

1. Consider the many different types of trust. Can you see any common features in them?

Suggested Answer:

A number of different definitions of trust can be found at 2.4. It can be seen that it is difficult to frame an overall definition that would include every type of trust. The *Westdeutsche Landesbank v Islington* [1996] AC 669 case attempts to describe the main elements of a trust. Even this relatively modern “definition” has its problems. The unifying concept of the conscience of the legal owner being affected is suggested. This definition can be tested against the various types of trust described in from 2.5 to 2.9. It is probably true to say that all trusts operate on the conscience of the owner of the legal interest, as *Westdeutsche* has it, but is that such a general statement as to be meaningless? What is “conscience”? It is suggested that a trust must have identifiable trust property, but constructive trusts do not necessarily have identifiable trust property and tend to be more of a remedy than an institution. *Westdeutsche* states that trusts have beneficiaries with a proprietary right in the trust property, but this does not apply to all types of trust. Charitable trusts do not have beneficiaries with enforceable equitable interests. Discretionary trusts have identifiable beneficiaries, but these beneficiaries do not have individual equitable interests. Debate continues over what a relatively recent development, the “Quistclose Trust”, actually is. (See answer 3). If we consider the matter from an historical perspective, the Court of Chancery imposed trusts in a number of different situations and did not think that there was a need for an overall, unifying theory.

2. A key feature of the trust is the ‘split’ between the legal estate and the equitable interests. Consider the difference between rights in equity and rights in law.

Suggested Answer:

The historical origins of the trust and the reason for the split between law and equity were explained in chapter 1. In the same chapter the trust, invented by equity, is compared to various legal concepts. You are reminded of the law/equity split in 2.3.1. Legal rights are enforceable against the whole world. Equitable rights are nearly as good, but can be defeated by the claims of “equity’s darling”, a bona fide purchaser of the legal estate for valuable consideration without notice. This means someone who buys the legal estate without knowing of the claims in equity. They take free of the equitable rights and are not bound by them. Further detail is given at 16.4.1. Equitable rights are quite strong as the court will insist that the purchaser was acting in good faith and had no way of knowing of the equitable rights. The theme of how an equitable interest differs from a legal estate is returned to in 2.10 in the case of *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694. Not all equitable rights are the same. The rights of a beneficiary under a trust are different from the rights of a beneficiary under a will or intestacy. Under a will or intestacy the equitable claims are not proprietary: the beneficiary has no right to the property itself, unlike under a trust.

3. How do Quistclose-type trusts fit into the classification of trusts?

Suggested Answer:

See 2.9. These trusts are hard to classify. At first, they look like a simple contractual situation, with no trust involved. *Barclays Bank v Quistclose* [1970] AC 567 insisted that there was a primary express trust, which failed, leading to a resulting trust. This is problematic, because in some of the succeeding cases, such as *Re EVTR* [1987] BCLC 646, the trusts were to achieve a purpose and lacked beneficiaries, which is not permitted, under the *Westdeutsche* principles mentioned in 1. *Twinsectra v Yardley* [2002] AC 164 attempted to solve the problem by suggesting that there was a resulting trust from the start, where the borrower held the property for the lender and no primary express trust. On that interpretation there is always a beneficiary, the lender. We have two House of Lords cases, with competing theories on the nature of *Quistclose* trusts. The Supreme Court has not considered this issue, but lower court cases accept the existence of this type of trust and tend to accept the *Twinsectra* interpretation: e.g. *Wise v Jimenez* [2014] 1 P 7 CRD 9, *Bellis v Challinor* [2015] EWCACiv 59.

FURTHER READING R.Hedlund and Amber Rhodes “Loan or Commercial Trust? The Continuing Mischief of the Quistclose Trust.” [2017] *The Conveyancer and Property Lawyer* 254.