citizens and corporations can organise the terms of their communal use of property. Trusts and derivatives of trusts techniques are used to organise charities, pension funds, cooperatives and even (in a very particular manner) NHS trusts. Similar techniques based on the stewardship of property by a trustee for the ultimate entitlement of beneficiaries also form an important part of commercial agreements, as considered in outline in Chapter 2 and in more detail in Chapter 11.

The second is as a means of using trusts to elude or avoid problems of law. So, for example, the preceding discussion of the carrying on of dispositions of equitable interests in ways that avoid the provisions of s 53(1)(c) of the LPA 1925 have indicated the manner in which trusts lawyers are able to *structure* their clients' affairs to achieve the desired effect. The same holds true for situations in which the client is not seeking to avoid some legal rule, but rather to achieve an identified, desired effect. Therefore, a commercial contract between two multinational financial institutions dealing in financial derivatives or between two sole traders dealing in used cars can be secured by providing that payment is held on trust until both buyer and seller are satisfied that the contract has been properly performed. The same techniques will apply, with suitable adaptations, to both circumstances.

However, equity ought to be about more than merely creating trusts-by-numbers. While the use of the express trust will become ever more institutionalised with its deployment in commercial contracts, will trusts and so forth, it should not be forgotten that this difficult concept of 'conscience' lies in the background. It is suggested in cases such as *Westdeutsche Landesbank v Islington* (1996) that the single idea of 'conscience' will solve all of those various disputes. And yet the question as to what constitutes good and bad conscience in different circumstances remains unanswered in many situations. It is a question that falls to be answered not simply by reference to the *creation* of such trusts but certainly in relation to the *management* and *breach* of such arrangements. The available remedies and equitable responses to contravention of the trust will differ in desirability from context to context.

This ideal of good conscience is a useful way of describing the pattern that equity creates in resolving these disputes; but it is not a means by which the legal system ought to attempt to impose order on that chaos by shoe-horning different social problems into the same ill-fitting boots.

An exceptional category: secret trusts

Thus far we have focused in this chapter on very deliberate legal structures: it would be useful to remind ourselves of the flexible and responsive uses of equity. A secret trust is almost as exciting as it sounds. Suppose the following circumstances. A man expects to die and decides to write his will. He has the following problem. He is married with children but also has a mistress and an illegitimate child by his mistress. In such circumstances he might not want to mention his mistress or her child in his will so as not to hurt his wife and children, but yet will want to provide for his illegitimate child. In this situation he may make what is known as a secret trust. He would leave property in his will to his best friend on the understanding that this friend would hold that property on trust for his mistress and child. As such there would be an arrangement created in secret: a secret trust.

This arrangement would be in contravention of s 9 of the Wills Act 1837, which provides that all the terms of the will must be included in a properly attested document and, more importantly, oral evidence which contradicted the terms of the will (such as holding property on trust for the mistress and child) would not be admissible. As we have already discussed in Chapter 1, the purpose of equity is to introduce fairness in circumstances in which statute might permit unfairness. Therefore, in our example, if the best friend were entitled to refuse to observe the secret trust that would be to allow him to use the Wills Act as an engine of fraud and to deny the mistress her property unconscionably.

The underlying purpose of the doctrine of secret trusts is to prevent statute or common law being used as an instrument of fraud (*McCormick v Grogan* (1869)), for example, in situations in which the beneficiaries under a will only received the property on the understanding that they would hold it for someone else. In *McCormick*, Lord Westbury considered that the basis of the secret trust was as a means of preventing fraudulent reliance on common law or statutory rights. Thus, the legal owner of property may be made subject to a 'personal obligation' (perhaps, 'proprietary obligation' imposed *in personam*) that requires that person to hold the specific property on trust for the person whom the testator had intended to receive equitable title in the property.

Fully secret trusts

Fully secret trusts arise in circumstances where neither the existence nor the terms of the trust are disclosed by the trust instrument. Oral evidence of the agreement between the testator and trustee is generally satisfactory. The settlor must have intended to create such a trust. That intention must have been communicated to the intended trustee. The trustee must have accepted the office and the terms of the trust explicitly or impliedly.

That the trustees or the settlor had caused an unexpected tax charge would not be sufficient in itself.

Judicial review of trustees' actions

There is also a doctrine permitting the judicial review of trustees' decisions. In *Re Beloved Wilkes's Charity* (1851) Lord Truro held that there is a duty of supervision on the part of the court which will consider whether or not the trustees have acted with 'honesty, integrity, and fairness' in the exercise of their powers. If there was insufficient honesty, integrity or fairness then the trustees' decision may be set aside.

