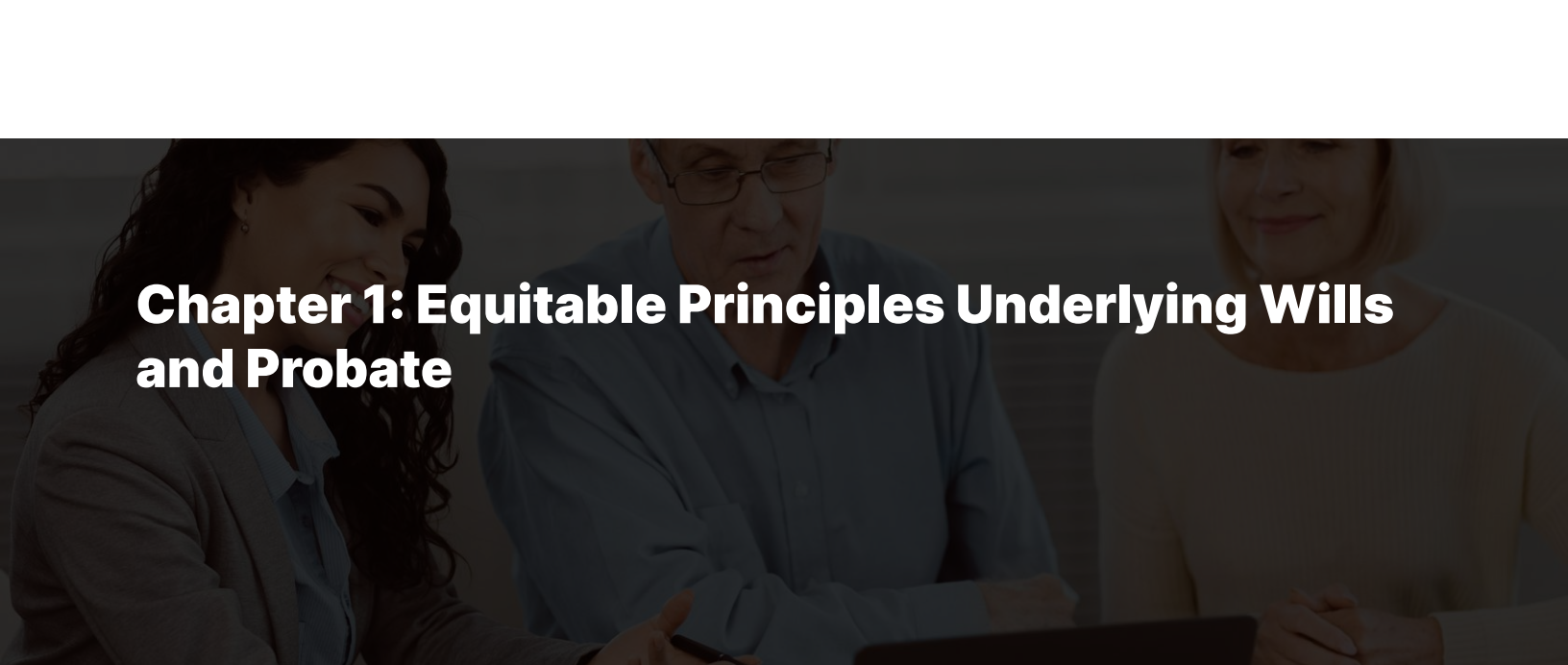




Chapter 1: Equitable Principles Underlying Wills and Probate



1.1 Introduction



1.2 Common law and equity



1.3 Trusts



1.4 Equitable remedies



Knowledge check



1.5 Summary

1.1 Introduction

In this chapter we will review the **history and relationship between common law and equity**, provide an overview on the **nature of a trust** and discuss the **roles of trustees**.

We will also look at some of the **different types of trusts** created during a settlor's lifetime and end with a review on the equitable remedies available.



CONTINUE

1.2 Common law and equity

1.2.1 Development of equity from the common law

Understanding the origin of how the justice system has developed over the years helps us to better understand why we have the legal systems we do today.

Step 2

The 13th century

From the 13th century the courts enjoyed a common law approach to dispensing justice. While this approach provided a predictable outcome for those applying for justice, the application was inflexible and unable to deal with issues arising that required a judge to step outside the precedent-based form of justice that existed.

As a result, a system evolved in which individuals had the ability to apply to or petition the King to dispense justice. This was done on a case-by-case basis and decisions were based on the King's sense of fairness to achieve a desired outcome.

Step 3

The 14th century

By around the 14th century the King started to pass the decision-making process to his Chancellor and over the years the Court of Chancery was born.

While the Court of Chancery was developed to fill the void created by the common law system, it also created uncertainty as different Chancellors applied the rules in different ways.

As the Court of Chancery developed, reports of cases started to be kept. This made it easier to find out how similar cases had been decided in the past. The result was that a body of precedent developed, allowing similar principles to be applied in all cases. In this sense, equity became more like common law, with its system of rigid precedent.

