John Duddington

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Acknowledgement

To my father, Walter Duddington, who first encouraged me to become a lawyer, and who would, I think, have been an equity enthusiast; to my wife Anne, for her constant support, loyalty and technical expertise now over many years and without which my books would never begin to be written; to my daughter Mary, for her seemingly faultless proofreading and sense of fun which keeps me going and to my son Christopher for just being himself.

I would like to thank the staff of Pearson, especially Christine Statham and Stuart Hay for their endless enthusiasm, cheerfulness and practical guidance. I would also like to thank all the reviewers, Simon Barnett of the University of Hertfordshire, Nick Dearden, Manchester Metropolitan University, Lisa Nolan, University of Westminster and Caron Thatcher, London South Bank University. Their comments were percipient and perceptive and have helped to enhance the quality of this book. However, as Harry S. Truman famously remarked: 'The buck stops here' and all responsibility for what is written rests with me.

I write these final lines under a portrait of Thomas More, one of the greatest of the Chancellors. Not, I hasten to add, the original by Holbein, which hangs in the Frick Collection in New York, but a print of it. More once invited the common law judges to dinner and told them that if they would administer the law more justly he would, in effect, not be needed as he would not have to issue injunctions preventing their judgments from being enforced. I suspect that More did not really expect his offer to be taken up and, like all the Chancellors down the ages, he looks on with interest at the continued vitality of equity. Long may that continue!

Finally, readers should know that this book is based on sources available to me at 14 August 2013, although some updating has been possible at proof stage.

John Duddington
March 2014

How to use this guide

Blueprints was created for students searching for a smarter introductory guide to their legal studies

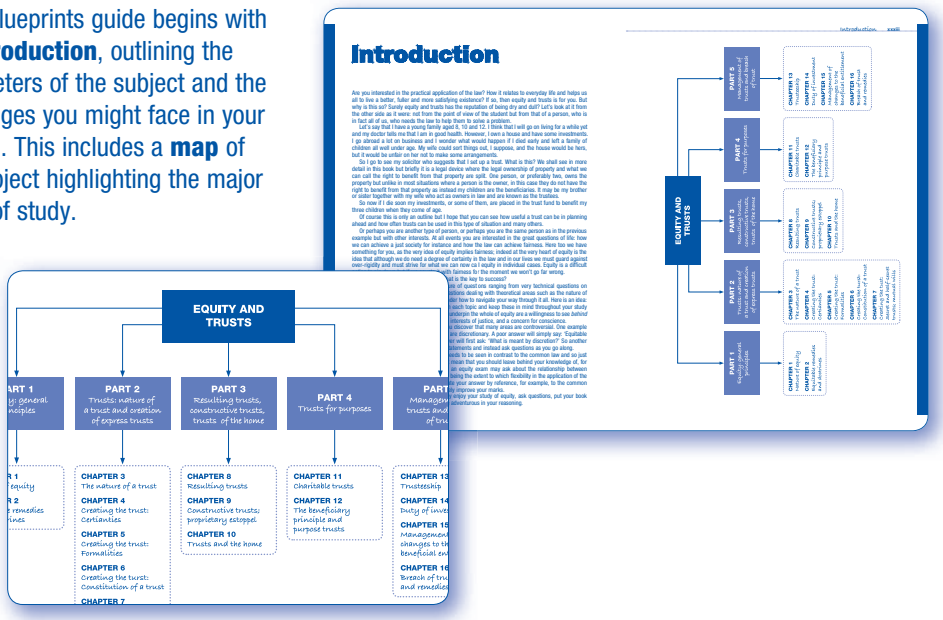
This guide will serve as a primer for deeper study of the law – enabling you to get the most out of your lectures and studies by giving you a way in to the subject which is more substantial than a revision guide, but more succinct than your course textbook. The series is designed to give you an overview of the law, so you can see the structure of the subject and understand how the topics you will study throughout your course fit together in the big picture. It will help you keep your bearings as you move through your course study.

Blueprints recognises that students want to succeed in their course modules

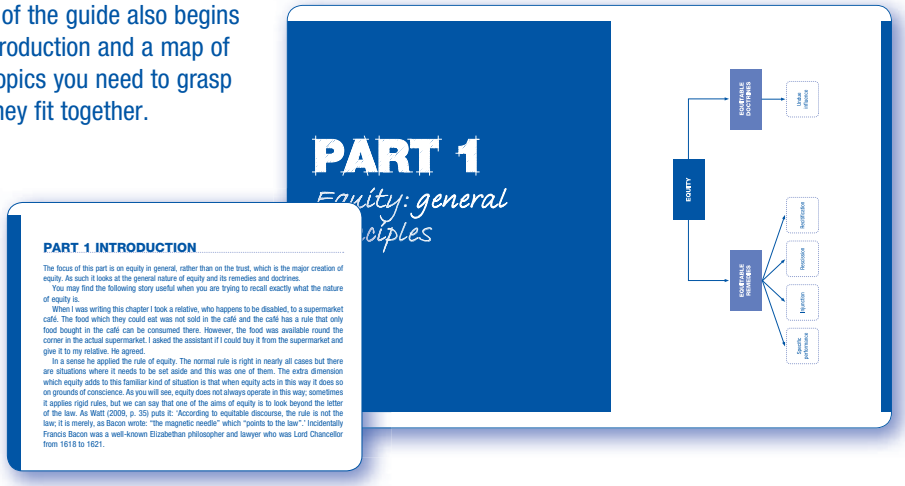
This requires more than a basic grasp of key legislation; you will need knowledge of the historical and social context of the law, recognition of the key debates, an ability to think critically and to draw connections among topics.

Blueprints addresses the various aspects of legal study, using assorted text features and visual tools

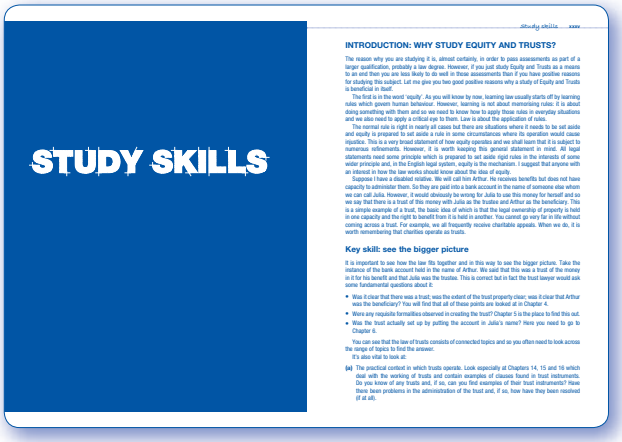
Each Blueprints guide begins with an **Introduction**, outlining the parameters of the subject and the challenges you might face in your studies. This includes a **map** of the subject highlighting the major areas of study.



