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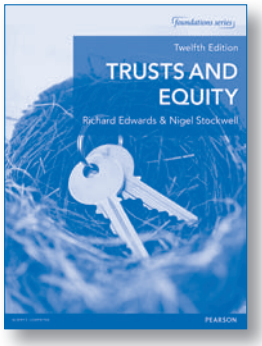

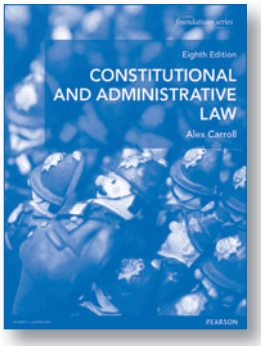

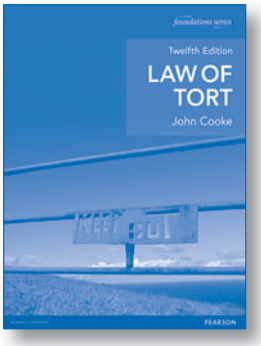

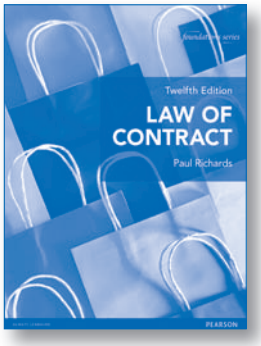

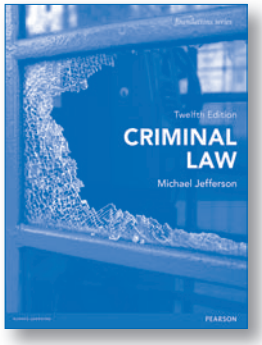

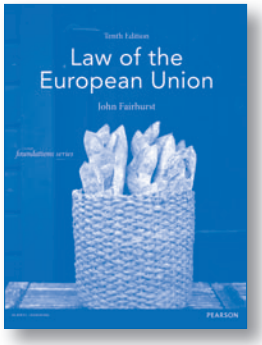

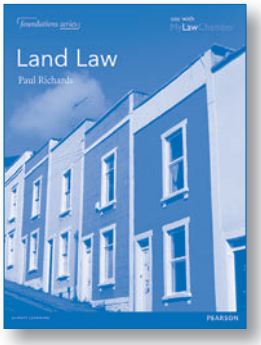

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Twelfth Edition

Trusts and Equity

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Preface

Many students come to the subject of trusts and equity with a lack of enthusiasm, having little idea of what it covers, but believing it to be complex and difficult. As a result it is (at least to us) an unpalatable fact that many students do find the subject less than easy to get to grips with, especially during their first few weeks of study.

We had these issues in mind when we wrote the first edition of *Trusts and Equity* in 1992. One of our aims then was to try to demystify the law of trusts and equity without any undue oversimplification. Over the intervening years the law has become very much more complex and the trust is being used in an ever-increasing variety of situations. We see no reasons why that initial aim is any less important now than it was in 1992.

One of the reasons why students may find the subject 'challenging' is because they say that they find the subject mundane and remote from their lives. In fact trusts and equity is a branch of the law which, although having ancient origins, has the flexibility to lend itself to providing solutions to many problems of the twenty-first century, impacting on the lives of many, if not all, of us. A short perusal of some of the cases can show that the facts involved often entail common situations in personal, domestic and commercial life with which it is not difficult to identify. The challenge for teachers is to communicate this to their students and to fire their enthusiasm. The challenge for students is to see the subject as dynamic and relevant.

We have made some structural alterations which we hope will aid this process. We have expanded our statements of aims and objectives for each chapter and linked these to the main text, in order to make it easier to identify particular topics within each chapter. We have adopted a policy for new cases of including the neutral citation, as well a citation to one of the leading reports, as we feel this more accurately reflects the modern student experience where cases are as likely to be read online as in hard copy. We have also created a new chapter dealing with unlawful trusts which places emphasis on the problems associated with the time that a trust can last.

