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Difference between an express trust and other types of legal relationships

Agency vs Trust

Key Takeaways

- Trust and agency both involve fiduciary duties but differ in **legal title, duration, and ownership structure**.
- A trust survives the trustee's death; an agency does not survive the death of the agent or principal.
- An agent may become a trustee only if required to **keep funds separate and account specifically** to the principal.
- In agency contracts, **the principal**, not the agent, is the contracting party — unlike in a trust, where the **trustee** holds and deals with property as **legal owner**.

Trust	Agency
• Parties: Trustee who holds the legal title for the benefit of another (Beneficiaries or Objects).	• Parties: The Agent is empowered to <u>effect</u> the legal relations of their Principal.
• Fiduciary: Owes Fiduciary Duties.	• Fiduciary: Owe Fiduciary Duties.
• Effect of Death: The Trust does not terminate upon the death of a Trustee — a new Trustee is appointed.	• Effect of Death: Agency terminates upon the death of the Principal or Agent.
• Title to Property: The legal title to Trust property is vested in the Trustee.	• Title to Property: The legal title to any property held by an Agent is usually vested in their Principal. Money received may be held as trustee.

Distinguishing Express Trusts from Other Legal Relationships

Before determining whether a **validly constituted trust** has been created, it is necessary to first examine whether the **relationship between the parties** is in fact that of an **express trust**, or whether it might instead fall within another legally recognised relationship — such as **agency, bailment, charge, contract, debt, or partnership**.

(As the lecturer notes, this recalls earlier study from *Principles of Private Law*.)

1. The Relationship of Agency

1.1 Nature of the Agency Relationship

In a **relationship of agency**, the **agent acts upon authority** granted by the **principal**.

The relationships of **agency and trust** can appear quite similar on the surface — in both:

- One party acts **on behalf of** and **for the benefit of** another; and
- The party acting in that role must **advance the interests** of the other.

In early **English legal history**, there was **no clear distinction** between trusts and agency relationships.

1.2 Fiduciary Character

Both trustees and agents are examples of **status-based fiduciary relationships**.

Both owe **fiduciary duties** in the performance of their respective roles — duties of loyalty, proper purpose, and avoiding conflicts of interest.

2. Distinctions Between Trust and Agency

2.1 Termination of the Relationship

- The **agency relationship terminates** upon the **death** of either the **principal** or the **agent**.
- The **trust relationship**, however, **continues** even if the **trustee dies**, because the trustee can be **replaced** and the trust relationship endures.

2.2 Ownership and Legal Title

- Unlike a trustee, an **agent does not require legal title** to the property in order to perform their role.
- The **trustee**, by contrast, is the **legal owner** of the trust property.

Cohen v Cohen

Key Takeaways

- The case demonstrates the **critical distinction** between a **trust** and a **debt** within an agency relationship.
- The **requirement to keep funds separate and to account specifically** indicates a **trust**.
- The **freedom to mix funds and repay an equivalent amount** indicates a **debt**.

Facts:
Mrs Dolly Cohen brought an action against her husband, Mr Lionel Cohen for several sums of money.

The Furniture Sale

- Some **furniture** was owned jointly by Mr and Mrs Cohen.
- The furniture was sold, and Mrs Cohen's share amounted to £123.
- She argued that her husband **held this amount on trust** for her.

The Insurance Policy

- The couple held an **insurance policy** covering valuable items of personal property.
- The insurer paid **Mr Cohen** a claim for **damaged earrings** belonging to **Mrs Cohen**.
- Alleged that she (**Mrs Cohen**) had **repeatedly requested** that her husband **account for the sum**, but he failed to do so.
- Mr Cohen said he had **acted as her agent** in making the insurance claim.
- Mrs Cohen contended that the **insurance proceeds** were held **on trust** for her.

3. When an Agent May Also Be a Trustee

In some cases, an **agent may also be a trustee** of property received while acting as agent.

Examples include:

- Where **money is entrusted** to the agent by the principal; or
- Where **money is received** by the agent on behalf of the principal.

Whether the agent holds that money **on trust** depends on the **terms of the agency relationship**.

- If the agent is **bound to keep the funds separate** from their own and **account specifically** for them to the principal → the agent **holds the money on trust**.
- If the agent is **permitted to mix the funds** with their own and is **only obligated to repay an equivalent sum**, → the agent is merely a **debtor** to the principal, not a trustee.

(The lecturer noted that this principle will be illustrated in the case of *Cohen v Cohen*, discussed shortly.)

4. Contracting Authority

When an **agent enters into a contract** on behalf of the principal:

- The **contracting party** is the **principal**, not the agent.

By contrast:

- A **trustee** is the **legal owner** of the **trust property** and is therefore the **principal party** in any transaction concerning that property.

Thus, the **trustee's role** in dealing with trust assets differs fundamentally from that of an **agent**, who acts purely **on authority** and **without ownership**.