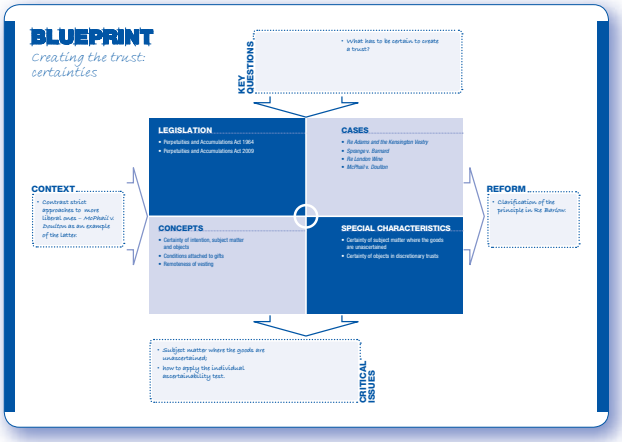
Each **Part** of the guide also begins with an Introduction and a map of the main topics you need to grasp and how they fit together.



Each guide includes advice on the specific **study skills** you will need to do well in the subject.

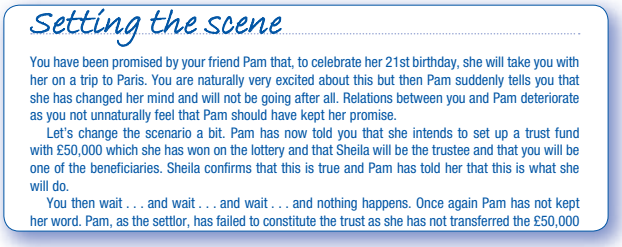


Each chapter starts with a **Blueprint** of the topic area to provide a visual overview of the fundamental buildings blocks of each topic, and the academic questions and the various outside influences that converge in the study of law.



A number of text features have been included in each chapter to help you better understand the law and push you further in your appreciation of the subtleties and debates:

Setting the scene illustrates why it is important to study each topic.



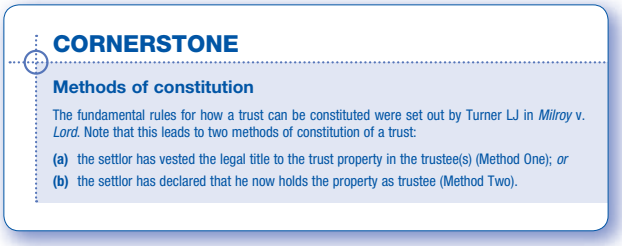
Setting the scene

You have been promised by your friend Pam that, to celebrate her 21st birthday, she will take you with her on a trip to Paris. You are naturally very excited about this but then Pam suddenly tells you that she has changed her mind and will not be going after all. Relations between you and Pam deteriorate as you not unnaturally feel that Pam should have kept her promise.

Let's change the scenario a bit. Pam has now told you that she intends to set up a trust fund with £50,000 which she has won on the lottery and that Sheila will be the trustee and that you will be one of the beneficiaries. Sheila confirms that this is true and Pam has told her that this is what she will do.

You then wait . . . and wait . . . and wait . . . and nothing happens. Once again Pam has not kept her word. Pam, as the settlor, has failed to constitute the trust as she has not transferred the £50,000

Cornerstone highlights the fundamental building blocks of the law.



CORNERSTONE

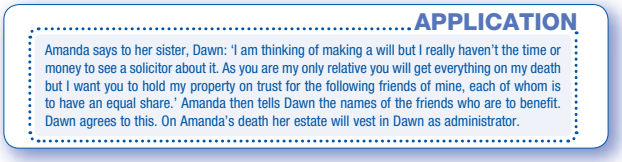
Methods of constitution

The fundamental rules for how a trust can be constituted were set out by Turner LJ in *Milroy* v. *Lord*. Note that this leads to two methods of constitution of a trust:

(a) the settlor has vested the legal title to the trust property in the trustee(s) (Method One); *or*

(b) the settlor has declared that he now holds the property as trustee (Method Two).

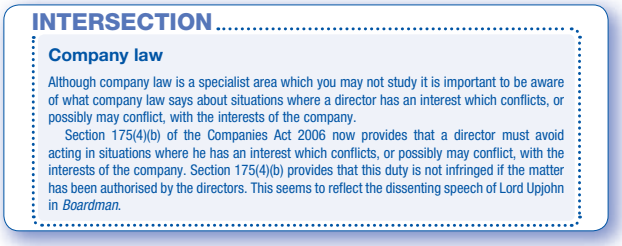
Application shows how the law applies in the real world.



APPLICATION

Amanda says to her sister, Dawn: 'I am thinking of making a will but I really haven't the time or money to see a solicitor about it. As you are my only relative you will get everything on my death but I want you to hold my property on trust for the following friends of mine, each of whom is to have an equal share.' Amanda then tells Dawn the names of the friends who are to benefit. Dawn agrees to this. On Amanda's death her estate will vest in Dawn as administrator.

Intersection shows you connections and relationships with other areas of the law.



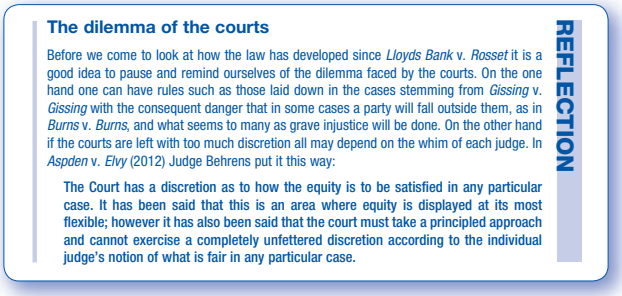
INTERSECTION

Company law

Although company law is a specialist area which you may not study it is important to be aware of what company law says about situations where a director has an interest which conflicts, or possibly may conflict, with the interests of the company.

Section 175(4)(b) of the Companies Act 2006 now provides that a director must avoid acting in situations where he has an interest which conflicts, or possibly may conflict, with the interests of the company. Section 175(4)(b) provides that this duty is not infringed if the matter has been authorised by the directors. This seems to reflect the dissenting speech of Lord Upjohn in *Boardman*.

Reflection helps you think critically about the law, introducing you to the various complexities that give rise to debate and controversy.



REFLECTION

The dilemma of the courts

Before we come to look at how the law has developed since *Lloyds Bank* v. *Rosset* it is a good idea to pause and remind ourselves of the dilemma faced by the courts. On the one hand one can have rules such as those laid down in the cases stemming from *Gissing* v. *Gissing* with the consequent danger that in some cases a party will fall outside them, as in *Burns* v. *Burns*, and what seems to many as grave injustice will be done. On the other hand if the courts are left with too much discretion all may depend on the whim of each judge. In *Aspden* v. *Elvy* (2012) Judge Behrens put it this way:

> **The Court has a discretion as to how the equity is to be satisfied in any particular case. It has been said that this is an area where equity is displayed at its most flexible; however it has also been said that the court must take a principled approach and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case.**

Context fills in some of the historical and cultural background knowledge that will help you understand and appreciate the legal issues of today.

