England and Wales

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1. Governing legislation

1.1 The nature of English trusts

A trust is essentially a creature of English equity and it therefore became established by court-led developments rather than by statute. For a legal device with such wide application today, it is of surprisingly old derivation. The cat and mouse game of legislation limiting trusts and trusts adapting to retain their importance begins with medieval legislation. In examining future changes forced by legislation, it is as well to remember that the ancestor of anti-avoidance legislation is the Statute of Uses 1535. Although historically there were attempts to limit or control the use of trusts by statute, there has been no cohesive framework of trust legislation. This has resulted in today's position where there exists a mature and complex system of trusts, but there is, for example, no statutory definition of what constitutes a 'trust'. One of the traditional and most widely accepted definitions is that which comes from Underhill and Hayton's *Law of Trusts and Trustees* (16th edition) p 3:

> *A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him (called the trust property being distinguished from his private property), for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.*

A marginally different version of this definition has been approved by the English courts.[1] More modern definitions have been put forward, but the above quotation provides the essence of an English trust.

1.2 Requirements of a trust

(a) Certainties

In order to be valid an English trust must meet the following requirements:

- certainty of intention;
- certainty of beneficiaries (or objects); and
- certainty of subject matter.

These were so summarised in *Knight v Knight*.[2] In short, they require that there be

1 *Re Marshall's Will Trusts* [1945] Ch 217 and *Green v Russell* [1959] 2 QB 226.
2 (1840) 3 Beav 148.

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sufficient certainty of the intention to create a trust in the words used to create it, and that both the trust property and the beneficiaries of the trust be identifiable (and human, *Re Wood*[3] – though trust monies may be expended on non-human objects; see later regarding purpose trusts). English courts have, over the years, struggled with the question of certainty of intention, with the result that some of the older cases are difficult to reconcile. A more modern approach would be to look at the purpose of the whole document generally. Mere precatory words (words of hope) are unlikely to be found to create a trust today, unless the intention of the whole deed would support that interpretation.

In terms of certainty of objects, the modern test is that from *McPhail v Doulton*.[4] It is not necessary for the trustees to be able to list the possible members of the class; instead, the trustee must be able to say whether any given person is or is not a member of the class.

(b) Trust deed

Although the conventional way of creating a trust is by written document, there is no general requirement that it must be created by deed or in writing, except where it concerns an interest in land when Section 53 of the Law of Property Act 1925 requires the terms to be in writing (although this does not affect the creation of trusts implied by law – constructive and resulting trusts – over land). A trust can be created orally, it can be imposed by statute and it can be imposed by a court as a result of the conduct of the parties (a constructive trust). A detailed examination of these issues is beyond the scope of this chapter. However, wherever possible the use of a professionally drafted trust deed is urged so that the terms of the trust can be proved accurately. A deed is preferable to a written document alone, so that the deed is capable of proving the terms of the trust without the need for further evidence to prove the written document and so on. For personal trusts, a significant proportion still arises by will. Under some circumstances, the laws of intestacy impose a trust on the estates of those who die without a valid will. These trusts can be for minor beneficiaries, usually children, and for the surviving spouse, where there are also children. The requirements for, and conduct and administration of, will and intestacy trusts is the same as for *inter vivos*, or lifetime, settlements.

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(c) Complete constitution of a trust

Equity requires that for a voluntary trust to be constituted, the settlor must have done everything necessary to bring the trust property under the trustee's control. Equity will, in general, not enforce the completion of an incompletely constituted trust (although, if the settlor executed a trust instrument which clearly identifies the trust property, it is a 'contract under seal' and the trustee and/or beneficiaries may have a contractual claim against the settlor if he declines to transfer the trust property). This point, when taken with the desirability of a trust being by deed, underlines the importance of paying close attention to the formalities when

3 [1949] Ch 498.
4 [1970] 2 All ER 228.

constituting an English trust and transferring to the trustee the property intended to be the subject of the trust. There is no requirement that to be valid a trust must have a trustee. A trust will not fail for lack of a trustee and, if the deed does not provide for further trustees, statute or ultimately the court will provide for the appointment.