The Jewellery Purchase

- Mr Cohen** ran a **jewellery import business**.
- Mrs Cohen**, who was originally from **Germany**, was owed money by a **German debtor**.
- After **World War I**, transferring funds from Germany to Britain was difficult, so she arranged for her husband to:
 - Travel to Germany,
 - Collect the funds owed to her, and
 - Purchase jewellery with that money, which could then be imported into Britain for his business.
- Later, the couple moved to **Australia** and their relationship broke down.
- Mrs Cohen sought to recover all sums from these transactions.

Issue:

Had Mr Cohen acted as Mrs Cohen's agent, or did he hold the sums on trust for her?

- If Mrs Cohen's claims were merely **debts**, they would be **barred** by the **statute of limitations** in force at the time.
- However, if the claims instead gave rise to **trust relationships**, they would be **exempt** from that statutory limitation period.
- Mrs Cohen therefore argued that:
 - o Her husband had acted as her **agent** in each of the relevant transactions; and
 - o He held each **sum of money received on trust** for her, not merely as a **debtor** owing an equivalent amount.

Rule: Dixon at [101]:

For Trust-Trustee:

- "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in it bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust."

For Agency:

- If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee but a mere debtor."
 - o Note:
 - o This is exactly how Dixon J characterised the **German marks** transaction. The husband was not accountable specifically for the funds or the goods into which they were converted. Therefore, this was a **personal debt**, and the limitation period applied unless acknowledged.

4. Judgment of Justice Dixon

Justice Dixon (sitting as sole judge) identified the **central question**:

- Whether the money received from the sale of the furniture, the insurance policy, and the jewellery transactions — received by Mr Cohen as his wife's agent — was **held on trust** for Mrs Cohen, or whether he merely **owed her a debt**.

Legal Test (simplified ratio)

- If Mr Cohen was **required to keep the property or funds separate** from his own and **account for it specifically** to Mrs Cohen → a **trust** existed.
- If instead he was **only required to repay an equivalent sum**, → the relationship was one of **debt**.

5. Application and Findings**Furniture and Insurance Proceeds**

Justice Dixon held that:

- Mr Cohen had indeed acted as his wife's **agent in those transactions**; and
- The money received in those two transactions was **held on trust** for Mrs Cohen.

He found that Mr Cohen was:

- **Obligated to keep the funds separate** from his own; and
- **Required to account specifically** to Mrs Cohen for them.

Each of these two transactions therefore gave rise to a **trust relationship**, meaning the claims were **exempt** from the statute of limitations.

Jewellery Purchase

By contrast, for the jewellery transaction:

- There was **no requirement** that Mr Cohen account specifically to Mrs Cohen for the funds received.
- The **agreement** between them was that:
 - o Mr Cohen would **repay her an equivalent sum** out of his own money; and
 - o The **goods purchased (the jewellery)** would **belong to him**.

Thus, although he had acted as her **agent**, he did **not hold the funds on trust** for her — the relationship was one of **debt**, not trust.

6. Outcome

- **Two of the claims** (furniture and insurance) involved **trust relationships** and were **not barred** by limitation.
- The **third claim** (jewellery) did **not create a trust** and would normally have been **barred**, though Mrs Cohen ultimately recovered the amount for reasons **beyond the scope of the course**.

Trust and Bailment

1. The Relationship of Bailment

1.1 Definition and Parties

In a **bailment**, the **owner of property**, called the **bailor**, may create a **bailment** over an item of their **personal property**, entitling another party, called the **bailee**, to **retain possession** of that item for a specified period of time.

1.2 Nature of Rights in Bailment

- A **trustee** holds **legal title** to trust property.
- By contrast, a **bailee** does **not obtain legal title** to the property bailed — they receive **only a right of possession**.
- Bailment can arise **only in relation to tangible personal property**.

By comparison, a **trust** may be created over **any type of legally recognised property** — whether **tangible or intangible, personal or real**.

1.3 Consequences of Lack of Title

- Because the **bailee** does **not hold title**, they generally cannot confer title on others. Unless one of the **statutory exceptions** in the **Sale of Goods Act** applies (the details of which are beyond the scope of the course), the **nemo dat** principle will preclude a **third party** from obtaining good title from a bailee.
- By contrast, if **trust property** is sold to a **bona fide purchaser for value without notice** of the beneficiary's equitable interest, that third party will **obtain legal title** to the property, free of the equitable interest.