CONTEXT

You will see that in many of these cases the courts are called on to make judgments on what is of educational value. Clearly such judgments must be objective and assisted by expert evidence. In *Re Pinion* (1965) the judges relied on expert evidence that, for example, 'in particular the pictures and china are quite worthless and the suggestion that they should be shown in public in London or anywhere else does not bear serious consideration'. There was worse to come: the expert inspected the silver and said: '"It is a perfect example of the tastelessness and ugliness of Victorian silver of this date"', which in fact was 1895.

Today we do actually rate Victorian objects more highly then was the case in the 1960s but the judges can only act on the evidence of the expert opinion of their time. However, we can still ask if the judges were, even unconsciously, influenced by their own views.

Take note offers advice that can save you time and trouble in your studies.

(b) ***Animals.*** Trusts for the care of specific animals are valid as in *Re Dean* (1889) where money was left for the maintenance of the testator's horses and hounds. A trust for the maintenance of animals in general can be charitable (see Chapter 11). However, trusts to not only maintain but also *to breed from* the testator's animal would be invalid.

(c) ***Miscellaneous.*** A trust for the saying of masses was originally void as being for 'superstitious uses' but in *Bourne* v. *Keane* (1919) they were upheld but without consideration of the beneficiary issue, possibly on the assumption that they would be said in public. Trusts for the saying of masses in public would be charitable (*Re Hetherington* (1989) and

Take note

It is sometimes said that in *Re Thompson* (1934) the court held that a trust for the promotion of fox hunting was valid. In fact, the case concerned a gift to be applied to the promotion of fox hunting with a gift of residue to Trinity Hall, Cambridge. The issue was

Key points lists the main things to know about each topic.

KEY POINTS

- There are detailed rules in statute governing the appointment, retirement and removal of trustees.
- A trustee may delegate in certain cases. If so, then the trustee may be liable for the delegate's acts on certain conditions.
- There is a fundamental distinction between duties (mandatory) and powers (permissive) of trustees.
- The right to seek disclosure of trust documents is part of the jurisdiction of the court to supervise

Core cases and statutes summarises the major case law and legislation in the topic.

CORE CASES AND STATUTES

Case	About	Importance
Bray v. *Ford* (1896)	Trustee should not put herself in a position where her duty and interest conflict.	States a fundamental fiduciary principle; but is it a 'counsel of prudence rather than a rule of equity'?
Pitt v. *Holt* (2013)	Sets the rule in *Re Hastings-Bass* in the context of general principles governing control by the courts of discretionary decisions of trustees.	Limits the extent to which trustees who had relied on incorrect tax advice and its effect can undo the transaction

Further reading directs you to select primary and secondary sources as a springboard to further studies.

FURTHER READING

Cottrell, R. (1971) *'Re Remnant's Settlement Trusts'* 34 *MLR* 98.
This is one of the more important cases on the Variation of Trusts Act and you will find this article most helpful.

Harris, J.W. (1975) *Variation of Trusts* (Sweet & Maxwell).
This is most useful on the background to the passage of the Variation of Trusts Act. It also

This is still useful on powers of maintenance and advancement as the basic principles have not really changed.

Luxton, P. (1997) 'Variations of trusts: settlor's intentions and the consent principle in *Saunders* v. *Vautier*' 60 *MLR* 719.
This article looks at the decision in *Goulding* v. *James* (1997) and, more widely, at whether

A **glossary** provides helpful definitions of key terms.

Administrator Person(s) appointed by the court to administer the estate of a person who has died intestate.

Advancement Payment of capital to beneficiaries before they are entitled.

Bailee A person with whom an article is left, usually under a contract, and who is responsible for its safe return.

Bare trust A bare trust is where the trustee holds property on trust for an adult beneficiary who is absolutely entitled to the property. The trustee has no active duties and so can be

Estoppel This arises when the representee has been led to act on the representation of the representor. If the representee then acts to their detriment on the basis of this promise, then in equity the court may grant them a remedy. Note the distinction between promissory and proprietary estoppel.

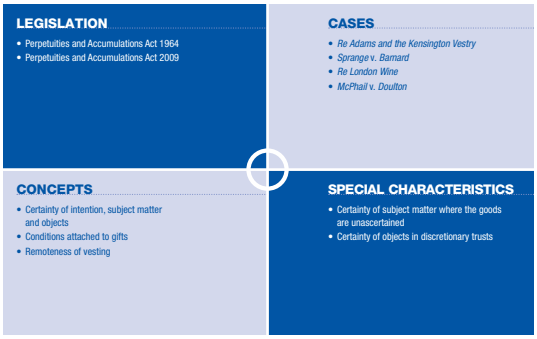
Executor Person(s) nominated to act in a fiduciary capacity in the carrying out of a testator's will.

Express trust A trust actually created by the settlor as distinct from being implied.

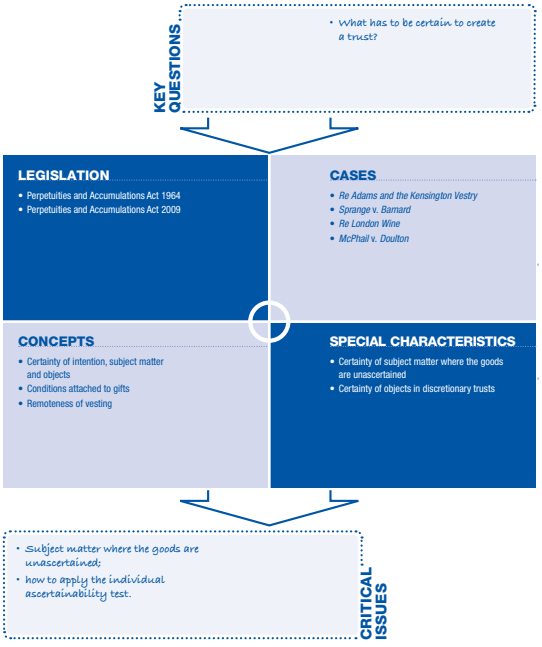
What is a Blueprint?

Blueprints provide a unique plan for studying the law, giving you a visual overview of the fundamental buildings blocks of each topic, and the academic questions and the various outside influences that converge in the study of law.

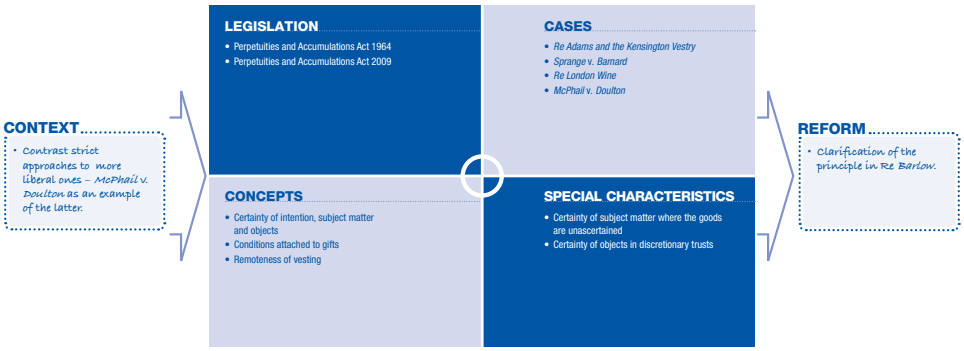
At the centre are the 'black-letter' elements, the fundamental building blocks that make up what the law says and how it works.



