

## Chapter 2: Understanding trusts

Was F W Maitland correct when he said that: “Of all the exploits of Equity the largest and the most important is the invention and development of the Trust. It is an ‘institute’ of great elasticity and generality; as elastic, as general as contract. This perhaps forms the most distinctive achievement of English lawyers” (F.W.Maitland, “Uses and Trusts” in *Equity: A Course of Lectures* (revsd. by J. Brunyate) (Cambridge, 1936))

There are three main strands to Maitland’s praise: first, that the trust is large and important; second, that it is elastic (as general as contract); third, that it is the most distinctive achievement of English lawyers. I will critically discuss each in turn.

### Large and important

There is no denying the large influence and importance of the trust in the law and life of legal systems based on the English model. The ability of the trust to attach to assets has led to a number of practical applications. Consider the following range of functions performed by the trust: to provide for property to be held for the benefit of persons subject to legal disability (minors are not permitted to hold the legal estate in land, but are permitted to be the beneficiary under a trust of land); to provide for property to be held for persons in succession, e.g. ‘to A for life, to A’s children in remainder’; to provide for property to be held by a number of owners concurrently, e.g. co-ownership of land; to protect family property from the bankruptcy or extravagance of particular beneficiaries; to take into account the possible changes in the future circumstances of beneficiaries in making a gift, instead of making outright gift; to apply property for purposes, rather than persons; to make collective investment e.g. pension funds (see below); to enable clubs (unincorporated non-profit associations) to receive and hold property; to minimise tax liability, by restructuring property ownership; to protect assets from creditors in the event of insolvency (see below); to concentrate managerial power (in relation to, for example, pension funds, trade unions and clubs); to achieve privacy in dealings with property (hiding true beneficial ownership behind legal ownership), e.g. by means of a secret trust.

### **Elasticity (as general to contract)**

The long list of functions performed by the English trust set out above is evidence of its elasticity. The point is that the trust, which enables the separation of beneficial ownership from formal legal ownership, must be more flexible than property applications in jurisdictions which allow no such separation. Whether separation of benefit from entitlement is *desirable* is another matter, however. Some of the trust functions which flow from it eg: tax avoidance, might be considered socially undesirable. Whether the elasticity of the trust as a form of property holding justifies the claim that it is as elastic as contract also calls for closer examination. Most express trusts are actually created by a consensual – contract-like – arrangement between the settlor and the trustee, but trust-creation is more flexible in so far as the consent can operate between a dead testator and a living trustee...and even if the trustee dies, the court will supply one if necessary. A trust will never fail for want of a trustee, whereas a contract usually fails for want of a contracting party. The trust is also more flexible than contract in other respects. A contract is a private relationship between the parties under which their rights and obligations are generally enforceable only against each other (*Beswick v Beswick* [1968] AC 58). Since the Contract (Rights of Third Parties) Act 1999 came into force, a contract for the benefit of a third party allows the third party to assert their claim against the contracting parties directly in certain circumstances – but a trust creates property rights in the third party which are enforceable against the trustee, the settlor - and anybody else who has notice of the trust. Crucially, property rights created by trusts are unaffected by the trustee's personal insolvency. So far as privity is concerned, therefore, the trust is more flexible than contract. Neither is trust formation constrained by the need to establish consideration. A trust can be made – and frequently is made – in the form of a free gift. There is, however, one respect in which contract is undoubtedly more flexible than the trust. The trust only operates in relation to ascertained assets of a sort we call “property”. Contracts can relate to more abstract “assets”, such as services even in the absence of property.

### **Distinctive achievement**

The English trust is almost certainly the most distinctive creation of this jurisdiction. Other jurisdictions have contracts and even contracts for the benefit of third parties, but only Anglo-Saxon jurisdictions recognise an institution such as the trust which permits a

genuine separation of beneficial from formal ownership of an asset. The flexibility inherent in the trust has assisted in making London one of the world financial hubs, but the trust can also allow an unhealthy secrecy in financial matters. The current global “credit crunch” is attributable in part to the fact that banks have traded on the mortgages they have over borrowers’ land – and in order to trade the mortgages efficiently, they have frequently pooled them under a trust. The French have long been suspicious of the English trust, and considering the abuses to which the trust can lend its aid – who can blame them? It is notable that the new (2007) French law of *La Fiducie* introduces a form of trust which is characterised by contract rather than by the Anglo-Saxon division of ownership. The trust may be the distinctive achievement of English lawyers, but it is an achievement which – if it produces pride – should also produce caution.