1.4 Remedies in Bailment

Because a bailment **does not create a trust**, the **bailor** is confined to **common law remedies**, including:

Trust	Bailment
<ul style="list-style-type: none"> • Parties: Trustee who holds the legal title for the benefit of another (Beneficiaries or Objects). 	<ul style="list-style-type: none"> • Parties: The Bailor transfers possession of an item of personal property to a Bailee. The Bailor retains the legal title to the property bailed (cf Principles of Private Law).
<ul style="list-style-type: none"> • Title: As the Trustee has legal title, title can validly pass to a Bona Fide Purchaser. 	<ul style="list-style-type: none"> • Title: The Bailee does not obtain Legal Title – if they purport to 'sell' the property the purchaser will be required to return the property: <i>nemo dat</i>.
<ul style="list-style-type: none"> • Remedies: A Trustee who breaches their duties will be liable in Equity for Breach of Trust or Breach of Fiduciary Duty. 	<ul style="list-style-type: none"> • Remedies: A Bailee who breaches their obligations may be liable in Tort for Negligence, Conversion or Detinue (cf Principles of Private Law) but will not be liable in Equity.

These differ from **equitable remedies** available under a trust.

Trust and Charge

Fundamental difference ([13.26])

The core distinction lies in the nature and extent of the rights:

	Trust	Equitable Charge
Nature of right	Equitable ownership Type of Right: The Beneficiary's interest is a proprietary interest in the Trust property. (i.e. Beneficiary owns or shares in the property) <i>(Note: this will only apply to Beneficiaries under a Fixed Trust).</i>	Security interest Type of Right: The Chargee has no right or interest in the property subject to the Charge – they have only a security interest to secure the repayment of the Chargor's personal obligation. (i.e. Chargee can only recover the amount owed)
Primary remedy	Beneficiary can seek full equitable remedies (including tracing, specific performance, injunctions, etc.) Remedies: Personal and Proprietary.	Chargee can only force sale of the property or appoint a receiver Remedies: Judicial sale of the charged property, personal liability for remaining debt.
Ownership	Trustee holds property <i>for</i> the beneficiary	Chargor still owns property; chargee just has a right to use it as security
Foreclosure	Possible under a trust	Not available to a chargee
Registration	Not required for equitable interests generally	Required by statute (e.g., under the <i>Personal Property Securities Act 2009 (Cth)</i> if personal property)

So: A **trust** gives the beneficiary **equitable ownership** of the trust property.

- A **charge** gives the chargee **only a limited right** — to have the property sold to satisfy the debt.

1. What is an equitable charge ([13.24])

An equitable charge arises when A (the **owner of property**) agrees that B will have the **right to use A's property as security** for a **debt or obligation** that A owes to B.

Importantly:

- A does **not transfer ownership** of the property to B.
- A does **not give possession** of the property to B.
- But B gains an **equitable right** that allows them, if A fails to pay, to ask the court to **sell or apply the property** to satisfy the debt.

So B's right is **equitable**, giving them a claim **against the property** if the obligation isn't met.

2. What trusts and charges have in common ([13.25])

Both **trusts** and **charges**:

- Create **equitable interests**:
 - In a trust → the **beneficiary** has an equitable ownership interest.
 - In a charge → the **chargee** (the lender or creditor) has a security interest.
- Both can be **defeated by a bona fide purchaser for value without notice** — someone who buys the property honestly, pays for it, and doesn't know about the equitable interest.
- Even if the property is lost to such a purchaser, the beneficiary or chargee still has **personal remedies** (they can sue the trustee or chargor personally) and may claim the **sale proceeds** received.

2.2 Rights of the Chargee

- The **chargee** can claim **only the amount secured**, and may do so either:
 1. By **repayment** from the chargor; or
 2. Through a **judicial sale** of the charged property.
- However, the **chargee is not entitled to possession or ownership** of the charged property.
- Thus, their rights are **less extensive** than those enjoyed by a **beneficiary under a trust**.

2.3 Distinction Between a Charge and a Trust

The essential difference is that:

- The **chargee** has only a **beneficial security interest**, not the **full beneficial ownership** that a **trust beneficiary** holds.
- When the **obligation secured by the charge** is repaid, the **beneficial interest wholly re-vests in the chargor** (the owner).
- Unlike a **trustee**, the **chargor** does **not hold the property** for the benefit of the **chargee**, and the **chargee is not the equitable owner** of the property.

2.4 Remedies of the Chargee vs Beneficiary

- A **beneficiary under a trust** can **enforce performance** of the trust and obtain both **personal and proprietary remedies**, which flow back to the **trust fund**.
- The **chargee's remedies are more limited**:
 - They may seek a **judicial sale** of the charged property; and
 - If there is a **shortfall**, they retain a **personal right** against the **chargor** for the **balance of the debt**.

4. Modern confusion and commercial drafting ([13.27])

In commercial agreements (especially secured loans), drafters sometimes **use the language of a trust** when the arrangement is really a **charge** — for instance, calling the lender a “**beneficiary**” instead of a “**chargee**.”

However:

- **Form doesn't determine substance.** Courts look at the **true legal effect** of the transaction.
- If the arrangement merely secures repayment of money, it's a **charge**, not a trust.
- Only if the parties genuinely **intend to create a trust relationship** (e.g. holding money “on trust” for another) will it be treated as such.