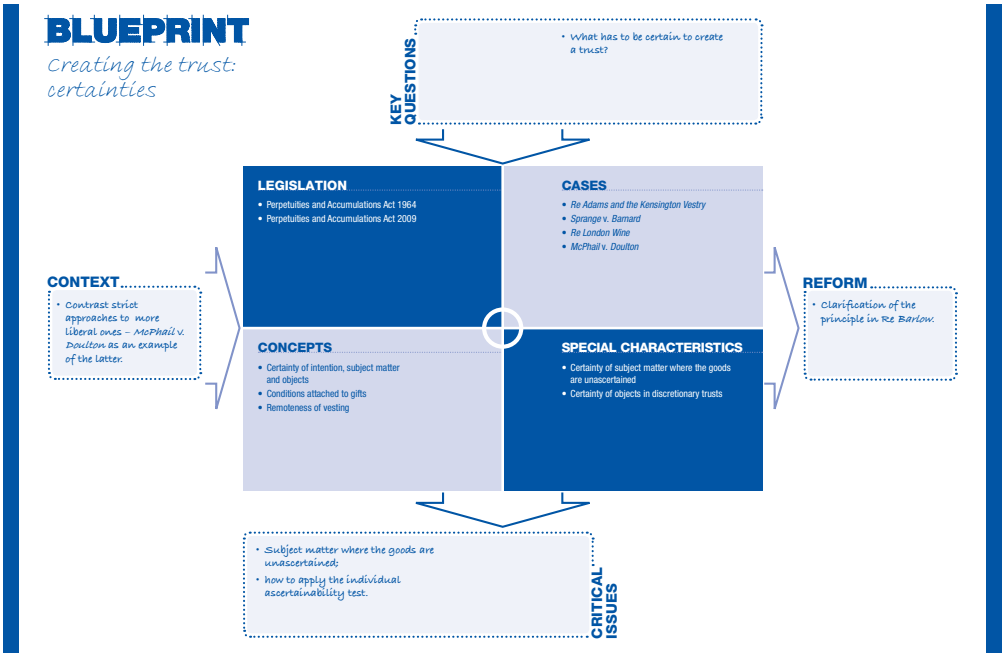
As a law student you will need to learn what questions or problems the law attempts to address, and what sort of issues arise from the way it does this that require critical reflection.



To gain a more complete understanding of the role of law in society you will need to know what influencing factors have shaped the law in the past, and how the law may develop in the near future.



You can use the Blueprint for each topic as a framework for building your knowledge in the subject.



Introduction

Are you interested in the practical application of the law? How it relates to everyday life and helps us all to live a better, fuller and more satisfying existence? If so, then equity and trusts is for you. But why is this so? Surely equity and trusts has the reputation of being dry and dull? Let's look at it from the other side as it were: not from the point of view of the student but from that of a person, who is in fact all of us, who needs the law to help them to solve a problem.

Let's say that I have a young family aged 8, 10 and 12. I think that I will go on living for a while yet and my doctor tells me that I am in good health. However, I own a house and have some investments. I go abroad a lot on business and I wonder what would happen if I died early and left a family of children all well under age. My wife could sort things out, I suppose, and the house would be hers, but it would be unfair on her not to make some arrangements.

So I go to see my solicitor who suggests that I set up a trust. What is this? We shall see in more detail in this book but briefly it is a legal device where the legal ownership of property and what we can call the right to benefit from that property are split. One person, or preferably two, owns the property but unlike in most situations where a person is the owner, in this case they do not have the right to benefit from that property as instead my children are the beneficiaries. It may be my brother or sister together with my wife who act as owners in law and are known as the trustees.

So now if I die soon my investments, or some of them, are placed in the trust fund to benefit my three children when they come of age.

Of course this is only an outline but I hope that you can see how useful a trust can be in planning ahead and how often trusts can be used in this type of situation and many others.

Or perhaps you are another type of person, or perhaps you are the same person as in the previous example but with other interests. At all events you are interested in the great questions of life: how we can achieve a just society for instance and how the law can achieve fairness. Here too we have something for you, as the very idea of equity implies fairness; indeed at the very heart of equity is the idea that although we do need a degree of certainty in the law and in our lives we must guard against over-rigidity and must strive for what we can now call equity in individual cases. Equity is a difficult notion to pin down but if we equate it with fairness for the moment we won't go far wrong.

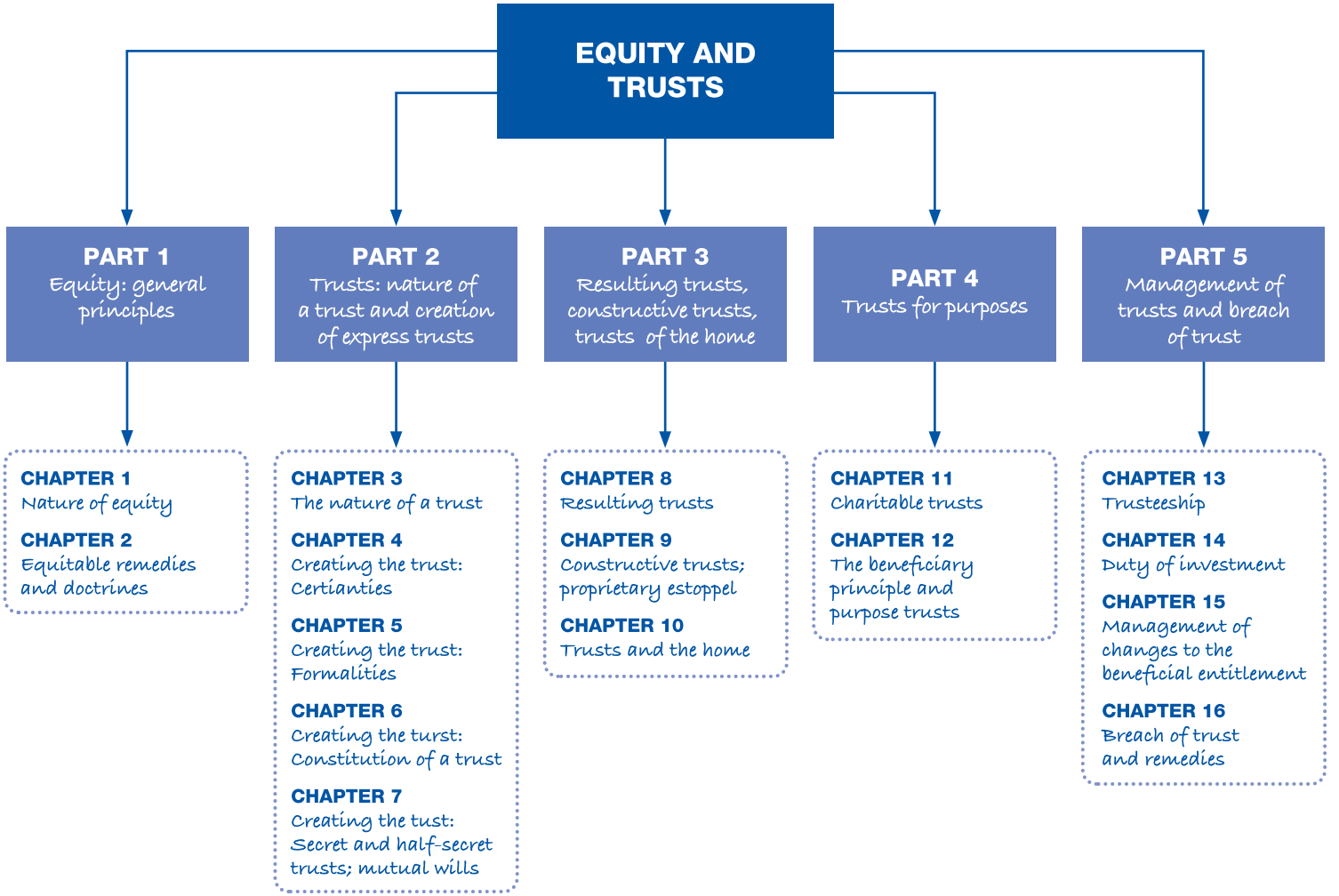
So you come to study this subject. What is the key to success?