Step 4

The 17th-19th centuries

By the 17th century, Chancellors emphasised that their decisions were not arbitrary. Lord Nottingham, for instance, said that men should not *"lose their estates by the mere fancy and imagination of a Chancellor"* (**Cook v Fountain [1676]**).

When he retired as Chancellor in 1827, Lord Eldon said that *"the doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles but taking care that they are to be applied **according to the circumstances of each case**"* (emphasis added).

In 1878, Jessel MR emphasised that Chancery *"is not, as I have often said, a Court of Conscience but a court of law"*.

However, as the volume of work increased, the old systems could not handle it. The reach of equity became extensive, not only in the availability of a novel range of remedies, but in its particular rules on mortgages, probate and the law of trusts. Part of the difficulty was the system of parallel courts – common law and equity. Common law courts could not give equitable remedies such as injunctions and the Court of Chancery could not award damages. This made for inefficiency. The solution was to fuse law and equity into a single court system.



Complete the content above before moving on.

1.2.2 Relationship between the common law and equity today

As a consequence of the **Judicature Acts 1873** and **1875** and the creation of the Supreme Court of Judicature, the rules of equity and the common law were to be administered together in any of the divisions of the High Court. There has always been a lively debate on the issue of fusion. The question is whether the merger was merely procedural and administrative in nature, such that the common law and equity remain distinct jurisdictions operating side by side or, alternatively, whether there has been a more complete merging of systems. This more complete merging is known as substantive fusion, and some academics argue that there are no longer any distinct rules of law and equity.

In some cases, a particular outcome has been indicated or reached by the court without clear reference to common law or equitable principles having been followed. One example is ***Boyer v Warbey [1953]*** where the Court of Appeal indicated obiter that the rules for the running of leasehold covenants should apply equally to enforceable equitable leases and legal ones. This has not been followed. Another example is ***Australian Blue Metal Ltd v Hughes [1963]***. In this case, the issue was the form of notice required to allow a party to

withdraw from a particular obligation. The common law approach implied a need for reasonable notice, and equity would have allowed a reasonable period of grace. The Privy Council view was that such a theoretical distinction should not lead to different results. The test was what was reasonable and fair as between the parties and the question of the origin of the protection (i.e. whether legal or equitable) was not crucial. Similarly, modern developments in both promissory and proprietary estoppel have been achieved without any clear indication as to whether they are equitable or common law doctrines or both.

Nonetheless, legal and equitable rights and remedies remain distinct in most cases, which suggests law and equity are not fully fused. Indeed, in ***M C C Proceeds Inc v Lehman Brothers International (Europe) [1998]*** Mummery LJ made it clear that the ***Judicature Acts 1873*** and ***1875*** did not change the substantive law. They were intended to make procedural improvements, not to change equitable interests into legal titles or do away with the common law rules. Similarly, in ***Swindle v Harrison [1997]*** Hobhouse LJ stressed that common law damages were not available for a breach of fiduciary duty. Evans LJ stated that it was still important to take into account the distinction between common law and equity.

CONTINUE

1.3 Trusts

Example

You have just joined Zoom & Teams Lawyers together with Alexandra and Asmee. All three of you are CILEX Advanced Paralegals. It is your first day and all three of you have been given a talk by each head of department. Sasha the head of private client has just finished explaining her department and the role of the team and that one of you will be joining to assist with the administration of trusts section. Sasha explains that the number of trusts created by the firm has grown over the years and the section needs more assistants to maintain the firm's already high standards.

Sasha asks if any of the three of you would like to join the private client team.

Both yourself and Asmee respond by saying that you were both looking to specialise in private client. Asmee goes on to say that trusts are still a bit of a mystery to her and she would love to learn more.

Sasha is pleased to respond to Asmee's question and explains that in its simplest form a trust arises when a person (the settlor) transfers their assets to a third party (the trustees) to hold for another individual, or individuals, entity or charity (the beneficiaries). Sasha goes onto explain that trusts developed when knights would go off on crusades, they would leave

their possessions in the hands of trusted third parties for safekeeping. The knight would become the settlor and the person left in charge of their possessions the trustee.

Looking at another simple example. Take a group of friends who house share and pool their funds monthly. Every month the house sharers each pay the same amount into the bank account of one of them who will apply the funds to pay the rent and other outgoings. The individual who takes charge of the money is the **trustee** and all of the house sharers are the **settlers**. The terms of the trust are to hold the funds to pay the monthly outgoings.



Do you think lending your car to a friend while you go away on holiday is another modern-day trust example? Consider whether title to the car passes. Would your answer change if the friend took legal title of the car for the purpose of selling it on your behalf?

CONTINUE

1.3.1 The nature of the trust

The word trust in its legal sense can strike fear in the heart of the unwary lawyer. It can be seen by some as high risk, alien and better for others to deal with. Understanding the nature of a trust will put you at ease with this subject. It is almost impossible to operate in this area of law without having to consider and address trust issues. As a private client practitioner, you will find yourself dealing with trust-related issues on a regular basis.