Under the **Personal Property Securities Act 2009 (Cth)**, the distinction is less critical in practice because both **trust-based and charge-based security interests** must be **registered** if they function as security.

- **BUT IN ASSOCIATED ALLOYS VS ACN (THE REASON WHY IT WENT TO COURT IS BECAUSE IT WASN'T REGISTERED UNDER (I.E. TO MAKE IT SECURE AGAINST THE LIQUIDATOR, CUZ THEY WENT BANKRUPTED))**

Associated Alloys v ACN (2000) 202 CLR 588

Facts:

- The case concerned a **retention of title clause** in a contract for the sale of steel.
- The clause was designed to **protect the supplier's financial interest** in the event that the **buyer (a manufacturer)** became insolvent.
- It included a **proceeds sub-clause**, providing that the **proceeds of sale** of any product containing the supplier's steel were to be **held on trust for the supplier**.
- Under the contract:
 - **Clause 3:** “The [Buyer] will receive all proceeds ... **in trust for the [Seller]** and will keep such proceeds in a separate account until the liability to the [Seller] has been discharged.”
 - **Clause 5:** “In the event that the [Buyer] uses the goods/products in some manufacturing or construction process ... then the [Buyer] shall hold such part of the proceeds ... **on trust for the [Seller]**.”
- The **manufacturer became insolvent**, and the **supplier sought recovery** of those proceeds.
- The **liquidator argued** that the clause did **not create a trust** but rather a **charge**, and since it had **not been registered**, it was **void** against the liquidator.

Issue:

Whether the **proceeds sub-clauses** created:

1. a **trust**, or

Application

Construction of the Clause

- The court emphasised that each **Romalpa clause** (retention of title clause) must be **interpreted according to its own text and context**.
- Labels like “**Romalpa clause**” are **no substitute** for careful application of **equitable principles** to the **actual wording** used.

The Key Proceeds Sub-Clause

- This language **expressly created a trust**.
- The **absence** of an express term requiring the buyer to keep proceeds separate **did not negate the trust**, since:

<p>2. an equitable charge (which would have required registration under s 263 of the <i>Corporations Law</i>). If it was a charge, then under s 266(1) of the <i>Corporations Law</i> it would be void against the liquidator or administrator because it was not registered.</p> <p>Held: Clause 5 created a trust, not a charge.</p> <p>Rule/Ratio held</p> <p>At 596, [6]: “The proprietary interest created [by the charge] is held by way of security, so that the chargee may resort to the charged asset only for the purpose of satisfying some liability due to the chargee. The charge is subject to the equity of redemption retained by the owner. However, the beneficial interest held under an express trust is not so limited in nature. The remedy of the beneficiary is to proceed in equity for the performance of the trust, not for the sale of trust property to satisfy a secured liability”.</p> <p>At 605, [34]: “<i>An express obligation upon the Buyer to keep the “proceeds” separate would have pointed to the existence of a trust if none had been explicit.</i> But where the existence of a trust is explicit, the absence of an express obligation to keep trust moneys separate does not deny the trust.”</p>	<ul style="list-style-type: none"> ○ The existence of a trust was clear on the face of the clause, and ○ Equity itself imposes duties on a trustee, including the duty to keep trust property separate and identifiable. <p>Intention of the Parties</p> <ul style="list-style-type: none"> ● There was no evidence of a sham or contrary intention. ● The terms of the invoices reflected the genuine intention to create a trust. <p>Outcome</p> <ul style="list-style-type: none"> ● The clause created an agreement to constitute a trust over future proceeds. ● It was not a charge, and so the registration requirements did not apply. ● Appeal dismissed; supplier succeeded.
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Trust and Condition

[13.28] – [13.30]