Provision of information

This section considers the ways in which beneficiaries are able to exert control over the administration of the trust. Typically, control will be exercised by petition to the court seeking a declaration as to the manner in which the trustees are required to act.

Control of the trustees by the beneficiaries

As has been made clear already, the most complete form of control for absolutely entitled, *sui juris* beneficiaries acting together is that they are able to terminate the trust by directing that the trustees deliver the trust property to them (*Saunders v Vautier* (1841)). What is less clear is the basis on which the trustees can be controlled during the life of the trust, that is, without calling for termination of the trust by delivery of the property to the beneficiaries. It is clear that the trustee cannot decide the terms of the trust (*Re Brook's ST* (1939)). Therefore, the trustee is necessarily bound by the terms of the trust, entitling the beneficiary to petition the court to have the trust administered in accordance with the terms of the trust. In *Re Brockbank* (1948) it was held that where the court is unable to interfere in the selection of trustees, the beneficiaries are similarly unable to act. *Tempest v Lord Camoys* (1882) illustrates the principle that the court will not interfere in the appointment of a new trustee, provided that it is done in accordance with the terms of the trust and not in contravention of public policy.

Control of the trustees by the court

The extent of the court's control of the trustees will depend upon the precise nature of the trust and whether the power given to the trustee is a personal power or a fiduciary power. Trustees are required to consider the exercise of fiduciary powers: they cannot exercise them entirely capriciously (*Re Hay's ST* (1981)). A trustee can act by personal choice where it is a personal power. In this latter circumstance the court will not interfere with the bona fide exercise of the power. Where trustees have a

power of appointment, they are required to consider the exercise of their discretion and the range of the objects of their power (*Re Hay's ST*; *Turner v Turner*). However, the exercise of a discretion was set aside in *Turner v Turner* (1978) where the trustees failed to examine the contents of deeds before signing them.

Where a company has a power to distribute the surplus of an employee pension fund (where that fund is actually held by a trust company) the company has a fiduciary duty to distribute the proceeds of the pension fund (*Mettoy Pension Trustees Ltd v Evans* (1990)). This power is incapable of review by the court unless it is exercised capriciously or outside the scope of the trust. However, in *Mettoy*, because the power was held to be a fiduciary power, it was held that it could not be released or ignored by the fiduciary.

This meant that the company was always trustee of that power, with no beneficial interest in the fund. Therefore, when the company went insolvent, the liquidator could not take possession of the content of the trust fund and use it to pay off ordinary creditors of the company on the basis that the employee-contributors to the fund were not volunteers but rather beneficiaries under a trust.

Trustees must give informed consideration to the exercise of their discretion. The trustees may need to have reference to actuarial principles to come to a particular decision (*Stannard v Fisons* (1992)). The exercise of the decision of the trustees in *Stannard v Fisons* was found by Dillon LJ to be capable of review where such knowledge 'might materially have affected the trustees' decision'. One further argument in this context would be that a beneficiary is entitled to see documents with reference to the trust as part of the trustee's duty to account to the beneficiary of the trust, considered next.

The duty to give accounts and information

An important part of the ability of the beneficiaries to control the trustees is their ability to force the trustees to give accounts to them and also to give information as to the administration of the trust. As will become clear from the decided cases, there is a distinction drawn between cases of necessary confidentiality between trustee and settlor, cases concerning the trustees' exercise of their discretion as to the entitlement of beneficiaries to have interests in specific trust property, and cases concerning information as to the day-to-day management of the trust. The trustees are not, however, required to give all information to all beneficiaries, as will emerge from the following discussion. The various categories of information which might need to be given are considered in the sections to follow.

The extent of the requirement for trustees to give reasons for their decisions

Where trustees fail to explain the reasons for their decision to exercise their discretion in a particular way, the court may set aside that decision or require reasons to be given (*Re Beloved Wilkes Charity* (1851)). In that case, the trustees

take the beneficial interest in that property, then those unallocated beneficial rights will bounce back to the settlor just as a ball on a piece of elastic would. The problem that property law faces is the following one: it is said that property cannot be without an owner. The law of property requires that all rights in property are owned by someone. As such it is impossible (in theory) to abandon property because someone must agree to assume the rights and the obligations of its owner. Therefore, if the settlor fails to identify the intended owner of property, the law requires that someone be its owner. The answer that equity has developed is to hold that the equitable interest in the property passes back to its previous owner on resulting trust.