Equity and trusts exams have a mixture of questions ranging from very technical questions on areas such as constitution of trusts to questions dealing with theoretical areas such as the nature of a resulting trust. Sometimes you may wonder how to navigate your way through it all. Here is an idea: first locate the central ideas that underpin each topic and keep these in mind throughout your study of it. For an example, the two themes that underpin the whole of equity are a willingness to see *behind* a rule and if need be to set it aside in the interests of justice, and a concern for conscience.

You will not go far, however, before you discover that many areas are controversial. One example is the extent to which equitable remedies are discretionary. A poor answer will simply say: 'Equitable remedies are discretionary.' A good answer will first ask: 'What is meant by discretion?' So another message is to avoid bland over-definite statements and instead ask questions as you go along.

You must also remember that equity needs to be seen in contrast to the common law and so just because you are studying equity does not mean that you should leave behind your knowledge of, for example, contract and tort. Questions in an equity exam may ask about the relationship between equity and the common law, one instance being the extent to which flexibility in the application of the law is unique to equity. If you can illustrate your answer by reference, for example, to the common law of negligence then this will immediately improve your marks.

Above all, make up your mind to really enjoy your study of equity, ask questions, put your book down and *think* about the subject, and be adventurous in your reasoning.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Management of trusts and breach of trust
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STUDY SKILLS

INTRODUCTION: WHY STUDY EQUITY AND TRUSTS?

The reason why you are studying it is, almost certainly, in order to pass assessments as part of a larger qualification, probably a law degree. However, if you just study Equity and Trusts as a means to an end then you are less likely to do well in those assessments than if you have positive reasons for studying this subject. Let me give you two good positive reasons why a study of Equity and Trusts is beneficial in itself.

The first is in the word 'equity'. As you will know by now, learning law usually starts off by learning rules which govern human behaviour. However, learning is not about memorising rules: it is about doing something with them and so we need to know how to apply those rules in everyday situations and we also need to apply a critical eye to them. Law is about the application of rules.

The normal rule is right in nearly all cases but there are situations where it needs to be set aside and equity is prepared to set aside a rule in some circumstances where its operation would cause injustice. This is a very broad statement of how equity operates and we shall learn that it is subject to numerous refinements. However, it is worth keeping this general statement in mind. All legal statements need some principle which is prepared to set aside rigid rules in the interests of some wider principle and, in the English legal system, equity is the mechanism. I suggest that anyone with an interest in how the law works should know about the idea of equity.

Suppose I have a disabled relative. We will call him Arthur. He receives benefits but does not have capacity to administer them. So they are paid into a bank account in the name of someone else whom we can call Julia. However, it would obviously be wrong for Julia to use this money for herself and so we say that there is a trust of this money with Julia as the trustee and Arthur as the beneficiary. This is a simple example of a trust, the basic idea of which is that the legal ownership of property is held in one capacity and the right to benefit from it is held in another. You cannot go very far in life without coming across a trust. For example, we all frequently receive charitable appeals. When we do, it is worth remembering that charities operate as trusts.

Key skill: see the bigger picture

It is important to see how the law fits together and in this way to see the bigger picture. Take the instance of the bank account held in the name of Arthur. We said that this was a trust of the money in it for his benefit and that Julia was the trustee. This is correct but in fact the trust lawyer would ask some fundamental questions about it:

- Was it clear that there was a trust; was the extent of the trust property clear; was it clear that Arthur was the beneficiary? You will find that all of these points are looked at in Chapter 4.
- Were any requisite formalities observed in creating the trust? Chapter 5 is the place to find this out.
- Was the trust actually set up by putting the account in Julia's name? Here you need to go to Chapter 6.

You can see that the law of trusts consists of connected topics and so you often need to look across the range of topics to find the answer.

It's also vital to look at:

(a) The practical context in which trusts operate. Look especially at Chapters 14, 15 and 16 which deal with the working of trusts and contain examples of clauses found in trust instruments. Do you know of any trusts and, if so, can you find examples of their trust instruments? Have there been problems in the administration of the trust and, if so, how have they been resolved (if at all).

(b) The social and economic context. Some chapters obviously lend themselves to this more than others. Good examples of where you can add value to your answers are:

- Trusts of the family home (Chapter 10), where you could ask why the law on trusts of the family home become far more important than it was say in 1960.
- Charitable trusts (Chapter 11), where you could ask, for instance, why people set up charitable trusts? Why indeed do people give to charity at all?

Putting what you have learnt into practice

Keep in touch with the news to see how what you have learnt is applied in practice. Here is an example from the *Daily Telegraph* of 10 June 2013. The story concerned what was said to be an attempt by 'manufacturing tycoon' John Barry Wild to avoid inheritance tax that led to a court battle over his legacy which, the paper said, 'would have made him turn in his grave'.