A trust can be described as follows:

A trust is a legal arrangement created by the settlor during their lifetime, to take effect immediately, at some specified date in the future or on the death of the **settlor** when assets are placed under the control of a **trustee** for the benefit of a **beneficiary**, or for a specified purpose.

A trust has the following characteristics:

- The assets of the trust are separate to the trustee's own assets and estate, and it is the trustee's duty to ensure they are kept that way.
- Legal title to the trust assets passes to the trustees and not the settlor.
- The trustee has powers and duties to assist in the running of the trust and ensure that the trustee is accountable to beneficiaries if the assets are not applied in line with the terms of the trust. A trustee has obligations that must be observed to avoid personal liability.
- The settlor can be a trustee and can also impose terms on the trustees in the running of the trust for the benefit of the beneficiaries.

1.3.1.1 Assets of the trust are separate to the trustee's own assets and estate

This is a fundamental point for all trustees to follow. A trustee must ensure that although assets are placed in their name, those assets are distinguished for their personal assets. The easiest way to achieve this is for the assets to bear the name of the trustee with the words "as trustee of the trust".

In practice this can be challenging in relation to land. The Land Registry is only concerned with legal title and not beneficial ownership. While the Land Registry will on occasion register legal owners of a specific trust more often it will disregard the trustee element and simply register the trustees as the legal owners. This is strictly correct: however it can cause issues down the line if trying to distinguish between trust and personal assets. Care should therefore be taken when registering trustees to ensure the transfer contains an appropriate declaration, and the title is protected by restriction(s). It is also helpful to conveyancers who may come into a property cold to understand that there is an underlying trust and to make further enquiries when dealing with a property.

Trustees can also hold shares.

Trustees also face issues with cash investments such as bank and savings accounts. Banks tend to shy away from trust accounts, and a lot of high street banks will not be prepared to open them at all. When a bank will allow a trust account to be opened it tends to attract minimal interest, and the majority of savings and investment accounts are only available to individuals in that capacity. For this reason, large sums of money are normally invested through a managed fund on advice from an independent financial adviser (IFA). It is the trustee's duty to ensure the IFA and managers of the fund have the correct instructions and the investments are diversified to meet the investment criteria.

It is for this reason that trustees must ensure a trust is properly formed and trust assets are distinguished from personal assets.

1.3.1.2 Legal title to the trust assets passes to the trustees and not the settlor

Following on from the point at **1.3.1.1**, it is not simply designation of trust assets that change, the legal title to the assets of the trust passes to the trustee. This means the trustee can deal with this property as if it were their own.

In contrast, holding property for a third party without title passing is a bailee arrangement not a trust relationship. An example is where a garage temporarily takes possession of a car until it is repaired and the bill is paid.

If a trust is created during a settlor's lifetime, the settlor will want to have full confidence in the trustees appointed, whether fellow trustees or entirely separate. It is therefore not entirely surprising that, if the trust is created during a settlor's lifetime, the settlor might want to be one of the trustees.

Trustworthiness is another reason why professional trustees are appointed. If a trustee abuses their power and uses trust property for personal gain, or takes trust property, claiming losses from lay trustees can be difficult, especially if the trustee has disappeared

with the trust assets, proceeds of sale from them or has simply spent the fund over the years and is left with nothing personally. A trustee who is acting in a professional capacity ought to have professional indemnity insurance that a disappointed beneficiary can claim against in circumstances in which the trustee has either been negligent, or dishonest.

1.3.1.3 Trustee has powers and duties to assist in the running of the trust

A trustee can be personally liable for breaches of duty in relation to trust obligations. For that reason, a trustee will be given powers to manage trust property properly and effectively. We will look at some of those powers later in this manual. Powers and obligations will come from a combination of the trust document and statute. We will look at trustee powers in more detail in Chapter 4.



1.3.1.4 Settlor acts as a trustee and imposes terms on the trustees in the running of the trust for the benefit of the beneficiaries

Although a settlor can reserve certain rights and powers, care should be given to the extent of these powers. For example, a power to appoint and remove trustees would be normal. However, a power to direct how and when trust funds are applied may be considered retaining too much control and result in the trust being declared a sham. While sham trusts are outside the remit of this course, it would be sensible to understand what is and is not recommended before advising on this subject.

A trustee can also be a beneficiary. This may seem strange; however, it is very common in will trusts, as shown in the scenario below. Care should therefore be given when advising on appointments of individuals as trustees depending on the type of trust being created.

Example

Consider a common scenario in which spouses or civil partners create a life interest in favour of the other in their wills and appoint each other as trustee and life tenant. If the remaindermen (ultimate beneficiaries) are the testators' children, the risk of conflict may well be reduced.



However, if both have children from previous relationships, how sensible is it to appoint the life tenant as trustee? How will the trustee react when a decision has to be made that will benefit either themselves or the remaindermen? Consider circumstances in which a conflict can arise between a trustee who is also a beneficiary and wishes to exercise a power in their favour.