Once again for this new edition we have included a number of new cases and statutes as well as updating the sections on taxation. Some chapters have undergone a more radical overhaul than others.

Statutory changes, both recent and prospective, include the Trusts (Capital and Income) Act 2013 (in force 1 October 2013) which affects the apportionment of capital and income in trusts, and the Inheritance and Trustees' Powers Act 2014 which, amongst other things, made changes to the statutory powers of advancement and maintenance and came into force in October 2014. We also make reference to the Marriage (Same Sex Couples) Act 2013, redefining marriage to include marriages between same sex partners. Possible future legislation referred to includes a cohabitation bill, currently being debated, which if implemented would give cohabitees the same rights as married couples on divorce, and the EU Anti-Money Laundering Directive which may require trusts to be publicly registered.

Recent case law we have referred to includes ***Futter* v *HMRC, Pitt* v *HMRC*** [2013] UKSC 26, [2013] 3 All ER 429 which re-states the rule in ***Re Hastings-Bass*** and also deals with when trustees' decisions can be overturned on the ground of mistake; ***Keene and Phillips* v *Wellcom London Ltd and others*** [2014] EWHC 134 (Ch), [2014] All ER (D) 241 (Jan) concerning the winding up of unincorporated associations; ***FHR European Ventures LLP* v *Cedar Capital Partners*** LLC [2014] UKSC 45, on the application of proprietary remedies to improper profits by fiduciaries; ***Central Bank of Nigeria* v *Williams*** [2014] UKSC 10, [2014] All ER (D) 172, ***Novoship (UK) Ltd* v *Mikhaylyuk*** [2014] EWCA Civ 908 on the use of the duty to account for profits imposed on intermeddling strangers; and ***Coventry (t/a RDC Promotions)* v *Lawrence*** [2014] UKSC 13, [2014] 2 All ER 622 on the relationship between injunctions and damages in lieu; and ***O'Kelly* v *Davies*** [2014] EWCA Civ 1606 where it was held that there is no distinction between a resulting and a constructive trust that is sufficient to make a resulting trust enforceable in the face of an illegal purpose and a constructive trust unenforceable.

We still hope that the text will be used in two ways: first, as a reference to dip into for help with particular aspects of the law and, secondly, to obtain an understanding and appreciation of a particular area of the law. To this end we have included the details of the facts and decisions of the most important and/or the most recent cases and extracts from relevant statutes. Again, because we hope that *Trusts and Equity* will be used as a reference, we have occasionally included key extracts from cases or statutes more than once. This is deliberate and is aimed at reducing the need to refer readers back and forth for information.

We could not end this Preface without again thanking Anne, M and m for their continued understanding and support, and H, B and m for sometimes providing a much needed excuse to take a break from writing.

RE and NBS
November 2014

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1

Growth of equity and the evolution of the trust

Objectives

After reading this chapter you should:

1. Understand and appreciate the main stages in the growth of equity and the evolution of the law of equity, a body of rules created by the Court of Chancery, initially presided over by the Lord Chancellor, and understand that the origins of equity and of the trust lay in overcoming shortcomings of the common law.
2. Understand and appreciate that the initial flexibility of equity resulted in uncertainty and unpredictability and that this led, in the late seventeenth and eighteenth centuries, to a body of precedent used in deciding cases, while preserving the discretionary nature of equity.
3. Be aware of how the conflicts between equity and the common law were addressed.
4. Be aware of the way in which the trust concept evolved.
5. Be able to describe the trust concept and identify the key elements of a trust, particularly of an express private trust.
6. Understand the nature of a beneficial interest.
7. Be aware of the concept of the *bona fide* purchaser principle and its reduced importance following the 1925 property legislation.
8. Be able to identify the main types of trusts both private and public.
9. Be aware of the distinction between a trust and other concepts.
10. Understand that tax avoidance or reduction is a reason for the creation of many trusts (or the form that the trust takes) and appreciate that the main taxes that are relevant are income tax, capital gains tax and inheritance tax.