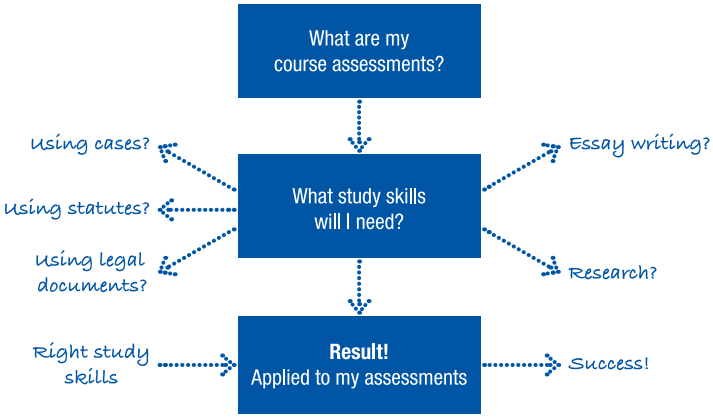
Rather than making a traditional will, Mr Wild set up a discretionary family trust to ensure his wealth was passed to his wife Susan, 79, daughter Julia, 47, and son Ian 54, in the most tax efficient manner possible. But the plan backfired when his son and his widow – Ian's mother – fell out over Ian's belief that she had cut him out of *her* own will with the result that Ian blocked a payment of £500,000 to his mother from the trust and also blocked attempts by the other trustees to pay this money out.

The court removed Ian as a trustee and Arnold J said: 'I consider that Ian has allowed himself to become unduly influenced by his concern over Susan's will. Ian has allowed his judgement as a trustee to become clouded by matters which are not relevant to the exercise of his duties as a trustee. The proper course for this court is to remove him.'

This case really brings to life the areas of:

- Discretionary trusts – see Chapter 4.
- Fiduciary duties of trustees – see Chapter 13.
- Removal of trustees – see also Chapter 13.

SPECIFIC STUDY SKILLS

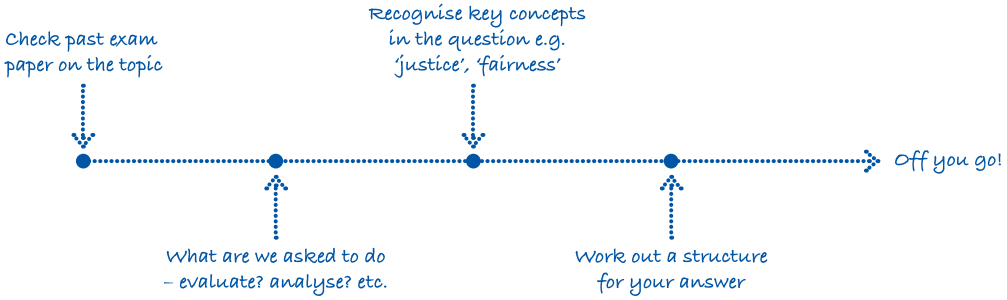


When you study equity and trusts you are first and foremost learning about this subject. However, at the same time you should take this opportunity to use your study of it to develop your study skills

as you will find that this will help you to improve your performance not only in assessments in this subject but in other subjects, both in your academic studies of the law and in any vocational studies which you may go on to undertake.

This chapter contains a number of examples of how to enhance your study skills, based on material which we will cover. Look through it carefully and then use the skills you have acquired in this chapter in other areas of equity and trusts and in other areas of the law too.

Study skill: when it comes to writing an essay on equity



You are far more likely to get an essay question on the nature of equity than a problem as this topic lends itself to essays, although the equity exam taken as a whole is likely to have a mixture of problems and essays.

In fact equity, perhaps more than other areas such as land law, does lend itself very much to essays as there are so many broad themes, e.g. the nature of equity, the relationship between equity and the common law and the fiduciary principle. Check past exam papers at your institution and see if essays are set on the nature of equity. If so, look through them and see what study skills you will require to gain a good mark.

Take this example:

> **'Equity is a word with many meanings. In a wide sense, it means that which is fair and just, moral and ethical; but its legal meaning is much narrower'.**
>
> **(Hanbury Modern Equity, 18th edition, p. 1)**
>
> **Critically consider what this statement tells us about modern equity.**

What study skills does this question need?

First we need to be clear about what we are asked to do. The question asks us to be **critical**, which does not necessarily mean to criticise but to exercise your critical faculties. So you need to think about the question: what does it mean, do we agree with the assumptions behind it? What we are not asked to do is simply give out information. Remember that critical analysis includes, where relevant, discussion of dissenting judgments, especially in House of Lords (now Supreme Court) cases; it also includes academic analysis of relevant areas.

Next, note exactly what the question says. We will see that it asks about modern equity, which is generally taken to mean equity following the Judicature Acts 1873–75. So an account of the history of equity will earn at best only minimal marks.

When you turn to the quotation this will enable you to **analyse** exactly what the question is about. If you do not analyse the question you will just see the one word 'equity' and then proceed to write all about the nature of equity, in effect giving a potted version of this chapter.

Analysing the question means **recognising** the key words and concepts in it. So here we have:

- Equity as a concept.
- Equity in a wider sense – fairness, justice, morality, ethical.
- Equity in a narrower sense – legal meaning.

This leads us at once to a **structure** for our answer, as we can see that the question is asking us to look at the concept of equity but in doing so to contrast two meanings of equity.

We then need to plan an **introduction**, setting the scene, and then **structure** the answer around the two areas which we need to **contrast**.

When we are writing the essay we need to keep coming back to the word **'critical'** and so throughout we should aim to **contrast** the two ideas in the question. In order to do this you need to be able to **select** relevant points to illustrate your answer. For example, you may decide to choose trusts of the family home. You then need to **distinguish** between one approach which says that the courts should base their approach simply on what is fair whereas other judges would say that the basis is the search for the common intention of the parties. Come back to the question though: even when the judges use the word 'fair' this is still used in a legal sense and contrasts with general ideas of fairness.

Finally, you must have a conclusion which comes back to the question. Do not summarise what you have said but engage with the question and be critical here as in the rest of your answer.

Study skills feature: When it comes to using cases in assessments

How would you use cases in assessments?

The basic point, which applies to all law assessments but which cannot be repeated too often, is that you must bring out the point(s) of law considered by the case and only use the facts to illustrate the law. Remember that facts of cases generally are not necessary unless they are fundamental to the question that you are answering.

How do we do this in the context of these chapters?

Take *McPhail* v. *Doulton* in Chapter 4 at pages 80–81. This is of course one of the seminal cases in trusts law and above all you need to use it as an authority for the rule on certainty of objects in discretionary trusts as stated by Lord Wilberforce in the House of Lords. Having done this you can use the facts of the case to illustrate this point. Why not go further and consider the majority and minority speeches. Why did the majority change the test for certainty of objects? What was the reasoning of the minority in seeking to retain the complete list test? It is this type of detailed research that really makes an answer stand out.

If you dig deeper in your research you will find, as pointed out on pages 81–82 that when this test came to be applied by the High Court and the Court of Appeal in *Re Badens's Deed Trusts (No. 2)* there was considerable debate among the judges as to how it should be applied. You should see in particular the judgments of LJJ Stamp, Sachs and Megaw.

