

Glossary

ab initio

From the beginning (pronounced 'ab in-ish-ee-oh').

account

A process by which the court assesses the sum due from one person to another, and the remedy of payment of the sum due that is ordered at the end of the assessment process.

accumulation of income

Instead of being spent or otherwise applied, trust income is sometimes retained by the trustees and accumulated. Accumulation of income is not the mere retention of income for administrative purposes. It is the process of adding income to capital. As Harman LJ put it in *Re the Earl of Berkeley* [1968] Ch 744 at 772: 'Accumulation to my mind involves the addition of income to capital, thus increasing the estate in favour of those entitled to capital and against the interests of those entitled to income'.

acquiescence

The decision by an injured party not to take action in response to the wrong done. Acquiescence may be a ground for barring a claim.

***ad valorem* stamp duty**

A tax charged as a percentage of the value transferred by a document.

advancement

A statutory power granted to trustees (which may be altered, enlarged or removed by the trust instrument) under which the trustee can apply trust capital for the benefit of beneficiaries even though the beneficiaries are not yet strictly entitled to it.

beneficial joint tenants

Where legal title to land is in the joint names of two or more persons who are also joint owners in equity, the co-owners are said to be beneficial joint tenants. Husband and wife will often be beneficial joint tenants.

bequest

A gift of personalty made by will. Personalty means personal property, so the term includes all forms of property apart from land. The one exception is leases, which for historical reasons are treated as personalty.

bona fide

Good faith (pronounced 'bone-a fyde' or 'bonna fye-dee').

bona vacantia

(pronounced 'bone-a vak-ansh-ee-a' or 'bonna vak-ant-ee-a'). Vacant goods, i.e. ownerless property. In England and Wales ownerless property will usually pass to the Crown or the Duchy of Lancaster.

capacity

‘Legal competency or qualification’ (*Oxford English Dictionary*).

certum est quod certum reddi potest

That is certain which can be made certain (pronounced ‘sir-tumm esst quad sir-tumm red-dee poh-test’).

cestui que trust

The one who trusts, i.e. the beneficiary of a trust (pronounced ‘settee key trust’).

civil partnership

A registered relationship between two people ‘of the same sex’ (Civil Partnership Act 2004).

‘class’

Persons who ‘come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares’ (per Lord Selborne LC, *Pearkes v Mosely* (1880) 5 App Cas 714 at 723).

compound interest

Interest calculated annually by adding to the capital the simple interest which has arisen during the previous year. Compound interest for the following year is calculated on the compound sum of capital and simple interest. The following year accumulated compound interest is added to capital, and the process repeated. It is, essentially, interest on interest.

constructive trust

A trust imposed by the court on the legal owner of an asset to prevent that person asserting beneficial ownership of the asset in bad conscience to the prejudice of the true beneficial owner.

covenant

This is a promise contained within a deed is called a ‘covenant’. A covenantee (i.e. a person to whom a promise is made by deed) is not a mere volunteer because the deed itself (or, traditionally, the seal on the deed) is deemed to satisfy the common law requirement of consideration. Any party to the deed can enforce the covenant against the person who made the promise (the covenantor). A person is a party to a deed when they are named in the deed and signed it.

CREST

An electronic share settlement system introduced to the UK Stock Exchange in 1996. It is administered by a company called Euroclear (formerly known as Crestco, formerly known as De Facto 340).

cy près

Old law French for the ‘the nearest thing’, literally ‘that which is near’ (pronounced ‘sea-pray’).

debt

'A monetary obligation owed by one person to another which is an item of value because it can be transferred to a third party by way of sale or security for a loan' (Michael Bridge, *Personal Property*, 2nd edn, Blackstone Press, 1996, p. 4).

delegatus non potest delegare

This is the classic maxim which summarises the trustees' duty of personal service. It means 'the delegate has no power to delegate'.

devise

A gift or trust of realty made by will. Realty means real property, so the term would include land apart from leases.

donatio mortis causa

A gift made *inter vivos* in expectation of the donor's imminent death, but which is not fully effective until the donor's death.

dualism

In its most extreme form, the belief that, despite the Judicature Acts, equity remains utterly distinct from the common law.

equitable maxim

This is a traditional judicial principle developed in the old Court of Chancery which serves as a guide to the exercise of discretion in the application of equitable doctrines and the award of equitable remedies.

fee simple

The largest and best form of land ownership in English law.