<p>[13.28] Nature of Conditional Dispositions</p> <ul style="list-style-type: none"> ● Property may be given upon a condition that the recipient pays a third party a sum of money or performs another obligation in favour of that third party. ● It will be a question of construction whether such an arrangement creates: <ol style="list-style-type: none"> 1. A trust for the third party, 2. A charge in favour of the third party, or 3. A gift subject to a condition precedent, which must be fulfilled before the gift takes effect. <p>[13.29] Reluctance to Recognise Conditions Precedent</p> <ul style="list-style-type: none"> ● Courts are reluctant to construe a disposition as a gift subject to a condition precedent. ● This reluctance stems from the fact that, if the recipient fails to perform the condition: <ul style="list-style-type: none"> ○ The recipient forfeits the gift, and ○ The third party receives no benefit. ● A third party beneficiary of a condition precedent: <ul style="list-style-type: none"> ○ Has no equitable interest (unlike a trust beneficiary). ○ Has no security interest (unlike a chargee). ● Nevertheless, courts have recognised that gifts can fail for non-performance of a condition precedent. <p>Case Example: Re Gardiner</p> <ul style="list-style-type: none"> ● The testator's will stated: “I give, devise and bequeath all my estate... unto my son Ivor, subject to my said son paying the sum of \$1000 within two years of my death to my son Albert.” ● Held: <ul style="list-style-type: none"> ○ This created a condition precedent. ○ Ivor's failure to make the payment within two years resulted in forfeiture of his interest. ○ The estate passed to the next of kin. 	<p>[13.30] Conditions Subsequent and Alternatives</p> <ul style="list-style-type: none"> ● In some cases, the condition is construed as a condition subsequent: <ul style="list-style-type: none"> ○ It relates to the use of the property after the gift is made. ○ If the donee fails to observe the condition, the gift may fail, and the intended beneficiary loses the benefit. <p>Equitable Alternatives to Invalidity</p> <ul style="list-style-type: none"> ● An alternative to total invalidity in cases of condition subsequent is to impose a personal obligation on the donee to compensate the intended beneficiary for loss caused by non-performance. ● Whether this is possible depends on the construction of the instrument. <p>Case Example: Gill v Gill</p> <ul style="list-style-type: none"> ● A farm with homestead was devised to a son on the terms: “That he keep the homestead as a home and provide board and residence for his sisters if they were unmarried.” ● Held (Harvey J): <ul style="list-style-type: none"> ○ The condition did not create a trust. ○ The sisters had no proprietary interest in the property. ○ However, failure to observe the condition could result in a personal obligation to compensate the sister under equitable principles. <p>Case Example: Cobcroft v Bruce</p> <ul style="list-style-type: none"> ● The will stated: “I give to my wife... my shares in public companies, to deal with as she in her absolute discretion sees fit, but otherwise on condition that she ultimately gives those shares, or the remainder thereof, to my nephews.” ● Held: <ul style="list-style-type: none"> ○ The words “deal with” were interpreted as granting the wife a life interest (i.e., the right to use the shares during her lifetime). ○ An equitable condition arose, requiring her to ultimately transfer the shares or what remains to the nephews.
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Trust and Contract MISSING A LOT

- Trident General Insurance v McNiece (1988) 165 CLR 107

	Trust	Contract
Intention	Founded on intention of the settlor	Mutual Intention
Consideration	Not Required	Required
Rights	Personal and Proprietary rights	Personal rights.
Enforcement	Beneficiaries can enforce a trust despite not being a party to its creation.	Doctrine of privity – only parties to the agreement can enforce the contract.
Remedies	A trustee must restore or make restitution of all Trust property and account for all profits flowing from their breach.	A party to the contract may be liable for common law damages for losses by their breach but may retain any profits over and above such loss.

Trust and Contract

[13.31] – [13.32]

[13.31] Contracts Creating 'Trust-like Arrangements'

- Contracts can create arrangements that resemble trusts, particularly where the contract is made **for the benefit of a third party**.
 - Example: A contract provides that A is to pay \$1000 to B for the benefit of C.

Third-Party Benefit and Privity

- There is **no public policy objection to contracts for the benefit of third parties**.
- However, such contracts are generally **unenforceable by the third party (C)** due to the **doctrine of privity of contract**.

Remedies and Limitations

- Even though C is the **intended beneficiary** of A's performance:
 - C has **no beneficial interest** in any payment made to B.
 - C **cannot invoke the remedies** available to a trust beneficiary.
- Additionally, the **promisee (B)**:
 - **Cannot recover substantial damages** for breach of contract.
 - This is because **B has suffered no loss**, and thus is only entitled to **nominal damages**.

[13.32] When a Trust is Intentionally Created Over a Contractual Benefit

- The legal position **changes** if A and B intend B to hold the benefit of A's performance **on trust for C**.
- In that case:
 - **B's right to sue for breach** becomes a **chose in action**, and
 - That chose in action is **held on trust for C**.

Legal Consequences

- C, as **beneficiary of the trust**, will then be:
 - **Entitled to sue A for non-performance** of the promise.
- If B (the trustee) **fails to sue A**, C may:
 - Join B as a **co-defendant** in a claim for **breach of trust**.

Key Legal Question

- The **critical issue** is whether A and B intended to create a trust for the benefit of C.
 - If the contract **expressly or by implication** shows **intention to create a trust**:
 - Then **C will enjoy the rights of a beneficiary**.

Trust and Debt NEEDS TO BE COMPLETED

Trust	Debt
<ul style="list-style-type: none"> Intention of the parties: The trustee holds the legal title to property, but the beneficiary has an equitable interest in the property. 	<ul style="list-style-type: none"> Intention of the parties: The debtor/borrower becomes the beneficial owner of the money lent. They are subject to a personal obligation to repay the creditor/lender.
<ul style="list-style-type: none"> Remedies for breach of trust: personal and proprietary. 	<ul style="list-style-type: none"> Remedies for creditor: personal – based in contract – an action on the debt.