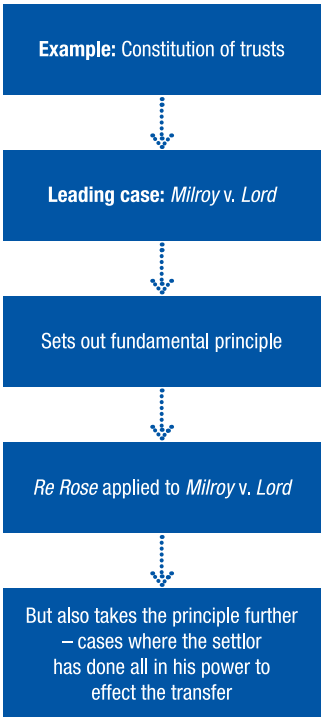
McPhail v. *Doulton* is an example of a case which really merits detailed research. Other cases need a different treatment. For instance, *Re Ralli's Will Trusts* (see Chapter 6 at page 121) has very complicated facts and you really need to just concentrate on understanding the point of law it makes. Another example is *Re Keen*, which lays down complex rules on communication of secret trusts where there is more than one intended trustee (see Chapter 7 at page 149). Here the vital point is to master the rules and there is no need to go into the facts of the case.

Re Keen concerned the position where the details of a secret trust are communicated by a sealed envelope. The Court of Appeal held that, had the rules on communication been complied with in other ways, the fact that the envelope was not opened until after the testator's death would not have made communication of the trust invalid.

You could leave the case at this point but you would lose marks. This is because the Court of Appeal then went on to consider the rules on communication of half secret trusts and, as you can see on page 149, they left the law in a confused state by indicating that there could be two different rules for the communication of half secret trusts.

You then need to research the subsequent cases to see how the courts have dealt with this apparent confusion. Examples are *Re Spence* and *Re Bateman*.

Study skill: when it comes to distinguishing cases in assessments



Often, when you are using cases, you come across a line of cases all on the same general topic but which are in fact slightly different.

What you must not do is give the facts and decisions in more than one case and then say lamely at the end: 'So all these cases make the same point'. This gets you nowhere. Each case that you

mention needs to bring out a slightly different point and thus add to your marks. You need to learn how to distinguish between cases and so trace a line of cases showing how the law has developed from one case to another.

Take some cases on constitution of a trust (dealt with in Chapter 6), an area which students always find difficult.

One area is the principle in *Re Rose* (1952) that in certain cases a trust can be completely constituted when the settlor has done everything which is in his power to do to transfer the property even though the transfer is not complete until some other person has done a particular act. A frequent example is a transfer of shares. The principle was applied to land registration in *Mascall* v. *Mascall* (1985) but you may decide that this is just a straightforward example of the application of *Re Rose* and decide not to spend too much time on it.

Instead, go back to the main case on constitution of trusts, *Milroy* v. *Lord* (1862), and see how *Re Rose* distinguishes it. Look at the judgment of Evershed MR in *Re Rose* and see how he sets out the rationale behind *Milroy* v. *Lord*, explaining that: 'if a man purporting to transfer property executes documents which are not apt to effect that purpose, the court cannot then extract from those documents some quite different transaction and say that they were intended merely to operate as a declaration of trust'. However, having said this, he then goes on to explain that Turner LJ, who gave the leading judgment in *Milroy* v. *Lord*, cannot have meant 'that, as a result, either during some limited period or otherwise, a trust may not arise, for the purpose of giving effect to the transfer'.

Here we have the precise point of departure: Evershed MR agrees with the judgment of Turner LJ in *Milroy* v. *Lord* that an ineffective transfer cannot be rescued by the imposition of a trust. However, and this is where *Re Rose* strikes out on its own, Evershed MR holds that a trust may come into operation for a limited period simply to effect the transfer. Thus he finds that where the settlor has done all in his power to transfer the property, such as making a share transfer, then pending registration of the transferee as owner of the shares, the settlor will hold those shares on trust for the transferee.

You can follow this up by looking at the major recent case which has considered *Re Rose*, *Pennington* v. *Waine* (2002), and identify the exact point at which the court developed the law. You will find that in *Pennington* v. *Waine* Arden LJ and Clarke LJ gave slightly different reasons for their decision although they concurred in the result. I suggest that you look at Arden LJ's judgment first.

Clearly there is much more that you could say here: for example you could say that *Pennington* v. *Waine* has now been distinguished and not followed in the recent Court of Appeal case of *Zeital* v. *Kaye*. At least this example should have given you some ideas on how to start! Remember that it is vital to identify inconsistencies when discussing relevant cases – why do you think cases reach court? If everything was so clear-cut there would be no need for judges or lawyers!

Study skills feature: when it comes to using statutes in assessments

Equity and Trusts is not a statute-based subject as, for example, employment law very largely is, but there is a substantial amount of statutory material. How should you use it to the best advantage in assessments?

Take the law on formalities in the creation of trusts which are contained in two paragraphs of s. 53(1) of the LPA 1925: the law on creation of trusts of land (s. 53(1)(b)) and the law on the disposition of equitable interests under trusts (s. 53(1)(c)).

The fundamental statutory provisions are simple enough: trusts of land require written evidence and dispositions of equitable interests require written evidence. This is fundamental. You then need

to go further and explain exactly what these paragraphs of s. 53(1) require: the best way is to make a list of the main points of each rather than try to learn the exact words of the statute off by heart.

You then need to go further and ask if there have been any cases on the interpretation of these paragraphs. In this instance there have been of course but the problem is that the facts of them are complex, in particular those involving the *Vandervell* litigation (see Chapter 5 at page 100 and the accompanying diagrams).

Here you could easily get completely lost in the intricacies of the cases and you need to concentrate on exactly what the statutes say (see above) and link your discussion of the cases to this.

Example

Take *Vandervell* v. *IRC* (1967). First, you need to be clear about which statutory provision this case illustrates. Here it is s. 53(1)(c) and so the issue to concentrate on is whether a disposition required writing. The next stage is to point out that writing will be required if it is a disposition of a subsisting equitable interest and so your explanation of the facts must concentrate on this one point. So you need to read the case carefully and then strip down the facts to the bare essentials, as we have done on page 103. From this you will be able to point out that there was no disposition of an equitable interest but instead a disposition of the entire legal and beneficial interest.

Moreover, you can often isolate vital words and then stress these in an exam. This example is based on material which we will cover in Chapter 15.

Example

Section 31(1) of the Trustee Act 1925:

> **Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property –**
>
> **(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is –**
>
> **(a) any other fund applicable to the same purpose; or**
>
> **(b) any person bound by law to provide for his maintenance or education.**

This, frankly, seems absolutely dreadful to the average law student! How do you disentangle it when you are studying it?

It is always better to look at complex legal wording in the context of an actual situation, so assume that you need to use it in an exam question:

> **Helen's father, who has died, left her a gift by will of £500,000 provided that she reaches the age of 25. Helen is now aged 16 and is a promising ballet dancer. She wishes the trustees, Teresa and Richard, to pay £1,000 a year for her ballet lessons.**

Take these steps:

(a) How did we know that this section was relevant at all? Look at the heading of the section 'Power to apply income for maintenance and to accumulate surplus income during a minority' in Chapter 15. This gave us a starting point: s. 31(1) is relevant if the trustees wish to exercise a power of maintenance and here we are told that Helen wishes the trustees to pay £1,000 a year for her

ballet lessons. Helen is 16 and so the power is exercisable as she is a minor. The Act did indeed use the word 'infancy' but now 'minority' or 'minor' is used.