CONTINUE

1.3.2 The role of trustees

A trustee is appointed to take legal title to and responsibility for the assets in the trust and apply those assets or the income from them for the benefit of the beneficiaries in line with the terms of the trust deed, while complying with statutory obligations.

Look at this practical situation:

Example

You are asked to advise Natasha, a client of the firm on the effect of her appointment as sole executrix and trustee of her late father's will. Natasha's father, Matthew, sadly passed away nine months ago. His estate consisted of a house, which has since been sold, and £10,000 cash in the bank which was used to pay for the funeral account and your firm's fees for administering his estate, and acting in the sale of the property which generated £540,000 after payment of all costs of sale. There was no capital gains tax to be concerned with as the property sold for probate value, and the size of the estate fell within the reliefs available for inheritance tax.



Matthew's will provided for Natasha to be his sole executrix and trustee and for his entire estate to pass to Natasha's two children, Arran who is five years old and Reece who is three years old, in equal shares when they attain the age of 25.

Natasha has asked you to give her an overview on her role as trustee.

You explain to Natasha that as trustee she will have to take control of the trust assets and ensure that they are kept separate from her personal finances, exercise her powers to invest using the investment criteria and apply both income and capital for the benefit of the beneficiaries following the terms of the trust.



Why is it important that a trustee keeps trust assets separate from their personal assets? What might happen if trust assets and personal assets are mixed (e.g. in a single bank account)? Consider the implications if Natasha was made bankrupt, or died with an estate that was taxable for IHT.

CONTINUE

1.3.3 Different types of trusts

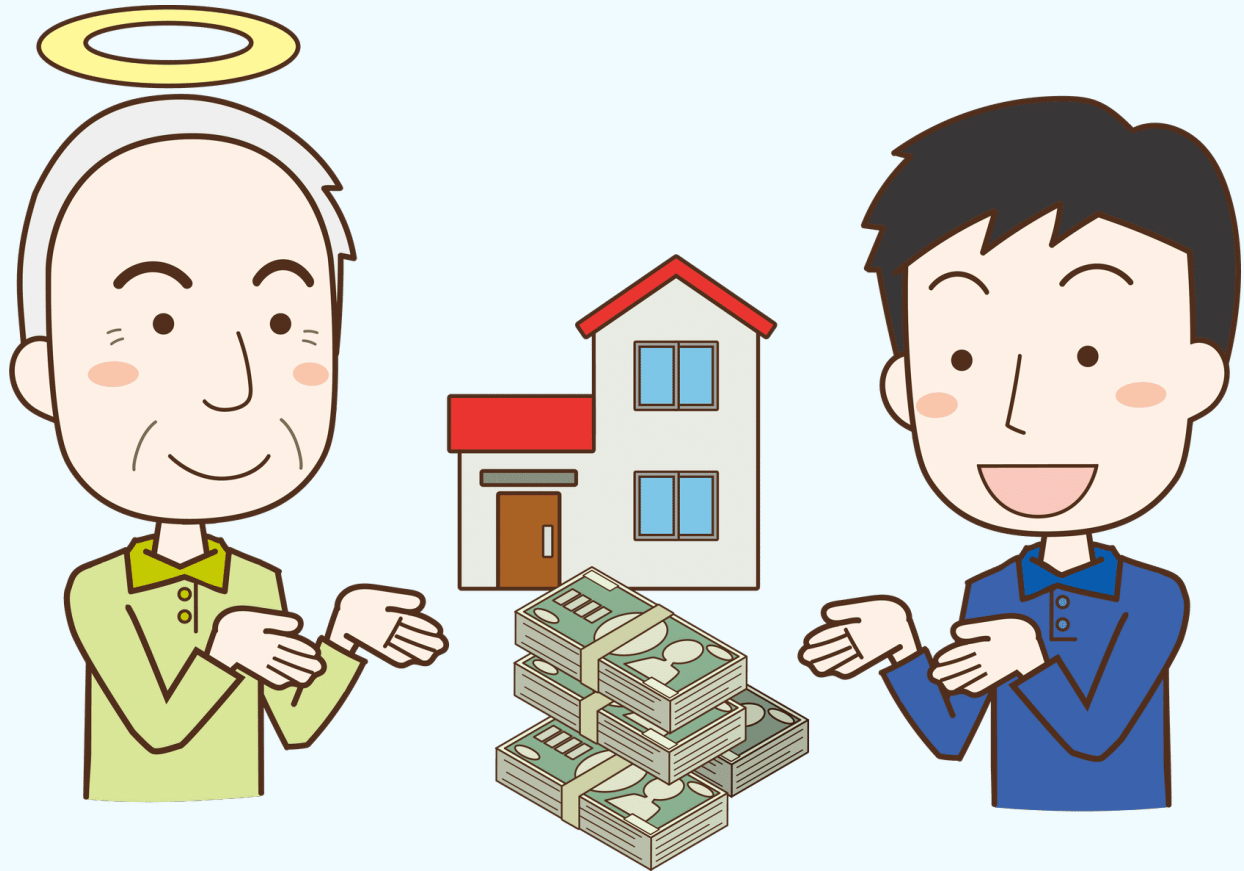
Trusts can be categorised in many different ways. Whether express or implied, charitable or private, by its objects or tax status, whether made during the settlor's lifetime or by will.