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567

Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491

From TT Chat, I did not review it

Trust and Debt

[13.33] – [13.37]

[13.33] Analytical Possibilities in a Simple Transfer of Funds

- Suppose A **pays \$100 to B**, and there have been **no prior dealings** between them. The legal nature of this transaction is **ambiguous**, and at least **five possible analyses** are open:
 - Gift** – if A intends for B to become the **beneficial owner** of the \$100.
 - Bailment** – if A intends B to **retain possession** of the notes/coins for a **specified period**.
 - Loan** – if the parties intend that B is **free to use the money**, but must **repay an equivalent amount** on demand or at a set time.
 - Express trust** – if the \$100 is transferred to B **on trust for specific persons or purposes**.
 - Resulting trust** – if there is **no evidence** of intention under (1)–(4), B will **hold the money on resulting trust for A**.

[13.34] Distinction Between Loan (Debt) and Trust

- In a loan:**
 - The **borrower (B)** becomes the **absolute owner** of the money.
 - The borrower is **contractually obliged to repay** the sum or perform another obligation.
 - Even if the loan is **intended for a specific purpose**, the borrower may **use it freely**.
 - If the borrower goes **bankrupt**, the lender is merely an **unsecured creditor**, sharing rateably in the debtor's available assets.

[13.35] Characteristics of a Trust

- In a trust:**
 - The **trustee (B)** holds only the **legal title**.
 - The **beneficiary** holds the **equitable title**.
 - The trustee must:
 - Keep the money separate** from their own funds.
 - Apply it only for the purposes** of the trust.
 - If the trustee becomes **bankrupt**, the trust property is:
 - Not part of the trustee's estate**, and
 - Not available to the trustee's creditors**.

[13.36] Implications in Commercial Structuring

- The debt–trust distinction** is fundamental to **commercial law**.
- Example:** The relationship between a **bank and customer** is that of **debtor and creditor**:
 - A **deposit** at the bank is **not trust money**, unless the deposit is **expressly made on trust**.
 - If the customer's account is in credit:
 - The customer is the creditor**.
 - The bank is the debtor**.

[13.37] Quistclose Trusts

- In recent years, some **loan agreements** have been drafted to **create an enforceable trust** as well as a contract.
- These are known as '**Quistclose trusts**', named after the leading case:

Barclays Bank Ltd v Quistclose Investments Ltd.

Nature of a Quistclose Trust

- Money is lent on terms that:
 - It is to be used **only for a specific purpose** named by the lender.
 - It is to be **kept segregated** from the borrower's own funds.
- An **express or implied term** provides:
 - If the money is **not used for the specified purpose**, it will be **held on trust for the lender** and must be **returned**.

Consequences

- If the money is **used for the purpose**:
 - The lender has only a **contractual right** to repayment.
- If the money is **not used for the purpose**, or is **misappropriated**:
 - The lender can enforce **trust remedies**, and may:
 - Recover the funds** from the borrower.
 - Trace and recover** the funds from a **third party recipient**.

Note: Quistclose trusts are discussed further in **Chapters 14 and 22**.

Trust and Partnership

NEEDS TO BE COMPLETED

Raulfs v Fishy Bite Pty Ltd [2012] NSWCA 135

Express Trust

Definition and Nature of the Express Trust

- The express trust has never been **authoritatively defined**.
- Indeed, the **very lack of definition** has been partly responsible for its **evolution as a flexible and effective method for managing wealth**.
- Nevertheless, the **principal features of a trust** can be described in **general terms**.

Ford and Lee's Description

- "An obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of a certain person (the beneficiary) or persons, or for the advancement of certain purposes."

Re Scott [1948] SASR 193, *Mayo J*

- "The word 'trust' refers to the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestuis que trust, or beneficiaries, if there be any; if not for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest."
 - In essence, this definition sees a trust as a **bundle of obligations** attached to property, enforceable in equity, compelling the trustee to act **for the benefit of others (or a purpose)** rather than themselves.