fiduciary

(As an adjective) descriptive of a duty of exclusive loyalty owed in law by one person to another and descriptive also of certain offices (the paradigm being trusteeship) under which a fiduciary duty is always one of the duties owed. (As a noun) descriptive of certain people: although a trustee is the paradigm fiduciary, the term 'fiduciary' is often used as shorthand to indicate 'a fiduciary other than a trustee'.

fusion

In its most extreme form, the belief that, after the Judicature Acts, equity and the law are indistinguishable.

gift subject to conditions precedent

The intended donee of such a gift will not be entitled to the gift unless he or she first satisfies a particular condition, e.g. he or she might have to qualify as a barrister before the gift vests.

gift subject to conditions subsequent

Such a gift vests unconditionally in the donee, but will be forfeited if the donee subsequently breaches a condition to which the gift was subject, e.g. the gift of land to a person might come to an end in the event of their moving to live abroad.

half-secret trust

This is where X formally leaves property by his will to Y expressly 'on trust' for another, but where Y is only informally made aware of the identity of that other. It will be clear on the face of the will that Y is not the beneficial owner of the property.

in loco parentis

'In the parent's place'. A guardian is said to stand in loco parentis to the child in his or her care (pronounced: 'inn low-co pair-entiss').

in personam

A remedy, such as an injunction, is said to operate *in personam* because it is enforced against a defendant personally. An *in personam* action is normally contrasted with an action *in rem*, which is a claim against property held by the defendant.

in rem

A right is an *in rem* right (also known as a 'proprietary right') where it is enforced against assets in the defendant's hands in which or over which the claimant has a proprietary interest, thus it is not defeated by the defendant's personal insolvency.

inter vivos

Also known as a 'lifetime' trust. A trust is said to be inter vivos if it is effective within the lifetime of the settlor. The person setting up an *inter vivos* trust is called a 'settlor'.

intermediate income

Income arising from a gift, including a trust, during the period between the effective date of the trust (e.g., the date of the testator's death, in the case of a trust made by will) and the date that the beneficiary's interest vests in possession.

intestacy

The legal scheme for distributing the estates of people who die without leaving a valid will.

investment

The process by which assets are applied with the intention of producing income and/or capital growth over the medium to long term.

'issue of the marriage' and 'marriage consideration'

Issue will include children and even grandchildren, but not children of a previous marriage (unless their interests are 'interwoven' with those of the children of the marriage (*AG v Jacob Smith* [1895] 2 QB 341), nor, it seems, 'illegitimate' children (despite the Family Law Reform Act 1987). The notion that children of a marriage have provided consideration is, according to Buckley J in *Re Cook's ST* [1965] Ch 902, a deliberate 'fiction'. In fact, the treatment of marriage as consideration is itself a fiction, not least because it functions as if

it were common law consideration, even though strictly speaking it was a creation of the Court of Chancery.

laches

Delay or 'laxness' in bringing a claim. A claim against a defendant will be barred by reason of the claimant's laches if there was such a delay in bringing the claim as is likely to prejudice the defendant's fair trial or otherwise offend the public interest in finality of litigation.

'lives in being'

Persons alive at the 'effective date' of the grant, or persons in their mother's womb at that time who are later born (see *Re Wilmer's Trusts* [1903] 2 Ch 411). However, for the purpose of the rule against remoteness of vesting 'lives in being' include only 'relevant' or 'measuring' lives in being. These descriptions usually correspond to those persons who are expressly or impliedly referred to in the instrument by which the disposition is effected. Thus the lives in being at the date of execution of an *inter vivos* gift to 'such of my grandchildren as qualify as lawyers' include not only the grandchildren, but also the settlor and any of his children who are then alive. The grandchildren were expressly referred to, the reference to the settlor and his children is implicit.

maintenance

A statutory power granted to trustees (which may be altered, enlarged or removed by the trust instrument) under which the trustee can apply trust income for the benefit of infant beneficiaries of the trust.

mandate

A binding instruction given to an agent.

marriage settlement

'A legal arrangement by which property is given or secured when a couple get married' (*The Oxford Dictionary of English*, Oxford University Press).

mutual wills

These are wills entered into by two or more persons in identical form and intended to be irrevocable upon the death of the first of them to die.

overreaching

This process enables a purchaser of land to take free of the beneficiaries' interests provided he pays all the trustees and the trustees are at least two in number or a trust corporation.