In this section we will look at the different types of trusts defined by their objects.

1.3.3.1 Life insurance

Example

Mr Sollinski meets with you to discuss lifetime planning for his adult child. He is divorced and his property is worth in the region of £750,000. He has cash in the bank of £100,000. He would like to make provision for the inheritance tax payable on his death. You explain that while you cannot give financial advice, he may want to speak to a financial adviser about taking out a life policy to pay out to his son a sum equivalent to the inheritance tax (IHT) payable on his death.



Life insurance is a policy that will pay out an agreed amount on the death of the insured. Policies of this nature are normally written in trust for a specific person or entity (e.g. mortgage company). On occasion, the lump sum benefit is payable at the trustees' discretion and the insured can nominate beneficiaries.

Care must be taken to ensure that a life policy does not form part of a deceased's estate – either when advising a client in relation to an existing policy, or in the administration of a deceased's estate.

1.3.3.2 Trusts created during the settlor's lifetime

Trusts created during a settlor's lifetime are now less common as taxation of lifetime trusts since the **Finance Act 2006** and anti-avoidance gift with reservation rules have restricted the tax advantages of these trusts. In addition, as the costs of care in old age escalate, it is difficult for a settlor to know how much money will be needed for the future and therefore how much can be placed on trust.

A few types of trusts can be created during a settlor's lifetime. These trusts have detailed requirements in relation to inheritance tax, but their basic characteristics are as follows.

1. Interest in possession —

A settlor may wish to give away assets during their lifetime to allow a beneficiary to benefit from the income or trust asset itself (e.g. to occupy a property rent free). However, the beneficiary would not have any entitlement to the capital assets themselves.

This is a way of reducing the value of the settlor's estate while protecting the capital assets.

2. Discretionary trust —

Instead of putting assets into a trust for beneficiaries to benefit from the income, the assets can be placed into a discretionary trust for a class of beneficiaries. The trustees will be given power to advance capital as well as income. An example of this is when a grandparent creates a discretionary fund to be applied for the benefit of grandchildren and for their education and maintenance.

3. Disabled person's trust —

This can be either a life interest or discretionary and is used to benefit a disabled person. The beneficiary must meet certain criteria and the fund must be applied almost exclusively for the benefit of the disabled beneficiary. Different taxation rules apply to disabled person's trusts. The assets that pass into a disabled person's trust are treated as a potentially exempt transfer for inheritance tax purposes and not a chargeable lifetime transfer and income is taxed as if the assets belong to the

disabled beneficiary. These types of trusts are also a rare example of a situation in which a disabled person can be both settlor and beneficiary and not fall foul of the gift with reservation of benefit rules.

An example of when this type of trust may be created is a parent who might want to make provision for a disabled child during their lifetime to ensure the fund is in place. It may also have the advantage of reducing the parent's estate for inheritance tax purposes.

Example

You have been invited by Mark, the head of private client in your firm, to join a meeting with Mr and Mrs Platowski who have acquired wealth over the years from their businesses and would like to discuss lifetime planning options, including the possibility of creating a trust for their eldest son who is disabled. Mark is called away from the office and while waiting for him to return Mrs Platowski asks you to explain trusts in more detail, specifically how they operate.



Activity

Consider what you would say to Mrs Platowski in light of the information in this chapter; prepare a list of bullet points covering your response to Mrs Platowski.

CONTINUE

1.4 Equitable remedies

Equity has developed a number of special remedies that can be used when damages are not adequate.

This section deals with common features of equitable remedies and explains the main available equitable remedies in more detail.

1.4.1 The general nature of equitable remedies

The remedies developed by the courts of equity differ from those developed by the common law courts. Equitable remedies supplement rather than compete with common law remedies. They are not available in every single case where a claimant has suffered a wrong.

In particular:

- equitable remedies are only available if the relevant common law remedy is insufficient to protect the claimant or compensate for the wrong they have suffered;
- equitable remedies are always discretionary;
- equity acts *in personam* (against a specific person);
- the courts are guided by the maxims of equity. The maxim “equity will not act in vain” is a prominent example. The court will not make an order that cannot be observed or

intervene where it would be pointless to do so.

These points are discussed in more detail below.

1.4.1.1 Remedy available only if remedy at common law is inadequate

It is a precondition of the award of an equitable remedy that the remedy at common law (usually damages) is inadequate. Damages might be inadequate where the justice of the case demands, where damages are difficult to quantify or where the obligation is such that successive breaches would bring about successive actions for damages. The aim of the equitable remedy is to “*do more perfect or complete justice*” (*Wilson v Northampton and Banbury Junction Railway Co [1874]*).

