Book Reviews

Chaos in the Law of Trusts

PRINCIPLES OF THE LAW OF TRUSTS (2nd edn)
by H A J Ford and W A Lee, Sydney, Law Book Company, 1990

Scholars of Equity will welcome the second edition of Ford and Lee's *Principles of the Law of Trusts*. In this area of the law, perhaps more than any other, Australian scholars have published work with a distinguished international reputation. Ford and Lee's second edition continues this tradition of rigorous scholarship, of clear exposition and helpful commentary. The new edition is an expansion from the first. Notably, the authors have added a new chapter on public unit trusts. They report in the preface that they have also added some 450 new cases, a third of which antedate the first edition.

In certain respects, Ford and Lee's work is at variance with other standard texts on trusts. It contains more than is usually to be found in such treatises. Through Ford and Lee's chapter on the trustee's title (chapter 3), students are introduced to the law of assignments as it stood prior to the High Court's decision in *Corin v Patton*.[1] Elsewhere, there are brief treatments of future property, undue influence, estoppel, the rule against perpetuities and bankruptcy. Trusts is thus set in a broader context.

In other respects however, Ford and Lee's work is quite traditional. It continues a method of treatise writing on the law of trusts which dates back over 150 years. The authors expound the law of trusts as a discrete branch of the law containing within it a basic coherence and unity of doctrine, which is treated in a systematic and orderly manner. Substantially, this is the same approach as was developed in the course of the nineteenth century. Like other books, *Ford and Lee* begins definitionally in distinguishing the trust from other concepts of law such as agency, bailment, debt and contract and continues with identifying those elements necessary to create a valid trust. The discussion of the nature of the trust and the means of its creation is followed by chapters on the trustee. The book then looks at certain specific types of trust — charitable trusts, resulting trusts, constructive trusts and public unit trusts. While these last types of trust call for special treatment, the assumption underlying the rest of the book, and other treatises of its kind, is that the trust is capable of exposition as a unitary concept without attention to

1 (1990) 64 ALJR 256.

context. It is not intended as a criticism of Ford and Lee's very fine work to suggest that the time has come for this basic premise to be fundamentally reviewed.

Creating Order out of Chaos: the Nineteenth Century Enterprise

The ordering of the law of trusts into a discrete area of law with a coherent body of doctrine was in large part the work of nineteenth century judges and scholars. They began to order this body of law, to categorise and to arrange it in such a way that the law should be knowable, coherent and rational. In this work they were influenced in no small measure by the idea that law was a science. Science provided a metaphor by which lawyers understood the work of doctrinal analysis. Legal science was a reaction to the "old-fashioned English lawyer's idea" that "a satisfactory body of law was a chaos with a full index".[2] Nineteenth century lawyers and judges saw their task as to order this body of law, to expound it according to fundamental concepts and to bring to the fore the thread of reason which runs through it explicitly or implicitly. To this nineteenth century systematization we owe much of our present-day understanding of the general law. The nineteenth century judges and scholars defined and delimited the categories within which we now organise our thoughts. Concepts such as contract, tort, the company and the trust provide the basis for law school curricula as for textbooks and basic legal analysis.

Modern scholarship has illuminated the extent to which textbook writers and judges were law-makers in this work. Those who organised and conceptualised the law were more than efficient filing clerks. They were editors and revisers who in restating the law to give it coherence, imposed upon it an interpretative grid which gave form to that which was inadequately honed. Professor Simpson has traced this editorial process in the formation of the modern law of contract.[3] So too the trust as it is understood today, can be traced to this nineteenth century codification.

Science provided a metaphor for this, but it was a certain kind of science, with a particular world view which fitted in neatly with the aspirations of nineteenth century lawyers. The kind of science which lawyers modelled was Newtonian. It was a vision of a clockwork universe in which the world was seen to be perfectly ordered and explicable by natural and fundamental laws. Newtonian science inspired a throng of imitators in the social sciences who sought to find the patterns of order within their disciplines. The scientific metaphor transferred particularly well to legal study. Law, strongly influenced until the time of Bentham and Austin by natural law ideas, was seen to be logical, ordered and rational. Coke had boasted of the common law that it was the "perfection of reason".[4] It had not seemed such to Bentham, who on listening to Blackstone's lectures was struck by the incoherence of much of the law which was expounded.[5] It was to overcome this state of

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2 Oliver Wendell Holmes attributed this description to T E Holland. See Alexander, G, "The Transformation of Trusts as a Legal Category, 1900-1914" (1987) 5 *Law and History Review* 303 at n36.

3 Simpson, A W B, "Innovation in Nineteenth Century Contract Law" (1975) 91 *LQR* 247. See also Simpson, A W B, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 *Univ of Chicago LR* 632.

4 Coke, Sir Edward, *Institutes of Laws of England* Part 1, sec138.

affairs that nineteenth century writers sought to reorder it. Cases needed to be reconciled, explained, and if necessary discarded. A firm doctrine of precedent needed to be established to maintain order, and the boundaries of various concepts of law and equity were firmly demarcated. The expositors looked for order and they found it.