This principle can be best explained by means of some examples from case law. The case of *Vandervell v IRC* (1967) was considered in Chapter 4. In that case, Mr Vandervell sought to transfer shares that were held on trust for him to the Royal College of Surgeons. His intention was to recover the equitable interest in those shares once a dividend had been paid to the Royal College. This convoluted stratagem enabled Mr Vandervell to make a tax-efficient donation to the College. To recover the shares, Mr Vandervell created an option to buy the shares back from the College. However, what Mr Vandervell did not do was to explain who was to be the owner of the option to repurchase the shares. The option was found to constitute an equitable interest in the shares. Therefore the court was faced with a situation in which there was an equitable interest in existence without an owner. Equity deals with such a situation by holding that the equitable interest returns on resulting trust to its previous owner. On these facts that meant that the equitable interest in the shares returned to Mr Vandervell on resulting trust.

Similarly, if the trust fails for some reason, the equitable interest will return to the settlor on resulting trust. So, in *Re Cochrane's ST* (1955) the entire estates of two spouses were settled on trust for those spouses as beneficiaries provided that they remained married. The wife left her husband; the husband subsequently died. The wife claimed to be entitled to her husband's estate; whereas the husband's other relatives contended that the termination of the marriage ought to constitute a failure of the settlement. The court agreed that the failure of the marriage constituted a failure of the trust. Therefore, all of the property that the husband had contributed to the settlement returned to the husband on resulting trust and was consequently distributed among his relatives in accordance with his will. Similarly, in *Re Ames' Settlement* (1964), where a marriage was declared to have been null and void, it was held that the marriage settlement predicated on that marriage was similarly ineffective. The property settled on trust was held on resulting trust for its settlors.

In these circumstances, the resulting trust operates simply to fill a gap in the title over property. The simplest, common-sense approach to the question, 'Who owns this property?' is to decide 'the property should belong to whoever had it last'. There is one logical problem with this doctrine, however. The problem is with the assertion that the title goes *back* to the settlor. That would require that the property leaves the settlor before going back. In the case, for example, of *Vandervell* it is not at all clear that the property ever left Mr Vandervell. It would

seem that if no new owner of the equitable interest was ever identified then the equitable interest should be treated as having *remained* with Vandervell throughout. Again, this is an example of the logic of trusts law finding difficulties in adapting to novel factual situations, as discussed in Chapter 2.

Purchase price resulting trusts

The second form of resulting trust identified by Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington* (1996) arises in the following situation:

> Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions.

What these *dicta* indicate are the following ideas. Traditionally, there is a presumption that where two people contribute to the purchase of property, that property is intended to be held on trust for those contributors by whoever is the common law owner of the property. So, if Xena buys the freehold over a small workshop for the designer clothes business which she runs together with Yasmin for £800,000 with £400,000 of her own money and with £400,000 belonging to Yasmin, but if Xena had the property registered in her sole name at the Land Registry, then it would be *presumed* that the property is held on resulting trust by Xena as trustee for Xena and Yasmin in equal shares. That presumption can be displaced if some other intention can be proved. So, for example, if it can be proved that Yasmin was only intended to make a loan of money to Xena which Xena was to repay, then the workshop would not be held on resulting trust because Yasmin would not be intended to take any equitable interest in it.

Latterly this presumption has been displaced specifically in relation to disputes as to the equitable ownership of the home between unmarried couples. It was held in *Stack v Dowden* (2007) and in *Jones v Kernott* (2011) that the resulting trust should not arise automatically in cases relating to the home and that instead the presumption should be that the equitable ownership mirrors the legal title (as considered in the next section of this chapter).

Presumptions and resulting trust

There were a number of situations in which presumptions have operated historically in relation to resulting trusts. Those presumptions require some explanation. There will be situations in which it is not possible for the court to have it proved conclusively what two parties' intentions were in relation to property. For example, Xena may purport to transfer a valuable painting to her son Xavier on

As a result of the requirement that the conscience of the holder of the legal interest is affected, 'he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience'. Therefore, the defendant must have knowledge of the factors that are suggested to give rise to the constructive trust.