The title of this text is *Trusts and Equity*. It deals with the most important principles and doctrines of equity and the main equitable concepts. It covers the trust at length. Maitland, in his *Selected Historical Essays*, said: 'If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.' As Maitland points out, the 'greatest and most distinctive

achievement' of English law is not merely the 'invention' of the trust but also the fact that the concept has been developed and refined over time to meet new demands and to provide solutions to new problems. It is this ability to adapt to new needs and circumstances which has led to the trust being so widely and inventively used. The trust was created and developed by equity, and in order to appreciate the modern law of trusts it is necessary to outline the evolution of equity and the manner in which the trust concept has grown.

As Maitland indicates, the trust is the invention of English law and, while it is a feature of other systems of law based on the common law, it is not normally found in civil law systems.

Although this text concentrates on the trust, it must not be thought that this is all that equity is, or has been, concerned with. Its field is very wide, and equitable jurisdiction includes certain probate business, patents, trademarks, copyright, the appointment of guardians for minors, partnership matters, companies and mortgages.

See Chapter 19 (p. 545) for a discussion of equitable remedies.

Equity has also developed a number of 'equitable' remedies, such as **specific performance**, the **injunction** and the remedy of account. Remedies will be discussed later.

Many of the concepts developed by equity are now, at least partially, covered by statutes which usually draw on the principles and rules developed by equity and also introduce additional material. One example where statutory intervention has taken place is in the area of trusts, where, in particular, the Trustee Act 1925 and the Trustee Act 2000 now contain a good deal of the relevant law.

Development of equity

Origins

Objective 1

The word 'equity' has a wide range of meanings and to many people it is a synonym for 'fairness' or 'justice'. To a lawyer, however, equity has a very special and narrow meaning: that body of rules originally developed and applied by the Court of Chancery. This court was presided over by the Chancellor and the rules were developed under his authority.

The origins of equity lie in deficiencies in the common law. The common law had gaps where a remedy was not available or where a remedy was available but was not appropriate to the particular loss of a plaintiff. The Chancellor was responsible, among other things, for the issue of writs and all actions had to be commenced by the issue of a royal writ. If there was no writ appropriate to a claim, there could be no action and thus no remedy. To some extent the severity of this was tempered by the Chancellor's willingness to develop new writs, but this came to an end when the Provisions of Oxford 1258 stopped the issue of writs to cover new forms of action without the consent of the King in Council.

Another problem of the common law lay where a plaintiff may have had a common law remedy but he was prevented from enforcing it because of the power or influence of the other party to the case. Or a plaintiff might be the victim of the corruption of the jury which heard his case.

Additionally, the common law was preoccupied with formality. For example, if two parties tried to enter into a verbal contract which was required, at common law, to be in writing the result would be that the common law would not recognise the contract nor grant any remedies on it. This was the case whatever the situation, whatever the merits of the case and irrespective of how the parties had behaved. In some of these situations equity would step in and provide a remedy despite the lack of formality.

The original role of equity was often as a 'gloss on the common law'. Equity might well provide a remedy where the common law provided none or provide a more suitable

remedy than the common law. Equity might also intervene to ensure that the available common law remedy was actually enforceable. In other words, equity worked alongside the common law and provided different solutions to problems.

It was considered that a residuum of justice resided in the King, and petitions were directed at tapping into this as a last resort if the common law had not provided justice. If a subject believed that the common law would not provide an appropriate solution to his case, he could petition the King and the Council asking that justice be done and that a remedy should be ordered. These petitions were referred to the Chancellor and eventually the Chancellor was petitioned directly. Cases brought before the Chancellor were called 'suits'. The Chancellor was making decrees by the end of the fifteenth century. The Chancellor was a very important figure, perhaps second only to the King, not least because he was responsible for issuing the royal writs. The Chancellor was, in effect, at the head of the common law and what he did was to ensure that the common law worked in an acceptable way. Initially, he was not creating a separate system but was dealing with the faults of the common law.

It was not until the end of the fourteenth century that it could be said that a Court of Chancery, in any real sense, came into being. Up until that time the Chancellor simply responded to petitions by issuing a decree without the procedures usually associated with a court hearing. It was only very gradually that equity developed and came to be regarded as a separate and, in some ways, a rival system of law.