(b) How did we identify that there was a power and not a duty so that trustees are not obliged to make maintenance payments? The clue is first in the heading, which says 'power', but this is not enough: where does this appear in s. 31? Look at paragraph (i), where you will see that it says: 'trustees may, at their sole discretion . . .'. The word 'may' is enough to indicate a power but in addition we are told that they have 'sole discretion'. Whenever you are studying a statute which allows a person(s) to take certain actions look for whether there is a power (indicated by 'may') or a duty (indicated by 'shall' or 'must').

(c) Check if there is a prior life interest – e.g. the question may say that Helen's father, who has died, left a gift by will of £500,000 to his wife Suzi for life and then to his daughter Helen. Suzi has a prior interest as she is a life tenant. If so, your answer will change as the entitlement of the beneficiary (Helen) to income will only come into effect when the life tenant (Suzi) dies.

(d) Now note that the gift is to Helen provided that she reaches the age of 25. This means that it is a contingent gift. Does s. 31 apply? Yes, as the opening words state that s. 31 applies if trustees hold property 'in trust for any person for any interest whatsoever'.

(e) Now read on in the question: 'Helen is now aged 16 and is a promising ballet dancer. She wishes the trustees to pay £1,000 a year for her ballet lessons'. We can now look at s. 31 of the Trustee Act (TA) 1925 and see that trustees may pay the income from the trust for the maintenance, education, or benefit of beneficiaries, so here again we have identified some vital words. In principle ballet lessons are for Helen's education.

So, if we go back to s. 31(1) of the TA we can annotate it as follows:

> **Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property –**
>
> **(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is –**
>
> **(a) any other fund applicable to the same purpose; or**
>
> **(b) any person bound by law to provide for his maintenance or education.**

Note that the heading also refers to 'accumulate surplus income during a minority'. This is contained in s. 31(2) which you can study and apply to the question!

Study skills feature: when it comes to using legal documents in assessments

Take this example of a clause which often appears in wills:

> **I DECLARE that in the application to the trusts of this my Will or any Codicil hereto the statutory power of maintenance given to my Trustees by Section 31 of the Trustee Act 1925 as amended the proviso in sub-section (1) of that section shall not apply and shall be deemed to be omitted**

> and that clause (i) of sub-section (1) of the said section shall be read as if the words 'as the trustees think fit' were substituted for the words 'as may, in all the circumstances, be reasonable'.

You will see that in fact it relates to s. 31 of the Trustee Act 1925 which we have just looked at in the study skill feature above.

What is it doing? You can see that it relates to a will, and look at the words in line three: 'shall not apply'. What the will is doing is providing that part of s. 31 of the Trustee Act 1925 shall not apply and so the will is overriding the Act. The first point to check is whether it can do so. The answer in this case is yes: see s. 69(2) of the Trustee Act considered at page 327 of Chapter 15. Do not always assume that it is possible for a legal document to override either a statute or case law. For example, a trustee exclusion clause cannot always do so: see Chapter 16.

What does this clause do?

First it excludes the 'proviso' in sub-section (1) as it says that the proviso of that section 'shall not apply and shall be deemed to be omitted'. So we need to look at the proviso to s. 31. Note that we did not consider this proviso when we looked at s. 31 in the study skills section above.

> Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

How did we know that it was a 'proviso'? This is easy: it opens with the words 'Provided that'. What does the proviso say though? Again we need to look carefully at the actual words and you will see that the vital ones are 'the trustees shall have regard to'. How do we know that they are the vital words? This is because they tell the trustees what to do.

So, what the proviso says is that when exercising their power of maintenance the trustees shall have regard to certain factors which are set out further on. These are, as you can see, such matters as 'the age of the infant and his requirements'.

We can now interpret the will as saying that, as the proviso does not apply, the trustees will not be bound to have regard to certain particular factors and so their discretion on whether to pay maintenance is widened.

There is more, too: the will also says that 'clause (i) of sub-section (1) of the said section shall be read as if the words "as the trustees think fit" were substituted for the words "as may, in all the circumstances, be reasonable"'. If we go back to s. 31 and what it says, we can see that the omission of the words 'reasonable' and substitution of 'as the trustees think fit' does give the trustees a much wider discretion as there is no room for any decision of theirs to be challenged on the ground that it is not 'reasonable'.

This particular clause is in fact commonly found in wills and in 2011 the Law Commission published a report, 'Intestacy and Family Provision on Death', which proposed reforming powers of maintenance and advancement to make them accord with current practice. One result would be to change s. 31 to make it accord with what is in this clause. This, of course, is an example of you using your research study skill (see below) to supplement your skill in analysing legal documents.

Study skills feature: when it comes to researching a topic for an assessment

You will need to research topics in equity and trusts for various reasons: it may be preparation for an exam or an assignment or possibly a presentation. Researching topics in equity and trusts involves the same basic study skills as in other areas which you study but it is helpful to see how these can be applied to equity and trusts. Here is an example:

Suppose that you are researching the question of what is a fiduciary? First be clear about exactly what you want to research. Is it just the meaning of this term or are you really trying to find out what it means in certain contexts, for example whether a company director is a fiduciary? So remember, right at the start, to refine and clarify your research question. Suppose, for example, that you are seeking to establish what a fiduciary is. You will find this area covered in Chapter 13.

This area is contained in case law and so you need to look for a fairly recent discussion of exactly who is a fiduciary is, preferably in a decision of the Court of Appeal, House of Lords or Supreme Court. Recent decisions have the advantage over earlier ones that they will usually refer to the earlier ones and so give you a trail for your research.

A quick search in a text book will show you that one often quoted case is *Bristol and West Building Society* v. *Mothew* (1998), where Millet LJ said that a 'fiduciary is someone who has undertaken to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence'.

Now that you have a start you need to follow the trail. Have a look at one of the most recent cases. A good example is *Sinclair Investments (UK) Ltd* v. *Versailles Trade Finance Ltd* (2011). This decision was of great importance on the issue of claims by a beneficiary, to whom a fiduciary owed duties, to a proprietary interest, but do not get led astray! You are researching the concept of a fiduciary and not this topic. Look at the leading judgment, that of Neuberger MR, and search for any reference to *Bristol and West Building Society* v. *Mothew* (1998). You will find it at para. 35.

If you then look further down this judgment you will see, as we mentioned earlier, that as it is a recent case it will refer you to earlier ones and in fact Neuberger MR in the next paragraph (36) refers to *Regal (Hastings) Ltd* v. *Gulliver* (1967). If you go to this case you will find references to *Boardman* v.