Let us take a simple, everyday example. Suppose that Xavier is queuing to buy two cinema tickets. The price of those tickets is £7.50 each. He pays with a £20 note. Mistakenly, the person working on the till thinks that Xavier has bought only one ticket – despite giving him the two tickets he asked for – and so gives him £12.50 in change as though only one ticket had been bought with the £20 note. The question would be as to Xavier's obligations in relation to the £12.50 that he had received mistakenly from the till operator. There can be little doubt that in good conscience Xavier ought to have informed the till operator of her mistake and returned part of the change to her.

The important question for the law relating to constructive trusts is the time at which Xavier realises that he has been given £7.50 more than he is entitled to receive. If he realises at the moment when the till operator hands him the £12.50 that she has made a mistake and he runs to his friend laughing at their good luck, then he would be a constructive trustee of that excess £7.50 for the cinema as beneficiary from the moment of its receipt. If he absent-mindedly received and pocketed the £12.50 (thus taking it into his possession) without realising the error and did not *ever* subsequently realise that he had £7.50 more than he should have had, then Xavier would never be a constructive trustee. If Xavier absent-mindedly pocketed the £7.50 without realising the mistake but was called back by the till operator once she realised the error, then from the moment he was informed by that employee he would be a constructive trustee of the excess change – but not before. That is the importance of the statement in *Westdeutsche Landesbank* that there cannot be liability as a constructive trustee until the defendant has *knowledge* of the facts said to affect his conscience.

The *Westdeutsche Landesbank* case concerns a contract under which a bank paid £2.5 million to a local authority. The local authority spent the money, as it was prima facie entitled to do under the contract. Only after the money had been spent did the parties realise that the contract had been void from its very beginnings because it was not lawful for the local authority to have entered into it under the applicable legislation. The bank argued that the local authority ought to have held the money on constructive trust for the bank in good conscience because the money had been paid mistakenly. The House of Lords was unanimous (on this point at least) in holding that none of the amounts paid to the local authority by the bank were to be treated as having been held on constructive trust because at the time when the authority had dissipated the money the authority had had no knowledge that the contract was void. In consequence the authority had no knowledge of any factor that required it to hold the property as constructive trustee for the bank.

A further example cited by Lord Browne-Wilkinson in the *Westdeutsche* appeal was that of *Chase Manhattan v Israel-British Bank* (1980), in which a decision of

Goudling J to impose a constructive trust was reinterpreted by his Lordship. In the *Chase Manhattan* case a payment was made by Chase to IB Bank and then that same payment was mistakenly made a second time. After receiving the second, mistaken payment, IB Bank went into bankruptcy. The question arose whether Chase was entitled to have that second payment held on constructive trust for it (thus making Chase a secured creditor) or whether Chase was merely an unsecured creditor owed a mere debt. Lord Browne-Wilkinson explained that this was an axiomatic constructive trust: where it could be shown that IB Bank had had knowledge of the mistake before its own insolvency then IB Bank would be bound in good conscience to hold that payment on constructive trust for Chase from the moment it had realised the mistake, not from the moment of receipt of the second payment. In this way we can see that the constructive trust is capable of arising in a range of general situations that are to do with the conscience of an individual defendant and not with any more refined principle. The remainder of this chapter will consider particular situations in which constructive trusts have arisen – although it is suggested that the following micro-categories are necessarily to be read in the light of the foregoing general principles.

Unconscionable dealings with land

Constructive trusts may arise in relation to land in three principal ways, all of which illustrate one function of constructive trusts highlighted earlier as a means of supporting voluntary agreements. First, by means of a common intention constructive trust where the parties either form some agreement by means of express discussions or demonstrate a common intention by their conduct in contributing jointly to the purchase price or mortgage over a property. This is an example of a constructive trust being applied in pursuance of a voluntary agreement: that is, the common intention formed as to the equitable interest in co-owned property.

Secondly, by entering into a contract for the transfer of rights in land there is an automatic transfer of the equitable interest in that land as soon as there is a binding contract in effect (*Lysaght v Edwards* (1876)). Again, the contract constitutes a voluntary agreement enforced by means of constructive trust.

Thirdly, by entering into negotiations for a joint venture to exploit land and subsequently seeking to exploit that land alone when those negotiations had precluded the claimant from exploiting any interest in that land. So in *Banner Homes Group plc v Luff Development Ltd* (2000), two commercial parties entered into what was described as a 'joint venture' to exploit the development prospects of land in Berkshire. It was held that no binding contract had been formed between the parties when the defendant sought to exploit the site alone without the involvement of the claimant. Extensive negotiations were conducted between the claimant and the defendant and their respective lawyers with reference to documentation to create a joint venture partnership or company. The defendant continued the negotiations while privately nursing reservations about going into business with the

hard and gruelling. While there was no specific discussion about the rights which the younger man could expect to receive in the farm when the older man died, it was found that the younger man had formed a reasonable expectation that the farm would be left to him in the older man's will, and that the fact that documents relating to the farm were left on a table so that the younger man would see them was considered in itself to be a confirmation of this situation. It was held that this was sufficient to constitute a representation between the two men. Remarkably this means that a representation or assurance can be made without any words being spoken between the people involved, provided that the representor is aware of the expectation which is being formed in the mind of the claimant.