Originally, Chancellors, though generally well versed in the law, particularly the canon law, were ecclesiastics rather than lawyers. They were sometimes referred to as the keepers of the King's conscience. Early decisions tended to be idiosyncratic and to be based on the ideas, beliefs and conscience of each particular Chancellor. John Seldon the seventeenth-century jurist illustrated this by saying it was as if equity varied with the length of the Chancellor's foot. In other words, the decision in any particular case would be relatively unpredictable and uncertain. This may be an acceptable approach in single isolated cases, but the uncertainty meant that the rights of individuals were impossible to assess without the trouble and expense of going to court.

Introduction of rigidity

Objective 2

The appointment of Lord Nottingham as Chancellor in 1675 marked the start of the systemisation of equity. He was responsible for setting down the principles upon which equity operated, thus moving away from the era of idiosyncratic, unpredictable decisions. He also laid out the boundaries within which equity functioned. Lord Nottingham was also instrumental in developing the law of trusts. The next important Chancellor was possibly Lord Hardwicke, who was first appointed in 1737. Lord Hardwicke further developed the principles of equity, and many of his decisions demonstrated the fine balance that had to be held between certainty and the flexibility needed to allow both 'justice' in a particular case and also the evolution of the law. Lord Hardwicke often emphasised the function of equity to provide a remedy in the case of unconscientious conduct.

The last great Chancellor involved in the development of equity into a modern system of law was Lord Eldon, who was first appointed in 1801. Lord Eldon was twice Chancellor, for a total of almost a quarter of a century. He stressed that decisions must be based on precedent (perhaps applied in a flexible and creative manner) and he consolidated the principles previously developed. Since the Chancellorship of Lord Eldon the principles and scope of equity have gradually evolved, adapting to new and changing situations.

Lord Nottingham has been described as the father of equity, while Lord Hardwicke was responsible for laying down the general principles upon which equity operated.

Lord Eldon was the consolidator, who worked on the application of the rules and principles of equity which he inherited from Lord Nottingham and Lord Hardwicke.

Gradually, decisions began to be based on precedent. This development took place at the same time as lawyers began to be appointed as Chancellors. Eventually a body of law evolved which was a more predictable, precedent-based system. This move started at the end of the seventeenth century and coincided with the refinement of the reporting of cases heard in the Chancery courts.

Trusts, which began to be developed to address family/domestic matters, gradually began to be used in a commercial/business context and here certainty and effective law reporting were particularly important.

Conflicts between equity and the common law

Objective 3

The general approach of equity was to follow the common law unless there was a sound reason to do otherwise. So, equity recognised and protected those estates in land and those interests in land that were recognised and protected by the common law. In fact, as well as recognising the common law estates, equity recognised other estates too.

But in a legal system where two bodies of law existed, there were bound to be occasions when there was a conflict. If conflicts arose between equity and the common law, equity would use the common injunction, which had the effect of preventing the common law action from proceeding or preventing the common law judgment from being enforced. This was clearly not acceptable to the common lawyers and for many years there was very active conflict. This was not resolved until the reign of James I when it was decided that equity should prevail.

The Supreme Court of Judicature Act 1873 s 25(11) provided that in cases of conflict between the rules of equity and the rules of the common law, equity shall prevail (now the Senior Court Act 1981 s 49).

Nature of the Chancellors' interventions

There are a number of very important underlying principles which relate to the ways in which equity intervened.

Equity acts *in personam*

The main remedy available at common law is damages. Equity, however, acted against the person and ordered him to do something. For example, a decree of specific performance ordered a party to a contract to fulfil his promises. An injunction ordered that something was not done or, sometimes, that something was done. Other equitable remedies are **rescission**, **rectification** and account. If the order of the court is not obeyed, then imprisonment may follow.

See Chapter 19 (p. 545) for a discussion of equitable remedies.