1.4.1.2 Equitable remedies are always discretionary

The common law remedy of damages for breach of contract is an example of a remedy that is available as of right. If the claimant establishes that the defendant has broken the terms of a contract and the claimant has suffered damage as a result, then the court will award damages. There are also legal mechanisms to ensure that the defendant complies with the award of damages, and these are available whenever damages are awarded. The court does not have any discretion as to whether to award damages or assist in their collection.

If the claimant is seeking an equitable remedy such as specific performance, the court has a **discretion** – a choice – whether to award that remedy. Although the court’s discretion is wide, it is exercised in line with established rules and principles, so that it should be possible to predict whether an injunction or specific performance will be available on any given facts.

1.4.1.3 Equity acts *in personam*

Equitable remedies are personal and exercised against a specified individual. The remedy prevents the specified individual from acting unconscionably and strikes at the defendant’s

conscience and conduct.

1.4.1.4 The maxim “equity will not act in vain”

Equitable remedies will be refused if the court cannot ensure that they will be observed. The defendant must be in a position to comply with the order made. The court will not interfere where there is no point in doing so.

The operation of this rule is illustrated by ***Jones v Lipman [1962]***. L changed his mind about selling land to J, even though they had a binding contract. L knew that if J brought an action for specific performance, J would probably be successful and L would have to transfer the land.

With this in mind, L sold the land to a third party, hoping that the court would refuse to make an order for specific performance and award damages instead. This strategy relied on the maxim that equity will not make a pointless order: since L did not own the land anymore, L could not transfer it to J.



However, L's strategy failed. This was because L did not sell the land to an innocent third party. L sold it to a company that he had bought for the purpose of buying the land. As L controlled the company, he was able to make it complete the contract with J. An order for specific performance was not therefore pointless. The court made the order against both L and the company. The result would have been different if he had sold the land to someone else.

CONTINUE

1.4.2 Specific performance

Specific performance is a discretionary order that a court can make to compel a party to fulfil a contractual obligation. Each case will turn on its own facts.

Consider the following.

Example

Alan and Louise a recently married couple are excited to start their new lives together in a house they both found after searching for over 12 months for the right property. Their offer was accepted and after months incurring costs in valuations, obtaining a mortgage offer and instructing lawyers, they were over the moon when contracts for the purchase were exchanged a week ago with a completion date in a week's time.

They were both surprised when the agent called to inform them that the sellers had changed their minds and would like to keep the property. The sellers also told the agents that if the property is to be sold they will want an increased offer from the buyers.





Do you think a claim in common law for damages to reclaim all costs and expenses incurred to the point the sale was withdrawn would be suitable or whether the sellers should be compelled to complete the sale on the terms agreed?

CONTINUE

In order to succeed in a claim for specific performance, the buyers must show that damages would not be a sufficient award. To do this, the buyers must demonstrate to a court that a property is sufficiently unique (*Penn v Lord Baltimore [1750]*).

Another example in which the courts considered whether specific performance was available was in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1997]*. It is particularly relevant given the recent pandemic that has affected businesses worldwide.

In *Co-operative Insurance Society Ltd* the issue of constant supervision was re-examined by the House of Lords. The defendant decided to close its supermarket in a shopping centre as it was losing money. The supermarket was the anchor tenant, attracting trade to the smaller businesses in the shopping centre. As closure of the anchor store would have a disastrous effect on other tenants, the defendant had been required to enter into a covenant to keep its business open for trade during the usual hours of business (a keep-open covenant). The defendant breached this covenant by closing its supermarket. The claimant sought an order for specific performance.

The judge at first instance awarded damages, but the Court of Appeal held that damages were inadequate and cited the *"gross commercial cynicism"* with which the defendant had acted. The Court of Appeal also took the view that what was required of the defendant was sufficiently well-defined that there was no threat of constant supervision, that is, repeated applications to the court leading to a long series of rulings to ensure compliance. In the House of Lords, however, Lord Hoffmann denied the availability of specific performance on the following grounds:

- the settled practice of the court is not to make an order to force the defendant to run a business – it is not for the court to force the defendant to trade at a loss under threat of imprisonment if they fail to comply with the terms of the court order;
- constant supervision – there is a risk of wasteful litigation where the defendant must carry out an activity over an extended period of time; and
- the risk of oppression to the defendant may outweigh the loss suffered by the claimant.

The approach of the House of Lords might be criticised as unduly restrictive on account of the failure to provide an equitable remedy where the justice of the case demanded that there should be one.

Below are some more examples in which the courts have been asked to consider specific performance as a remedy.