This does not mean that representations will be found to exist in all circumstances. A good example is *Lissimore v Downing* (2003), in which a wealthy heavy metal musician who lived in a large stately home in the English Midlands met a married woman in a pub and began a casual sexual relationship with her. She claimed that on one evening, when he had taken her to the edge of his estate and, looking back over his land, had asked her something to the effect of 'How would you like to be lady of a manor like this?' that he had effectively made her a representation that she would acquire rights in the property. Their relationship had been entirely casual and had not involved many meetings. Mann J held (after a lot of consideration) that this did not constitute a meaningful representation and consequently that she should not be entitled to claim proprietary rights in his property.

Examples of the test for proprietary estoppel in operation

A typical situation in which proprietary estoppel claims arise is where promises are made by the absolute owner of land to another person that the other person will acquire an interest in the land if they perform acts that would otherwise be detrimental to them (for example, *Gillett v Holt* (2000)). Typically, then, the person making the promise dies without transferring any right in the property to that other person. For example, in *Re Basham* the plaintiff was 15 years old when her mother married the deceased. Over a number of years she worked unpaid in the deceased's business, cared for the deceased through his illness, sorted out a boundary dispute for the deceased, and refrained from moving away when her husband was offered employment with tied accommodation elsewhere.

All of these acts were performed on the understanding that she would acquire an interest in property on the deceased's death. The deceased died intestate. It was held that the plaintiff had acquired an equitable interest in the home on proprietary estoppel principles. It was found that proprietary estoppel arises where, in the words of Judge Nugee QC:

> A has acted to his detriment on the faith of a belief which was known to and encouraged by B, that he either has or will receive a right over B's property, B cannot insist on strict legal rights so as to conflict with A's belief.

This can be contrasted with *Layton v Martin* (1986), in which a man had promised to provide for his mistress in his will. He died without leaving any of the promised bequests in his will and therefore the mistress sued his estate claiming rights on constructive trust. Her claim was rejected on the basis that she had not contributed in any way to the maintenance of his assets. At one level it is a decision based on the absence of detriment. This can be compared with the decision in *Re Basham* in which the claimant was found to have made sufficient contributions to the defendant's assets. Similarly, where a wife contributes to her husband's business activities generally it may be found that she has suffered detriment that will ground a right in property (*Heseltine v Heseltine* (1971)), particularly if this evidences a common intention at some level which may be undocumented (*Re Densham* (1975)). Other relatives will be entitled to rely on their contributions to the acquisition or maintenance of property where there have been assurances made to them that they would be able to occupy that property as their home (*Re Sharpe* (1980)). In such situations it is essential that the expenditure is made in reliance on a representation that it will accrue the contributor some right in the property and cannot simply be general expenditure without any focus on acquiring rights in property.

Another classic example of proprietary estoppel arose in the decision of Lord Denning in *Greasley v Cooke* (1980). There, a woman, Doris Cooke, had been led to believe that she could occupy property for the rest of her life. She had been the family's maid, but then had formed an emotional relationship with one of the family and become his partner. In reliance on this understanding she looked after the Greasley family, acting as a housekeeper, instead of getting herself a job and providing for her own future. The issue arose whether or not she had acquired any equitable interest in the property.

It was held by Lord Denning that she had suffered detriment in looking after the family and not getting a job in reliance on the representation made to her. Therefore, it was held that she had acquired a beneficial interest in the property under proprietary estoppel principles because she had acted to her detriment in continuing to work for the Greasleys in reliance on their assurance to her that she would acquire some proprietary rights as a result. The form of rights that Lord Denning granted was an irrevocable licence to occupy the property for the rest of her life. (What is particularly satisfying about this case is that, had Charles Dickens sought to incorporate these events into a novel such as *Nicholas Nickleby*, he could have found no better name for the exploitative family than 'the Greasleys'.) That such a particular remedy was awarded brings us to the more general question: what form of remedy can be awarded under proprietary estoppel principles?