1.3 Legislation relating to trusts

The principal statute relating to trusts is the Trustee Act 1925. Broadly speaking, this law provided administrative powers for trustees that were additional to the powers in the deed, unless application of the act was expressly excluded by the deed. However, in the period since 1925, trusts have developed as society has changed its views and, in particular, as investments and their management have changed out of all recognition.

The Trustee Act 2000 has changed the landscape and has liberated the investments trustees can hold, away from a prescriptive approach which laid down, in the Trustee Investment Act 1961, the types of investment held. The modern approach frees the trustees to hold any investments an individual could hold, but requires trustees to take professional advice. While this still means that the decision is that of the trustee, it does put that trustee at risk of liability to the beneficiaries if he has acted without taking that advice and loss is suffered. Even this change of approach has not answered the challenge of modern investment products that are not constructed to acknowledge the trust law distinction between the generation of ‘income’ and of ‘capital gains’. This has an impact in cases where trustees face the fundamental conflict in balancing the interests of those entitled to the current enjoyment of the fruits of the trust fund and those whose interest is in the future (usually on the death of the person currently enjoying those fruits).

The Trustee Act 1925 was part of a codification of private property legislation in that year, including the Law of Property Act, the Administration of Estates Act and the Settled Land Act. At that time, most of the big landed estates in England and Wales were ‘settled land’ as opposed to ‘trusts for sale’, to which the Trustee Act applied.

The vital difference was that the powers to buy and sell for settled land were in the hands of the current ‘tenant for life’, and he merely accounted for the proceeds of sale to his trustees. In trusts for sale, the ‘life tenant’ had no such powers, and it was left to the trustees to buy and sell investments. Under the Trusts of Land and Appointment of Trustees Act 1996, no new settled land settlement can be created, although a similar effect can be created under the control of the trustees of a trust. This legislation reflects a move in the second half of the 20th century to impose more duties on trustees and to make them more actively accountable to beneficiaries.

Other legislation which has had a significant impact on trusts since 1925 includes the Variation of Trusts Act 1958, the Perpetuities and Accumulations Acts 1964 and 2009, Sections 1 (changing the age of minority) and 26 (permitting evidence to rebut presumptions of illegitimacy or legitimacy) of the Family Law Reform Act 1969, the Inheritance (Provision for Family and Dependants) Act 1975, the Human Fertilisation and Embryology Act 2008 (which broadened the meaning of the word ‘children’ when interpreting trusts) and the various pieces of matrimonial property legislation which give powers to the courts, in divorce cases, to intrude into trusts to do right to parties to a marriage.

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1.4 International recognition of trusts

The Hague Convention on the Law Applicable to Trusts and their Recognition was adopted into English law by the Recognition of Trusts Act 1987. This now largely governs the question of jurisdiction and the application of law to any particular trust. The Hague Convention only applies to trusts made voluntarily and evidenced by writing, so will not address trusts created by operation of law. Generally, a settlor is entitled to choose the governing law (either expressly or where there is a choice manifest in the instrument). Where there is no choice, the proper law of the trust is that of the jurisdiction with which the trust is most closely connected, focusing on the location of the assets, the place of administration of the trust and where the trustees conduct their business.

Where a trust deed does not specify the proper law applicable, English courts will normally have jurisdiction where all the relevant parties are physically present within England. Jurisdiction is also likely to be assumed by English courts where the parties (or some of them) are absent but the property is present within the jurisdiction. More tenuous connections will also be accepted as a basis for having jurisdiction, such as the presence of the defendant within English jurisdiction. However, this rule does not apply under the European rules relating to jurisdiction found in the Brussels or Lugano Conventions or the Brussels Regulation on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters. It is always open to the English court to decline to hear a matter on the basis of *forum non conveniens* if it is satisfied that the court of another jurisdiction is a more convenient forum. Enforcement of foreign trust judgments by English courts will follow, provided they arose out of a court which had jurisdiction under the Brussels or Lugano Convention or the Brussels Regulation and are not contrary to public policy. The revised Brussels Regulation (the Brussels Regulation (recast)) has been in force since January 2013 but applies only to legal proceedings started on or after January 10 2015. The original Brussels Regulation (Regulation 44/2001/EC) continues to apply to proceedings started before that date.