Table 1.4

Subject matter of contract	Whether damages likely to be adequate remedy	Relevant case law
----------------------------	--	-------------------

Sale or purchase of land or grant of a lease	Land is unique by its nature and therefore damages will not be adequate as a remedy.	<i>Penn v Lord Baltimore [1750]</i>
Antiques	If the antique item is rare, then damages is unlikely to be adequate as a remedy.	<i>Phillips v Lamdin [1949]</i> (specific performance ordered of contract for sale of an antique door) <i>Cohen v Roche [1927]</i> (specific performance of contract to purchase six chairs was refused because they were “ordinary articles of commerce and of no special value”)

A consumer product, such as petrol, in short supply	If it is difficult for the purchaser to obtain the product from another seller, then damages may not be adequate as a remedy. If the item is available on the open market, then damages would be an adequate remedy.	<i>Sky Petroleum Ltd v VIP Petroleum Ltd [1974]</i> (defendant tried to end contract for the supply of petrol to claimant; claimant could not obtain supplies from elsewhere because of international shortage; injunction awarded that had same effect as a decree of specific performance)
Contract to pay an annuity (a fixed annual payment)	A contract to make a loan or to pay a monetary sum is not specifically enforceable because damages are adequate. The value of an annuity, however, is difficult to quantify because it	<i>Beswick v Beswick [1968]</i> (contract to pay an annuity to a third party (a widow) enforced in circumstances

	depends on the longevity of the person receiving the money (so how long the person lives for). Damages may be inadequate.	where only nominal damages were recoverable (the privity rules prevented the widow from recovering more fully); the justice of the case demanded an equitable remedy)
Sale and purchase of shares	Whether damages will be adequate will depend on whether the shares are freely available. If the shares are in a publicly listed company, damages would be adequate. It is less easy to obtain shares in a private company from another source and so specific performance is likely to be available.	<i>Duncuft v Albrecht [1841]</i> (specific performance ordered of contract for purchase of shares in a private company)

As evident from the cases discussed above, the decisions are fact-specific. If the claimant can satisfy the court that the subject matter of the contract is sufficiently unique, it opens the door to seriously consider whether specific performance is the right remedy.

CONTINUE

1.4.3 Injunctions

Injunctions fall into two main categories:

- **mandatory** (to carry out a specific act), and
- **prohibitive** (to prevent a specific act from being carried out).

Historically, injunctive relief was an equitable remedy. However, it is now statutory and can be found under **s37 Senior Courts Act 1981 (SCA 1981)**:

The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

Injunctions can be either:

- **final** (as a result of a decision at trial), or

- **interim** (issued before proceedings are issued, or during pending determination at trial).

Injunctive relief is a developing field, and can be used to combat fraud. A recent example is ***Matchroom Boxing Ltd v British Telecommunications plc and Others [2020]*** in which an injunction was ordered to prevent unlawful live streaming of boxing matches, which demonstrates how this remedy can be applied to new technology.

While injunctive relief is seen as urgent and therefore prioritised, the Covid-19 pandemic saw the court imposing additional conditions in connection with granting such relief. An example of this can be seen in ***Calor Gas Ltd v Chorley Bottle Gas Ltd and Others [2020]*** in which the court ordered additional undertakings relevant to the Covid-19 pandemic imposed on a solicitor appointed to supervise a search order.

Although it would not be possible to list all circumstances in which an application for injunctive relief can be made, the ***Civil Procedure Rules r25.1(1)*** sets out the court's power to grant different types of interim relief, which include:

- a freezing order – preventing dealing or disposing with assets;
- an order that deals with the provision of information about or location of property or assets;
- a search order – as seen in ***Calor Gas Ltd*** – normally used to search property to preserve evidence or assets;
- orders that require property to be delivered up.

Breaching an order providing for injunctive relief is very serious as the orders are normally endorsed with a penal notice. This should put anyone on the receiving end of such an order on notice of the consequences of breaching the terms.

1.4.4 Rescission

Rescission is a remedy available in relation to contracts at both common law and in equity. However, because of the restrictive nature of the common law approach the majority of cases will rely on equity to achieve the desired result.

It is important to understand that rescission will only assist contracts that are voidable at (common) law, not contracts that are void. In relation to contracts that are void the remedy will lie in restitution (see 1.4.8).

A contract can be rescinded where it can be shown that there is a defect in the formation of the contract.

1.4.4.1 Rescission *ab initio*

The effect of rescission in equity is to put the parties back into the position they were in before the contract was entered into. For example, where goods and money have passed between the parties to the contract the goods and money should be returned.

For some contracts, damages may be a more applicable award, for example, the provision of services, which have at least in part been carried out.

It is also important to distinguish contracts that are capable of being rescinded due to a repudiatory breach of the contract. While in these circumstances the contract can be rescinded, it is different from rescission as a result of a voidable issue on formation. This was considered by the House of Lords in ***Johnson v Agnew [1980]***.

1.4.5 Rectification

The equitable remedy of rectification is not to be confused with the limited ability to apply to the court for rectification of a clerical error in a will, which is a statutory remedy applied for under **s20 Administration of Justice Act 1982**.

In relation to contracts, if a party believes a mistake has occurred in drafting in relation to the description, subject matter or meaning of the words used, or believes that something of substance has been omitted and the parties cannot agree to a variation, either party can apply to the court to rectify the terms.

The remedy is rarely used as it is an expensive way to resolve these issues. However, in some circumstances it is useful to understand that this remedy does exist.