Equitable remedies are discretionary

A common law remedy can be claimed as of right. For example, if a breach of contract is proved, the victim can demand an award of damages. However, the award of an equitable remedy is at the discretion of the court. The victim of a **breach of contract** to transfer property can only ask the court to exercise its discretion and award a decree of specific performance ordering the transfer of the property. There are now clear principles governing the exercise of the discretion and these will be discussed in detail later.

See Chapter 19.

The *bona fide* purchaser

Whereas a legal right may be said to be enforceable against anyone in the world, an equitable right is enforceable against anyone except a *bona fide* purchaser of the legal estate for value and without notice of the prior equitable rights. (This principle is of less importance following the introduction of registration of rights over land but is nevertheless a basic principle of equity.)

Judicature Acts 1873–75

It is clear that although equity started life as mere supplement to the common law it developed into a separate system. Equity was administered by the Courts of Chancery, which were separate from the common law courts. This caused many problems. For example, it was often necessary to use both the common law courts and the court of equity in the same dispute. There were some improvements but it was not until the Supreme Court of Judicature Acts 1873–75 that the position changed significantly. This legislation provided for the creation of one single Supreme Court to replace the separate courts that existed previously. The Courts of Exchequer, Queen's Bench, Chancery, Common Pleas, Probate, Admiralty and the Divorce Court were abolished. In their place was one court, divided, for convenience only, into three Divisions of the High Court (Queen's Bench, Chancery and the Probate, Divorce and Admiralty Divisions, the latter being renamed the Family Division in 1970). In practice, matters are allocated to the most appropriate Division but in fact any Division can adjudicate on any matter and both common law and equitable remedies can be awarded in any Division. As mentioned above, it was specifically provided that, if there was a conflict between the rules of the common law and the rules of equity, equity shall prevail (Supreme Court of Judicature Act 1873 s 25(11); now the Senior Courts Act 1981 s 49).

There is no doubt that this legislation merged the administration of the two systems of law. There is, however, some debate as to whether the two systems of law themselves have been fused into one. Ashburner, in *Principles of Equity*, expressed his view by saying that 'the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters'. There have been judicial and academic statements to the effect that there is a fused system of law. For example, in ***United Scientific Holdings Ltd* v *Burnley Borough Council*** [1977] 2 WLR 806, Lord Diplock said:

> The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873, the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by Courts of Admiralty, Probate and Matrimonial Causes) were fused.

The prevailing view appears to be that, although the two systems operate closely together, they are not fused. In ***MCC Proceeds Inc* v *Lehman Brothers International (Europe)*** [1998] 4 All ER 675, Mummery LJ said that the substantive rule of law was not changed by the Judicature Acts. These were intended to achieve procedural improvements in the administration of the law and equity in all courts, not to transform equitable interests into legal titles or to sweep away the rules of the common law.

However, Lord Browne-Wilkinson, in ***Tinsley* v *Milligan*** [1993] 3 All ER 65, appears to take a different view. He said:

> More than 100 years has elapsed since the fusion of the administration of law and equity. The reality of the matter is that, in 1993, English law has one single law of property made up of legal estates and equitable interests.

The distinction still remains between equitable and common law remedies. There remain important differences between common law and equitable rights.

Evolution of the trust

Objective 4

Tracing the development of the trust by equity is to discover a series of problems looking for answers: the answers being provided by the trust. It is a concept which began as the solution to some relatively simple and straightforward problems and then just grew and grew. Its great merit was and still is its adaptability, its ability to evolve and to solve new and different problems.

The modern trust has its origins in the **use** (from the Latin *ad opus*) which was developed as the response of equity to the shortcomings of the common law.

The development of the trust began even before the Norman Conquest in 1066, when land was transferred 'to the use' of other people or purposes. At first the problems for which uses provided a solution were often short term and rooted in a family or domestic setting, rather than in a business or commercial context. For example, the owner of land was planning to be away for some time (perhaps on a crusade) and he transferred the land to a friend (the transferee) who it was understood would take the land not for his own benefit but would hold it for the family of the owner. Often the arrangement was to last only until the owner returned. In most cases there would be no problem: the friend would honestly and faithfully carry out his promise and would ensure that the benefits of the land flowed to the family. However, there were occasions when the promise was not kept or a disagreement arose over the manner in which the land was administered. In such cases the common law would recognise only the ownership of the transferee. The family was considered to have no rights in the land at all. In other words, the family had absolutely no legal redress if the transferee simply ignored his promise and administered the land for his own benefit. The promise was binding in honour only and the family had to hope that a wise choice had been made and that the transferee was a man of honour.