2. Critiques and Limitations of Mayo J's Description	3. Broader Legal Recognition and Civil Law Context
<ul style="list-style-type: none"> ◆ (a) Multiple Trustees & Joint Powers ● Mayo J assumes one trustee; does not capture co-trustee arrangements where powers are exercised jointly. ◆ (b) Bare Trusts ● No mention of bare trusts (minimal powers/obligations). <ul style="list-style-type: none"> ► See: <i>Herdegen v FCT (1988) 84 ALR 271</i> – trustee has no active duties beyond transferring legal title upon request. ◆ (c) Discretionary Trusts & Trust Powers ● Assumes either: <ul style="list-style-type: none"> ○ Beneficiaries with fixed equitable interests (fixed trust), or ○ Trusts for charitable purposes. ● Fails to account for: <ul style="list-style-type: none"> ○ Discretionary trusts: trustees can choose whom to benefit among a class. ○ Trust powers: no individual has a proprietary right until trustee exercises discretion. <p>► <i>Kafataris v DCT (2008) 172 FCR 242</i> at [44] Objects of discretionary trusts may be called beneficiaries <i>even if they lack any current beneficial interest</i>.</p>	<ul style="list-style-type: none"> ◆ Common Law Origins ● Trusts often considered unique to common law. <ul style="list-style-type: none"> ► Maitland: trusts are "the greatest and most distinctive achievement performed by Englishmen in jurisprudence". ◆ Trusts in Civil Law Systems ● Civil law jurisdictions (e.g. China, Japan, South Korea) have trust codes, despite lacking dual title distinction (legal vs equitable interests). <ul style="list-style-type: none"> ► Source: <i>Ho & Lee, Trust Law in Asian Civil Law Jurisdictions</i> (CUP, 2013). ◆ Hague Trusts Convention (1991) ● Recognises trusts in cross-border contexts. ● Implemented in Australia via <i>Trusts (Hague Convention) Act 1991 (Cth)</i>. ✓ Article 2 Definition (Convention): Trust = legal relationship created inter vivos or by will, where assets are placed under trustee's control for: <ul style="list-style-type: none"> ● a beneficiary, or ● a specified purpose. <p><i>Hutchinson v Bank of Scotland Plc [2012] QSC 28</i></p> <ul style="list-style-type: none"> - Held: trust governed by Scottish law under the Convention, even though Scottish law does not recognise equitable proprietary interests.

Important Elements in the definition (Ford and Lee's Description) *TT 13.2 pg 212*

a) Obligation vs Power	e) Trustee as Manager
<ul style="list-style-type: none"> ● A trust imposes an obligation or duty on a title-holder of property to apply the property for the purposes specified by the creator of the trust. ● This contrasts with the concept of a power, which confers a discretion on the person on whom the power is conferred to apply property for purposes specified by the creator of the power. 	<ul style="list-style-type: none"> ● The trustee is not simply the owner of property; he deals with the property and manages it. ● Management duties are not uniform; they vary according to the nature of the trust in question. <ul style="list-style-type: none"> ○ Ex. The trustee of a superannuation trust comes under extensive statutory and equitable obligations. ○ Ex. The trustee of a bare trust is a nominee trustee, with no active duties to perform, who must act at the direction of the beneficiaries.
(b) Enforceability in Equity	(f) Benefit of the Beneficiary
<ul style="list-style-type: none"> ● A trust is enforceable in equity, which simply means it is enforced by courts which have power to apply equity as administered by the Court of Chancery prior to the Judicature Acts reforms. 	<ul style="list-style-type: none"> ● The trustee manages the trust property for the benefit of another person – the beneficiary. ● The beneficiary holds equitable title to the trust property. ● Trusts can be created: <ul style="list-style-type: none"> ○ For unborn beneficiaries ○ As well as for the living ● In functional terms, the beneficiaries enjoy the property the trustee manages. ● The beneficiaries are sometimes termed the 'objects' of the trust.
c) Trustee's Title and Role	(g) Trusts for Purposes
<ul style="list-style-type: none"> ● The trustee holds legal or equitable title to the trust property. ● Functionally, the trustee is the manager of the trust property. ● The trust document, equity, and statute confer: <ul style="list-style-type: none"> ○ Obligations on the trustee, such as the duty to invest trust money. ○ Powers or discretions which the trustee can exercise if he considers it in the interest of the trust to do so, such as the power to sell trust property. 	<ul style="list-style-type: none"> ● Not all trusts are established for the benefit of human beneficiaries. ● Some are created for the advancement of purposes. ● The most common category of trusts for purposes is the charitable trust. ● However, it is also possible to create, within judicially prescribed limitations, some trusts for non-charitable purposes, such as: <ul style="list-style-type: none"> ○ Trusts to maintain a testator's pet ○ Trusts to maintain a gravestone
(d) Trust Property (Subject-Matter)	
<ul style="list-style-type: none"> ● There must be trust property, often referred to as the 'subject-matter'. ● The trustee will usually hold legal or equitable title to the property. ● However, a possessory title, such as a title held by a thief or an adverse possessor of land, can also be the subject-matter of a trust. 	

Characteristics of Express Trust [13.3]

- Express trusts serve varied wealth-management purposes, such as:
 - Providing for infants
 - Running businesses
 - Providing for superannuation
- Although different structures and terms can be used to achieve these purposes, certain basic legal propositions apply to all express trusts.

(1) Trusts vs Gifts

- A trust is distinguishable from a gift:
 - Once a gift has been made, all legal rights affecting the subject-matter of the gift vest in the donee.
 - By contrast, beneficiaries of a trust:
 - Are not entitled to full ownership of the trust property.
 - A beneficiary of a fixed trust holds equitable ownership of their share of the trust property.
- The subject-matter of the trust remains vested in the trustee until:
 - It is transferred to the beneficiary, or
 - Otherwise disposed of upon termination of the trust.
- In the interim, the property is applied for the benefit of the beneficiaries.