The effect, if successful, will be to correct the mistake and the correction is retrospective. This may be a reason to apply to the court for this remedy.

However, before making an order for rectification the court will also consider the impact of such an order on anyone affected by it and may refuse to exercise discretion to amend a term if it feels it would unfairly affect other parties.

1.4.6 Account

The equitable remedy of taking an account applies to anyone in a fiduciary relationship, such as an attorney, personal representative or trustee.

In the case of an attorney and personal representative, part of the process of accepting the role is to confirm that an account will be produced on demand.

There is no need to establish fault to obtain an order for an account to be taken, simply to establish a person's liability to produce an account is sufficient. There is no need to establish breach of fiduciary duty. However, that can be a cause of a separate order known as "wilful default".

In essence, any person who has received assets on behalf of another is liable to prepare accounts details which detail the assets that person has had control over and what has happened to them, income and capital, and any expenditure incurred as a result of holding the funds.

If the person refuses to provide such an account, the court can order the person to produce the account for the court to consider whether there has been any default.

CONTINUE

1.4.7 Appointment of a receiver

The court has power to appoint a receiver over a debtor's interest in property. In ***ACC Loan Management Ltd v Rickard [2017]*** the Court of Appeal considered whether the court's power extended to both legal and equitable interests in property and when a receiver can be appointed over future debts owing to a judgment debtor. The court held that a receiver could be appointed over both equitable and legal interests in that case, as well as over future payments due to the judgment debtor.

1.4.8 Restitution

Claims for restitution are normally made when a party has been unjustly enriched at the cost of the party making the claim.

The enrichment does not have to be money or goods, it can be receipt of services or some other benefit. Provided it was received unjustly and at the cost of the party claiming, the equitable remedy can be used.

The Supreme Court considered how close the connection had to be to demonstrate enrichment at the expense of a person or entity in ***Bank of Cyprus UK Ltd v Menelaou [2015]***. Lord Clarke found that there had to be sufficient causal connection between the loss to the claimant and the benefit received by the defendant.

The remedy for unjust enrichment is the return of the benefit received. However, if the benefit was not money or goods, then the only remedy will be damages assessed at a value for the benefit received.



Law in Context: Life insurance trusts

The following article from Legal and General discusses how life insurance trusts work, highlighting their advantages and potential disadvantages: [Putting Life Insurance in Trust | Legal & General](#)

Key advantages include giving control to the person setting up the trust of who will benefit from the proceeds, as well as who will manage them as trustees. There is a practical benefit to the family because the proceeds of the life policy can be accessed shortly after receiving the death certificate, rather than having to wait for a grant of probate or administration.

Disadvantages include the fact that the decision is irreversible and there is some loss of control to the trustees.

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

Question 1 of 3

Which of the following statements about trusts are correct?

(Select 2 correct answers)

- ☐ The assets of the trust are separate to the trustee's own assets.
- ☐ The assets of the trust do not have to be separate to the trustee's own assets.
- ☐ Legal title to the trust assets can remain with the settlor.
- ☐ The settlor can be a trustee and can also impose terms on the trustees.

SUBMIT



Complete the question above before moving on.

Question 2 of 3

Which of the following versions of the paragraph is correct?



In the Middle Ages, the common law system of justice was seen as **flexible**. As an alternative, individuals would petition the King, who would decide cases based on his sense of **humour**. Later, the **rules** took over this responsibility, which led to the inception of the Court of Chancery. Initially there was a level of **uncertainty** as cases might be decided in different ways by different individuals, but gradually **decisions** were written down and **a sense of fairness** began to develop.



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SUBMIT



Complete the question above before moving on.

Question 3 of 3

Match the following scenarios with the most appropriate remedy.



Sunil, a senior civil servant, accidentally left his briefcase on a train. The briefcase contained embarrassing private letters from a member of the royal family. A tabloid newspaper is threatening to publish them next Sunday.

Specific performance

⋮

Michael and Becca have booked their wedding, which is due to take place next week, at Craig Castle. They have paid a deposit of £2,000 and were due to pay the balance today. The castle has now developed a fault in its roof and is unsafe and cannot be fixed in time for their wedding. Fortunately, they have found an alternative wedding venue.

Injunction

⋮

Heritage Properties Ltd recently exchanged contracts on the purchase of a country manor house. They have focussed a major marketing campaign on its historical connections. The sellers now want to pull out of the contract as they have had a better offer.

Damages

SUBMIT



Complete the question above before moving on.

1.5 Summary

In this chapter we have looked at the following:

1. the historical development of equity;
2. the current relationship between the common law and equity, including the **Judicature Acts 1873–1875**;
3. the nature and characteristics of a trust;
4. the distinction between the “settlor”, the “trustee” and the “beneficiary”;
5. some of the different types of trust including life insurance, life-time trusts, interest in possession trusts and discretionary trusts;
6. the key characteristics of equitable remedies, including their discretionary nature; and
7. the key equitable remedies, including specific performance, injunctions, rescission and rectification.

You have completed Chapter 1.

EXIT