Proprietary estoppel – a breadth of remedies

What is most significant is that the court will have complete freedom to frame its remedy once it has found that an estoppel is both available and appropriate (*Lord*

judgments have led only to confusion, or the lower courts have either focused unexpectedly on one minor detail in those judgments or they have chosen to follow the principles set out in other decisions in other lower courts.

There is no reason to suppose that *Jones v Kernott* will make the law any clearer, not least because the Supreme Court has allowed those lower courts to do what they consider to be 'fair' in certain circumstances or to 'infer objectively' a common intention from the parties' conduct: both of these principles are inadequately explained in the judgments and in any event leave the lower courts with an enormous amount of leeway in reaching their own decisions. The result will be the emergence in the years to come of a number of contrary trends in the case law applying these principles.

Consequently, the approach taken in this chapter is as follows. First, to explain the principles which emerge from *Jones v Kernott* (as it re-interprets *Stack v Dowden*) and, second, to examine the different approaches taken in the previous decisions because they will continue to be important in future cases.

(The issues raised in this area are among the most fascinating in equity. Those issues are also easy to understand because they arise out of ordinary domestic circumstances, without any of the complexities of other areas of trusts law. Because there are so many contradictory currents in the case law it would be easy to think of it as a confusing mess; but you should not be downhearted. The secret to understanding this area of the law is to recognise that the different judges simply have different opinions about the way in which people should be allowed to acquire rights in their homes. If you simply think of the judgments as being different views (e.g. some people want to focus only on who paid for the property, others think that raising children is in itself enough to raise a right in the home, and so forth) then those differences of opinion are not only easier to understand but they are also to be expected among any group of thoughtful people.)

Express trusts of homes

When attempting to decide which of a number of co-owners is to acquire equitable rights in the home, the most straightforward factual situation is where there has been an express declaration of trust allocating the whole of the equitable interest in the land at issue. Such a trust may arise under the terms of the conveyance of the property to the co-owners, or as a result of an express declaration of trust between the parties, or in a situation in which the property is provided for the co-owners under a pre-existing settlement.

In short, there is no need to consider any surrounding circumstances in the context in which the equitable interest in the property has been allocated between the parties on express trust. It should be remembered that, in order for there to be a valid declaration of trust over land, the declaration must comply with s 53(1)(b) of the Law of Property Act 1925:

> . . . a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.

Failure to comply with that formality requirement will lead to a failure to create a valid express trust over land. It should also be remembered that under s 53(2) there is no formality requirement in relation to constructive, resulting or implied trusts. The following sections will consider the creation of constructive and resulting trusts, which is when the issues become more interesting.

The principles in *Jones v Kernott* and *Stack v Dowden*

The joint judgment delivered by Lady Hale and Lord Walker in the Supreme Court in *Jones v Kernott* (2011) contained a summary of the principles they wished to establish in this area. Both of those judges also gave judgment in agreement in *Stack v Dowden* (2007), a case which singularly failed to take a stranglehold on this area. It must be assumed that this summary (and the very similar summary set out by Lord Kerr) will come to establish the leading principles in this area for the immediate future. We will only know for sure when future cases are decided by the county courts, the High Court and the Court of Appeal. They do nevertheless contain a lot of flexibility within them. Their judgments in *Jones v Kernott* are not, however, exactly the same as the principles in *Stack v Dowden*; in particular in relation to their acceptance in *Jones v Kernott* that 'fairness' can be a ground for allocating rights in the home, which was excluded by Lady Hale in *Stack v Dowden*.

Those principles are as follows.

(1) If there is a clear express trust or provision to that effect of the parties' rights in the conveyance of the property, then that will be decisive of the matter. If there is no such clear trust, then the court must follow through the other principles.

(2) Distinguish between cases in which there is only one person entered on the legal title in the home on the Land Register, and cases in which both parties are entered in the legal title. Different presumptions apply in each case. (A presumption in equity is an assumption which the court makes as to the legal position in the absence of decisive evidence in favour of either party.) A presumption can be rebutted by clear evidence that the parties intended something other than the result suggested by the presumption.

(3) (a) Where there is only one person entered on the legal title, then the presumption is that it is that person who is intended to take the entire equitable interest in the home.

(b) Where both parties are entered on the legal title, then the presumption is that the equitable interest is taken by them jointly.

that the couple had intended to muck in together and thereby share everything equally.