(2) No Legal Personality

- Unlike a corporation, A trust has no legal personality:
 - The trustee is the legal person who holds property on behalf of the trust.
 - All trust activities are conducted through the trustee.
- Legal proceedings:
 - Actions in contract or tort can be brought by or against the trustee, not the trust.
- Trustee liabilities:
 - While managing the trust and acting as trustee, the trustee is likely to incur liabilities.
 - The trustee may have recourse to the trust fund to pay 'properly incurred' liabilities.
- The obligation
 - Any legal obligation owed "by the trust" is actually an obligation owed by the trustee, as the legal title holder of the property.
 - The trust itself cannot owe or be owed duties.
- Thus, "the trust" is simply a label describing the obligation owed by the trustee to the beneficiaries, not a separate person in law.

(3) Fiduciary Obligations of the Trustee

A trustee owes fiduciary obligations to the beneficiaries of the trust.

- The trustee is a classic fiduciary.
- Much of the law of fiduciary obligations has developed by analogy to the trustee-beneficiary relationship.

However, in some respects, a trustee is not a typical fiduciary:

- Unlike most fiduciaries who owe obligations to an identified principal, a trustee may owe fiduciary obligations to unascertained beneficiaries, such as unborn children.
 - These beneficiaries have not reposed trust or confidence in the trustee.
 - It is the settlor, not the beneficiaries, who entrusts the trustee with the management of trust property.

Nevertheless, trustees are subject to:

- The 'no conflict' rule
- The 'no profit' rule
- Equitable and statutory duties:
 - Statutory duties are mainly prescribed by State and Territory trustee legislation.
 - These statutory duties do not apply to other types of fiduciaries.

(4) Rule in *Saunders v Vautier*

- The legal separation between management of property (trustee) and enjoyment of property (beneficiaries) is qualified by the rule in *Saunders v Vautier*.
- This rule provides:
 - Where all beneficiaries are of full age and capacity, they may terminate the trust by:
 - Requiring the trustees to transfer the assets to them,
 - Or at their direction.
 - The importance of the rule is that it overrides the terms of the trust instrument.
 - For example:
 - If a settlor settles property on trust for A, B, and C:
 - The beneficiaries, if adult and of full capacity, can agree to terminate the trust and divide the trust property amongst themselves.
 - It is irrelevant that:
 - The trustees oppose termination.
 - Termination is not authorised by the trust deed.

The Parties to an Express Trust [13.4]

(1) The Settlor

- The settlor is the person who creates the trust.
 - If a trust is created by will, the settlor is also the testator.
- Once the settlor has created the trust, they typically have no rights in respect of the trust property — the settlor "drops out of the picture."

settlor may, however, retain some influence over trust management by:

- Expressly reserving a power in the trust instrument to vary or revoke the trust (though this is rare in practice).
- Being named as the "appointor", a person with power to appoint or remove trustees.

Nominal vs Substantial Settlers

- Many trusts are created by an initial settlor settling a nominal sum (e.g., \$2), with substantial contributions later made by a different provider.
- Under tax law, the later provider is not the settlor.

However, where a trust is challenged as a sham or illusory, a court may ignore the nominal settlor and instead ask:

- Does the provider of substantial funds exercise practical control of the trust?
- If yes, they may be considered the true owner of the funds. This reflects the substance-over-form approach in equity.

(2) The Trustee

- The trustee holds title to the trust property and must perform the trust obligations.
- A trustee can be an individual or a corporation.

Appointment and Disclaimer

- A trustee does not need to consent to appointment.
 - But if the person does not want to act, they must disclaim the trusteeship.

Number of Trustees

- Statutory limits apply in NSW, limiting trustees to four in certain cases.

Choosing the number of trustees involves a balance:

- Too few (e.g., one):
 - Increases risk of fraud.
 - Can lead to problems if the sole trustee dies or becomes incapacitated.
- Too many:
 - Can obstruct administration, as trustees (except in charitable trusts) must act unanimously, not by majority.

No Trustee?

- A trust can continue to exist without a trustee under the maxim: "No trust shall fail for want of a trustee."
- In such cases, the court will supervise the trust until new trustees are appointed.

Disqualifying Conditions

In NSW and ACT:

- A person under 18 may not be appointed a trustee.
- Conveyancing Act 1919 (NSW) s 10(1)(b)

In other jurisdictions:

- A minor may be appointed, but: Their lack of capacity to exercise powers or enter contracts binding the trust is grounds for removal.
 - Similar concerns apply to persons of unsound mind.
- There is no automatic disqualification of a bankrupt, though bankruptcy is grounds for removal.