In the fourteenth and fifteenth centuries the Chancellor began to protect the family and would order the transferee to carry out the terms of his promise. As equity acts ***in personam***, the protection took the form of ordering the transferee to act in a particular way to accord with the terms of his agreement. Soon, however, equity allowed the family to enforce their rights not only against the original transferee but also against third parties who had received the property from the original transferee. However, it was always accepted by equity that the legal owner of the property was the transferee. So, gradually, over a period of many years, the attitude of the Chancellor evolved into the recognition of separate rights of the family, and eventually it was accepted that two types of ownership could exist in property at the same time. One was recognised by the common law and the other by equity.

The terminology used was that the transferee (now called the trustee) was known as the 'feoffee to uses' and the people for whom he held the property (now called the **beneficiaries**) were called the '***cestuis que* use**'.

Another classic reason for employing the use was to enable property to be held for an individual or body which was not itself allowed to hold property. For example, Franciscan friars took vows of poverty and were not allowed to hold property and so land would be conveyed to an individual to hold to the use of the community of friars.

Again, the use was applied in order to sidestep the common law prohibition on disposing of land by **will**. The would-be **testator** would transfer the land during his lifetime to a number of his trusted friends and then nominate to whose use they were to hold the land after his (the transferor's) death, and in the meantime until his death the property would be held for the transferor. Once more, the use was being employed to overcome what many saw as a defect of the common law.

However, perhaps the most common application of the use was to avoid feudal dues. It will be recalled that since the Norman Conquest the Crown owns all land. Under the feudal system all land was held under the Crown in exchange for the provision of money or services. The Crown granted estates in land to certain lords who in turn could allow others to hold from them, again in return for money or services.

Over a period of time the obligations to provide services were converted into money, but with the effect of inflation these payments lost their value and were often not collected. The Tenures Abolition Act 1660 abolished most of the remaining dues.

However, although the dues became less and less important there were incidents which often attached to land and which could be very valuable. A lord was entitled to a payment if land was held by a minor, and if a tenant died without leaving an heir the lord was entitled to the land under the right of escheat. It was common to employ the use to avoid these feudal incidents. If a tenant feared that he might die leaving his minor son as his heir he might decide to transfer the land to some trustworthy adults who would hold to the use of the son. If the tenant died before the heir was adult, no feudal dues were payable as the land was, according to the rules of the common law, held by the adults.

It is clear that, since all land was held from the Crown, it was the Crown which suffered most from the employment of uses to avoid the feudal dues.

The response of Henry VIII to this loss of revenue was the Statute of Uses 1535 which was initially intended to apply to all uses but was, in the event, modified so that it affected only some of them. The Statute was one of the first examples of anti-tax avoidance legislation. The Statute simply executed uses to which it applied. If, for example, land was held by Arthur to the use of Ben, the Statute of Uses caused the use to be executed or ignored, and the feoffee to uses disappeared and the legal estate was considered to be vested in the *cestui que* use. The end result was that the legal estate was vested in Ben, the *cestui que* use. When Ben died feudal dues would become payable. In this way the Statute of Uses prevented the avoidance of taxes on the death of Ben.

The Statute did not apply to uses where the feoffee to uses had active duties to perform such as the collection and distribution of profits from the land. Nor did the Statute apply if the property subject to the use was held only for a term of years.

For some time the Statute was effective in restricting uses to active uses or uses covering only a period of years, but attempts to have recourse to the passive use, which was the use normally employed to avoid feudal dues, were no longer profitable.