'perpetuity period'

For the purpose of this rule this is the period ending 21 years after the death of all 'lives in being'.

proselytise

'To convert or attempt to convert (someone) from one religion, belief, or opinion to another' (*The Oxford Dictionary of English*, 2nd edn, Oxford University Press, 2003).

quantum meruit

The literal translation of this Latin phrase is 'as much as he has deserved'.

According to the *The Oxford Dictionary of English* 'a reasonable sum of money to be paid for services rendered or work done when the amount due is not stipulated in a legally enforceable contract' (2nd edn, Oxford University Press, 2003).

quia timet

'Because he fears'. A quia timet injunction is ordered where a civil wrong is threatened but has not yet been committed.

re-conversion

'That notional or imaginary process by which a prior notional conversion is annulled or discharged, and the notionally converted property restored...to its original actual quality' (Snell's Equity, 20th edn, Sweet & Maxwell, 1929).

religious belief

'Monotheism' is belief in one God; 'polytheism' is belief in more than one god; 'atheism' is belief in no god at all and 'agnosticism' is a belief that neither affirms nor denies the existence of a God or gods.

restitutio in integrum

To put the parties back into the position they were in prior to entering the rescinded agreement.

restitution

There is no simple definition of restitution, and if there is, it is disputed on account of its simplicity. For present purposes we will adopt Professor Andrew Burrows' simple (and disputed) proposition that 'Restitution is the law concerned with reversing a defendant's unjust enrichment at the plaintiff's expense' (*The Law of Restitution*, 1993, Butterworths, p. 1).

resulting trust

Where an attempt is made by the owner of an asset to dispose of the beneficial ownership of the asset, the benefit will return to the donor under a resulting trust whenever the attempt is for any reason unsuccessful, unless it is clear that the owner intended to abandon the entirety of his interest in the asset.

'right of survivorship'

This is where an asset, such as land or the balance of a bank account is owned 'jointly' (i.e. not in shares) so that each owner can be said to own the whole of the asset, on the death of one joint tenant the surviving joint tenant (or joint tenants) remains owner of the whole by 'right of survivorship'. It is important to realise that survivorship is not a process of inheritance. The joint tenant who survives does not inherit anything. He or she was already owner of the whole.

secret trust

This is a trust binding on property passed under a will, but which does not comply with the formalities required the Wills Act. It is effective because it binds the conscience of the

person to whom the property passes under the will, that person having accepted the trust when the testator was still alive.

simple interest

Interest calculated, usually on an annual basis, on the capital monies due from the trustee to the trust.

specific performance

An equitable remedy taking the form of an order of the court requiring performance of a contract; it is awarded where the court will not permit the defendant to breach his contract and pay common law damages by way of remedy.

sui juris

Adult and of sound mind (pronounced 'soo-ee your-is').

testamentary

Any trust which comes into effect upon the death of the person setting up the trust is said to be 'testamentary'. The person setting up such a trust is called a 'testator' (if male) and a 'testatrix' (if female).

the 'effective date' of a disposition

This varies according to whether the disposition was made *inter vivos* or by will. An *inter vivos* deed of gift or trust is effective at the date of its execution. A testamentary gift or trust is effective, not at the date of execution of the will, but at the date of the testator's/testatrix's death.

'The three certainties'

certainty of intention = a certain intention to create a trust (i.e. words and conduct which create an imperative obligation); certainty of subject = certainty with regard to the assets (property) subject to the trust and the shares in which it is to be held by the beneficiaries; certainty of object = certainty with regard to beneficiaries or purposes of the trust.

trustee *de son tort*

'If one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with the trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong, i.e., a trustee *de son tort*, per Smith LJ in *Mara v Browne* (1896) 1 Ch 199 at 209.

types of interest

These are: 'vested in interest', 'vested in possession' and 'contingent'. The difference between the two types of vested interest can be illustrated quite simply by taking the classic trust 'to A for life and B in remainder'. In such a trust, both A and B are entitled to an interest, their interests have both 'vested in interest'. However, only A can claim to be entitled to the *present use and enjoyment of the trust property*, B has to wait until A dies. So it is said that only A's interest has 'vested in possession'. Where an interest might never be acquired, as in the case of a gift that is dependent upon the happening of an uncertain event, e.g., 'to A when he qualifies as a barrister', A's interest is said to be 'contingent' and as such it has not 'vested' in either sense of the word.

volunteer

Where a promise is made voluntarily in favour of a person, the person claiming the benefit of the promise is said to be a volunteer. A volunteer does not give contractual consideration for the performance of the promise.