The second question was whether or not there is any imputed intention that should be applied to the parties. It was found that, while he contributed personally to the business which she had set up in Valencia, this did not justify any reallocation of any proprietary rights without more. His cash investment had not, it was found, been made with an intention to acquire any further property rights in that Spanish property. With reference to the household chattels it was held that 'the parties must expect the courts to adopt a robust allegiance to the maxim "equality is equity" '. Therefore, everything was divided down the middle.

The confusion which remains at the doctrinal level in these cases is well illustrated by the decision of the Court of Appeal in *Midland Bank v Cooke*. In 1971 a husband and wife purchased a house for £8,500. The house was registered in the husband's sole name. The purchase was funded as follows.

£6,450	(by way of mortgage loan)
£1,100	(wedding gift from H's parents to the couple)
£950	(H's cash contribution)
£8,500	(total purchase price)

In 1978 the mortgage was replaced by a more general mortgage in favour of H, which secured the repayment of his company's business overdraft. In 1979 W signed a consent form to subordinate any interest she may have to the bank's mortgage. Subsequently, the bank sought forfeiture of the mortgage and possession of the house in default of payment. W claimed undue influence (pre-*Barclays Bank v O'Brien* (1993)) and an equitable interest in the house to override the bank's claim.

The Court of Appeal, in the sole judgment of Waite LJ, went back to *Gissing* without considering the detail of *Rosset* (although accepting that the test in *Rosset* was ordinarily the test to be applied). Waite LJ had trouble with the different approaches adopted in *Springette* and *McHardy*. The former calculated the interests of the parties on a strictly mathematical, resulting trust basis. The latter looked to the intentions of all the parties as to whether or not the deposit should be considered to be a proportionate part of the total purchase price or as establishing a half share in the equity in the property. He claimed to find the difference in approach 'mystifying'.

Waite LJ returned to the speech of Lord Diplock in *Gissing* and to the decision of Browne-Wilkinson VC in *Grant v Edwards*, before holding the following:

> [T]he duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity'.

On these facts, the matter could not be decided simply by reference to the cash contributions of the parties. The court accepted that the parties constituted a clear example of a situation in which a couple 'had agreed to share everything equally'. Facts indicating this shared attitude to all aspects of their relationship included evidence of the fact that Mrs Cooke had brought up the children, worked part-time and full-time to pay household bills, and had become a co-signatory to the second mortgage.

What is not clear is how this decision is to be reconciled with the findings in *Burns v Burns* and *Nixon v Nixon* that activities revolving only around domestic chores could not constitute the acquisition of rights in property. Further, it is not obvious how the decision can be reconciled with the *dicta* of Lord Bridge in *Rosset* that a common intention formed on the basis of conduct must be directed at the mortgage payments and that it 'is difficult to see how anything less will do'. Returning to *Gissing*, as Lord Pearson held: 'I think that the decision of cases of this kind have been made more difficult by excessive application of the maxim "equality is equity".' Therefore, Waite LJ's approach in *Hammond* and in *Cooke* is fundamentally different from that.

Proprietary estoppel

Introduction

The doctrine of proprietary estoppel was considered in detail in Chapter 8. This discussion is necessarily much shorter and is focused specifically on the acquisition of rights in the home. Proprietary estoppel is a two-step process: first, the claimant must demonstrate that the estoppel arises, then there is a second question as to the appropriate remedy. Each element is taken in turn.

The basis of proprietary estoppel

Proprietary estoppel will arise in circumstances in which a representation or assurance is made to the claimant, such that the claimant relies on that representation to her detriment (*Re Basham* (1986)). A representation can be made in a single moment or it can be in the nature of an impression which the defendant allows the claimant to form over time. So, in *Thorner v Major* (2009) it was held that there could be a representation in circumstances in which two taciturn farmers from Somerset hardly spoke a word to one another but in which the claimant had been allowed to form the impression that the other farmer would leave the farm to him by will. Importantly then, it is possible to make a representation without even speaking. Which is unusual. It had been held in *Gillett v Holt* (2000) that a

time. Therefore, some commentators have doubted whether or not this form of liability should really be described as a 'constructive trust' in any event because no property is held on trust by the stranger. However, the term 'constructive trusteeship' is correct because the defendant is being *construed* to be liable to compensate the trust for its loss as though she was a trustee.