This remained the situation until about 1650 when a device known as a use upon a use was found to be an effective way round the Statute. The solution involved a double use. Land would be transferred to Arthur to the use of Ben to the use of Charles. It was eventually accepted that only the first use was executed under the Statute of Uses leaving the second use intact. The phraseology altered and the second use began to be described as a trust and the common form was to transfer land 'unto and to the use of Ben in trust for Charles'. The effect was that the legal estate was vested in Ben, and Charles owned the land in equity. Eventually the terminology was refined even more and land would simply be conveyed to Ben on trust for Charles.

Definition/description of the trust

Objective 5

A trust is very difficult if not impossible to define, but its essential elements are reasonably easily described and readily understood. There have been very many attempts to produce a definition of a trust but such definitions are either long, amounting to descriptions rather than definitions, or shorter but susceptible to criticism, often as not being comprehensive. It is not considered worthwhile either to attempt yet another definition or to criticise existing definitions; rather the concept of a trust will be described.

If a **settlor**, Simon, transfers property to trustee 1 and trustee 2 (Tim and Tom) to hold on trust for Ben, the legal ownership of the property is vested in Tim and Tom and the **equitable (or beneficial) ownership** is vested in Ben. It will be recalled that this division of ownership was the invention of equity and is the basis of the trust. Tim and Tom hold the property not for their own benefit but for the benefit of Ben. Tim and Tom's technical, legal, ownership brings only burdens and responsibilities which can make their position very onerous. The duties and responsibilities of Tim and Tom will be imposed by the settlor, by statute and by the general law of trusts. The beneficial ownership which rests with Ben brings with it, as the name suggests, the positive advantages of ownership. Any income which the trust property generates will belong to Ben. Any profit made from the trust property will accrue for the advantage of Ben.

See Chapter 9 (p. 199) for a discussion of purpose trusts.

Generally speaking, it is not possible to create trusts for purposes rather than to benefit human beneficiaries (see p. 200). The law generally requires there to be human beneficiaries who can enforce the trust or who can apply to the courts for enforcement. The most important exception to this general rule against **purpose trusts** is the charitable trust which will be dealt with at length later.

Charitable trusts cannot be enforced by beneficiaries because there are none, but are enforced by the Attorney-General. It is also possible to have a trust for a purpose which is to provide a direct benefit to a group of people. For example, in ***Re Denley*** [1968] 3 All ER 65, the court found that a valid private trust came into existence when land was given to be used as a sports field primarily for the benefit of the employees of a specified company.

See Chapter 10 (p. 216) for a discussion of charitable trusts.

In most trusts the settlor will transfer the trust property to others to hold as trustees, but it is perfectly possible for a trust to be created by the owner of the property declaring that he holds it henceforth on specified trusts for the beneficiaries. (See Figures 1.1 and 1.2.)

It is also possible for a settlor to be a beneficiary under a trust he has created. For example, Arthur might decide to transfer a block of shares to a trustee to hold on trust for himself for life and then the remainder for his son, George.

Any property may be the subject matter of a trust, and, although the nature of the property may affect the formalities for setting up or running the trust, the essential elements remain constant whatever the type of property involved. Property both real and personal can be the subject matter of a trust. The property may be tangible or **intangible. Choses in action** such as shares in companies can as readily be trust property as land or money. It is even possible to create a trust of an interest under an already existing trust. This is called a sub-trust.

An example of the breadth of the categories of property that may be the subject matter of a trust is ***Don King Productions Inc* v *Warren*** [1998] 2 All ER 608, in which contracts expressed to be non-assignable were the subject matter of a valid trust. The case concerned two partnership agreements which were intended to deal with the boxing promotion and management interests of two leading promoters. One of the agreements stated that the two parties would hold all promotion and management agreements relating to the business