Subject to certain limitations, the existing Brussels Regulation recognises jurisdiction agreements. For a jurisdiction clause to satisfy the test set out in the existing Article 23, there must be:

- at least one party domiciled in a member state; and
- a member state court specified in that jurisdiction clause.

The new Brussels Regulation introduces changes to this provision. Under the existing Article 23:

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Under the Article 25 of the recast Regulation:

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which

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may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Other reasons for non-enforcement occur where:

- the judgment was in default of appearance;
- insufficient time was given for a defence; and
- the judgment conflicts with an earlier judgment given by an English court.

1.5 Trustees

In general, any individual, limited company or other corporation may act as a trustee. There are no statutory restrictions on who may be appointed, provided that the person is mentally competent and of age (curiously, a minor can become a trustee by circumstances – a constructive trustee – but cannot be expressly appointed as a trustee). Beneficiaries are not barred from acting as trustees of the trusts from which they take benefit, although there are often cogent reasons for avoiding such appointments, especially because of problems of conflicts of interest. There is no bar to one non-resident acting as a trustee, although it is questionable whether someone outside the country should act in this capacity, given the difficulty of enforcing the terms of the trust against a trustee who is out of the jurisdiction. This point is recognised by Section 36 of the Trustee Act 1925, which gives as one reason for the removal of a trustee his having been outside the country for 12 months. This is only a permissive ground, not a mandatory disqualification, and requires an application to court. If the appointment of new non-resident trustees leads to the general administration being carried out abroad, because, as a matter of fact, decisions are taken abroad, the issue takes on a more complicated nature.

The question of whether trusts can be enforced in the place where the administration is taking place often arises. In the Privy Council's ruling in *Crociani*[5] it was held that a clause specifying a forum for administration of a trust is not a jurisdiction clause.

Crociani looked at whether the test applicable to jurisdiction clauses in contracts should be applied in trust cases. The test in contracts requires that there are exceptional circumstances or 'strong reasons' to depart from the clause.[6] The Privy Council stated as follows:

> *… the Board is of the opinion that it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract…*
>
> *Where, as here (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause …*

Thus, beneficiaries may be able to question a change of forum of administration

5 *Crociani v Crociani* [2014] UKPC 40.
6 *Donohue v Armco Inc* [2002] 1 All ER 749 (HL).

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by the trustees if it appears that the trustees had acted improperly in making the move and hence had not validly retired as trustees.

Unless the trust deed defines the number of trustees, there is in general no limit to the number of trustees for a trust. If the trust is one of land, only the first four named trustees will hold the legal title to the land (Section 34 of the Trustee Act 1925). Land can be held by only one trustee, but unless that sole trustee is a trust corporation (see below) a sole trustee cannot give good receipt for the sale proceeds of land and therefore a minimum of two would be needed to effect a sale. A trustee contracts for all services to be provided for the trust in his personal capacity. The trust does not have a legal personality for this purpose and cannot contract with third parties, nor does the trustee contract in some intermediate form as trustee. The contracts are personal and a creditor is therefore a creditor of the trustee, not the trust. The personal funds of the trustee are thus at risk. The law recognises that trustees have a right of indemnity from the trust fund for liabilities that they incur as trustees in the proper execution of their office (contained in Section 31 of the Trustee Act 2000). This indemnity is underpinned by a lien over the trust fund, establishing an equitable interest over the trust assets in the trustees' favour, limited to the extent of their indemnity. Of course, if the trust fund is insufficient to meet the demand, the trustee will be liable. Trustees must therefore be very sure of the extent of the financial obligations they incur in the course of trust business, and ensure that the trust will always be sufficient to meet its obligations. Where the trust fund is insufficient but trust assets have been appointed to beneficiaries, the right of indemnity persists even when the funds leave the trust. In most cases, trustees will not rely on the indemnities provided by the law and will insist on an express, written indemnity (or a lien over a proportion of the trust assets).

This is an extract from the chapter 'England and Wales' by Martyn Gowar and Ziva Robertson in Trusts in Prime Jurisdictions, Fourth Edition*, published by Globe Law and Business.*

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