The nature of dishonest assistance

The leading case for the test of dishonest assistance is *Royal Brunei Airlines v Tan* (1995). In that case, the appellant airline contracted an agency agreement with a travel agency, BLT. Under that agreement BLT was to sell tickets for the appellant. BLT held money received for the sale of these tickets on express trust for the appellant in a current bank account. The current account was used to defray some of BLT's expenses, such as salaries, and to reduce its overdraft. BLT was required to account to the appellant for these monies within 30 days. The respondent, Tan, was the managing director and principal shareholder of BLT. From time to time amounts were paid out of the current account into deposit accounts controlled by Tan.

BLT held the proceeds of the sale of tickets as trustee for the appellant. In time, BLT went into insolvency. Therefore, the appellant sought to proceed against Tan for assisting in a breach of trust. The issue between the parties was whether 'the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee'. It was held that Tan would be liable because he had acted dishonestly in assisting the breach of trust.

In describing the nature of the test Lord Nicholls held the following:

> . . . acting dishonestly, or with a lack of probity, which is synonymous means simply not acting as an honest person would in the circumstance. This is an objective standard.

This *Tan* test is therefore based on an objective understanding of 'dishonesty', whereas knowing receipt, in the judgment of Scott LJ in *Polly Peck* (1992), sets out a subjective test of whether or not the recipient ought to have been suspicious and thereby have constructive notice of the breach of trust. One can therefore be dishonest if one *fails to act honestly*: significantly, you do not have to be actively deceitful. Therefore, if I were to find a £10 note on the floor of a train carriage next to the foot of another passenger when there is only one other passenger, an honest person would ask that other passenger if the note was theirs. If I were to pocket the note, Lord Nicholls would find me dishonest for failing to do what an honest person would have done. He would not ask whether I *actually knew* the note belonged to that other person, and so forth.

Nevertheless, as considered below, Lord Nicholls's judgment has been adapted and re-moulded by later cases. We shall begin our discussion with an analysis of the misjudged foray by Lord Hutton in the House of Lords into turning the test

into a partially subjective test, its reversal by the Privy Council, and then the remodelling of the objective test by the lower courts more recently.

Whether dishonesty is subjective or objective in this context

There have been two subsequent House of Lords decisions on the meaning of 'dishonesty' in this context since *Royal Brunei Airlines v Tan*. In the first, *Twinsectra v Yardley* (2002), a solicitor was appointed to manage a client's affairs in place of the former solicitor. The client had borrowed money by way of a loan. The terms of the loan had limited the purposes for which the loan monies could be used. The replacement solicitor was nevertheless directed by the client to use the loan monies for purposes other than those set out in the loan contract, in breach of the solicitor's own obligations under that agreement. The money was dissipated. The lender sued the replacement solicitor to recover the dissipated loan monies, contending that the solicitor had been a dishonest assistant in the client's breach of his fiduciary obligations (in the form of a *Quistclose* trust, as discussed in Chapter 10). The solicitor contended that he had not known of the nature of his client's duties to the lender and in consequence that he had not acted dishonestly.

The House of Lords was therefore faced with a dilemma. If the test for dishonesty were objective, as Lord Nicholls had suggested in *Royal Brunei Airlines v Tan* (1995), then it would not matter that the solicitor had not known that he was acting dishonestly because his liability would be assessed objectively. Lord Hutton in *Twinsectra v Yardley* therefore held that the test for dishonesty should be made up of two components: first, it must be shown that an honest person would not have acted as the solicitor had acted and, second, it must also be shown that the solicitor had himself known that his action would have been considered to be dishonest by such an honest person. This second limb is subjective. Consequently, the solicitor was found not to be liable for dishonest assistance. (It was unclear whether or not the majority agreed with Lord Hutton's view of this test.)

This conclusion seems to me to be somewhat remarkable. It is remarkable in the first place that a solicitor should be entitled to demonstrate his lack of dishonesty by contending that he did not understand the nature of his own client's legal obligations. Second, it is a remarkable conclusion because it transforms the nature of liability for dishonesty in this context into a semi-subjective test. In *Walker v Stones* (2001) it had been held by the Court of Appeal that a person would not be absolved from liability for dishonesty simply by suggesting that he or she did not consider his or her actions to have been dishonest. Instead, it was enough for the court to impose such liability if it could be shown objectively that an honest person would not have acted in the manner that the defendant had acted. This notion of subjective and objective liability is taken up again in Chapter 14. In short, it is argued there that a doctrine predicated on conscience (such as the law of trusts) ought to operate on an objective basis, in the manner envisaged as long ago as 1615 by Lord Ellesmere in the *Earl of Oxford's Case*, to inquire into