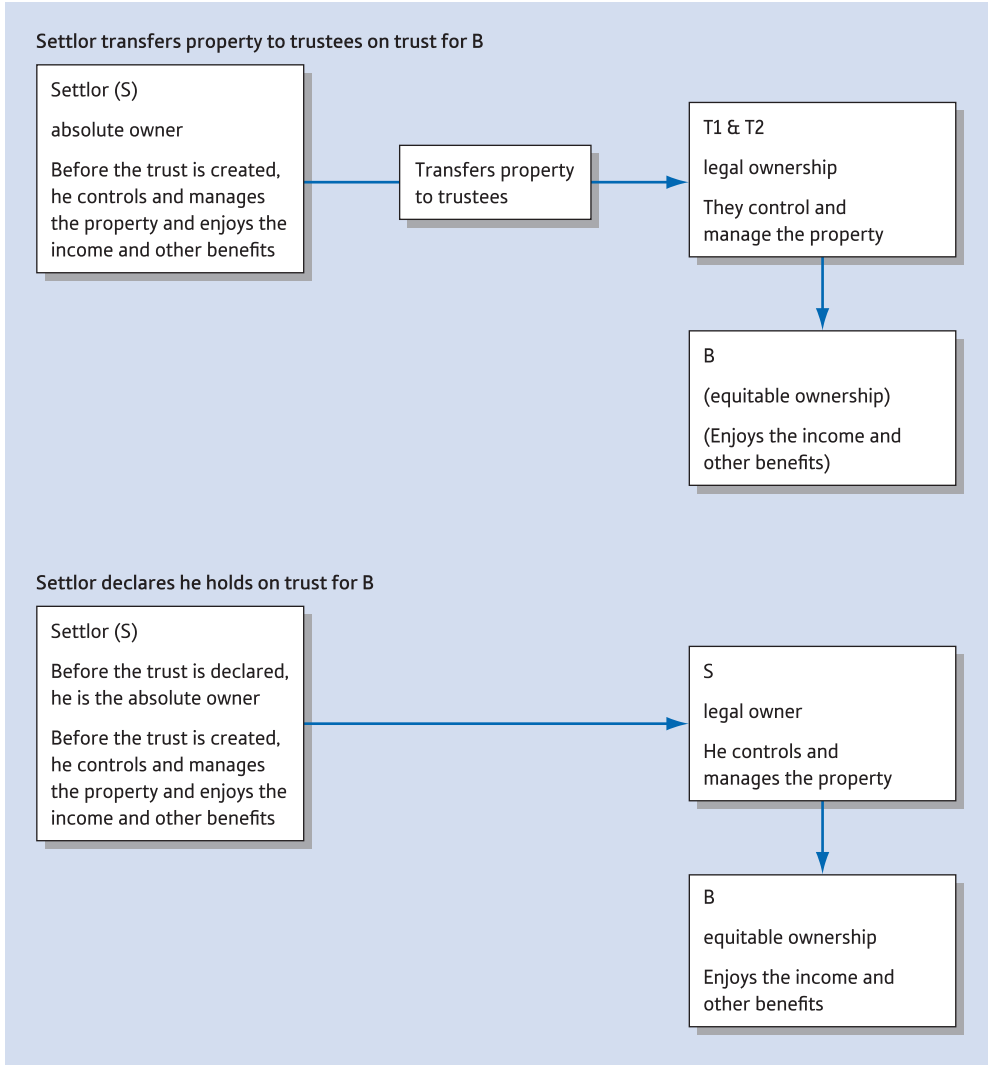

Figure 1.1 Creating trusts

for the benefit of the partnership. Some of the promotion agreements and all the management agreements contained non-assignment clauses. However, none of the contracts (promotion and management) contained a prohibition on the partners declaring themselves as trustees. Lightman J considered that a trust of the benefit of a contract was different in character from an assignment of the benefit of a contract. The Court of Appeal upheld the decision of Lightfoot J at first instance ([1999] 2 All ER 218). (Further discussion of transfer formalities may be found at pp. 104–07.)

If the trustees deal with the trust property in a way that is contrary to the terms of their trust this will constitute a **breach of trust**, and the beneficiary will be able to seek various remedies through the courts, including damages. If trust property has improperly been transferred to a third party, it may be possible for the beneficiary to 'follow' or trace the trust property into the hands of third parties and recover it.

See Chapter 17 (p. 492) for a discussion of remedies for breach of trust.