Writings on equity did of course pre-date the nineteenth century, but these were not systematic doctrinal expositions. Rather they were either collections of maxims (of which Richard Francis' *Maxims of Equity* (London, 1727) appears to have been the most influential) or practitioners' texts which placed the trust within the overall context of the law of conveyancing and settlements, and focused on the Statute of Uses.[6] It was only as a result of the nineteenth century enterprise that the law of trusts emerged as a distinct body of law, removed from its locus as an aspect of the law of conveyancing, and distinguished from other legal concepts.

The first of the great treatises on trusts was Thomas Lewin's *A Practical Treatise on the Law of Trusts and Trustees* which first appeared in London in 1837. Other writers on both sides of the Atlantic subsequently contributed to the doctrinal exposition of the subject.[7] Lewin expounded the law of trusts in a way which would be reasonably familiar to readers in the present day. In his treatment of the elements of the trust, Lewin made no distinction between different kinds of trusts. As he explained in the opening to his book, mutatis mutandis, trusts of chattels operated on the same principles as trusts of realty, and indeed he took Coke's definition of a use as his definition for trusts in general. In his discussion of the duties of trustees however, he did distinguish between different kinds of trusts. Different chapters were devoted to trusts of chattels personal, of renewable leaseholds, trusts to preserve contingent remainders, trusts for sale, and trusts of charities. In his second edition he added trusts for the payment of debts. Such individuation is by and large absent from modern texts such as *Ford and Lee*. Lewin's focus on different kinds of trusts did not however extend to the trust itself, beyond the basic division between trusts arising by express or implied intention and those arising by operation of law. The trust itself was treated as an abstract and autonomous legal concept, rooted in the definitional model of the conveyancer's trust. The tradition thus became established of treating the trust as having distinct and identifiable features which gave a unity to the exposition of the subject as a whole.

One aspect of this development in the case-law was that the boundary lines of the trust were sharpened and the trust was distinguished carefully from other legal categories such as contract and gift. Thus for example, the rule emerged that Equity will not cure an imperfect gift by treating it as a trust.[8] Lord Eldon had not found the same difficulty in finding a valid declaration of trust where a man's written power of attorney to his agent was

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5 Harris, J, *Legal Philosophies* (1980) at 24.

6 For example Sanders, F, *An Essay on Uses and Trusts and on the Nature and Operation of Conveyances at Common Law* (5th edn, 1844 by G W Sanders and J Warner).

7 Major works on the law of trusts which were first written in the nineteenth century include Hill (1845), Underhill (1878), Godefroi (1879), Ames (1882).

8 *Milroy v Lord* (1862) 4 De G F & J 264, 45 ER 1185; *Jones v Lock* [1865] 1 Ch App 25, *Richards v Delbridge* (1874) LR 18 Eq 11.

not carried out before the former's death.[9] By the last quarter of the century, a more rigid formalism prevailed.

In the course of the nineteenth century, the classic model of the trust became more firmly established. As one writer has said:

> Equity courts in the nineteenth century increasingly emphasised the model's elements in sharpening the lines between trust and similar legal categories. Judicial reasoning made the decisions appear to flow inexorably from the legal category that the parties themselves selected, even if mistakenly. And whether trust was the appropriate category depended on whether all of the elements of a trust were in place.[10]

It is noteworthy that although the trust was seen as an autonomous concept, it lay beyond comprehensive definition. As great a scholar as Maitland acknowledged in his Cambridge lectures that he did not know where to find an authoritative definition of the trust, and contented himself with a "wide vague definition".[11] To Maitland, as to many other writers after him, the trust was best defined by what it is not. Its nature emerges in contradistinction to other legal concepts. Ford and Lee venture a working definition (at 101)[12] but go on to expand on it and to qualify it through several paragraphs and by footnotes. The difficulty in defining a trust is indicative of the wider problem inherent in treating the trust as an abstract and singular concept distinct from the various contexts in which it arises.

The Breakdown of the Nineteenth Century Model

In the modern era, this model of the trust is breaking down. It would of course be possible to show a breakdown of the law in the books in any area of law by citation of decisions from various jurisdictions which are inconsistent with the textbook account. That judges display idiosyncrasy or failures either of logic or learning does not show that the classical model has broken down. Rather it is evidence of the need for scholars and appellate courts to reinforce the law as revealed by established precedent.

However that there is a certain amount of chaos in the law of trusts may be shown by reference to major cases in English and Australian law which either have current acceptance among scholars and judges or which are illustrative of a line of such cases where departures from orthodoxy occur. Although the greatest tumult has concerned resulting and constructive trusts, the express trust also fits uneasily within the confines provided for it by nineteenth century writers. The conveyancer's trust no longer provides a helpful definitional model — if it ever did — for the variety of contexts in which the trust is invoked.

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9 *Ex parte Pye* (1811) 18 Ves 140, 34 ER 271. A Mr Mowbray gave a written power of attorney to his agent instructing him to transfer an annuity to a woman by whom he had had three children. The failure of the agent to carry out these instructions before Mowbray's death did not defeat the mistress's claim. Lord Eldon held that the written power of attorney constituted Mowbray's declaration of trust.

10 Alexander, G, "The Transformation of Trusts as a Legal Category, 1800-1914" (1987) 5 *Law and History Review* 303 at 328.

11 Maitland, F, *Equity—A Course of Lectures* (Brunyate, J (ed), 1936) at 44.

12 References are to the paragraph numbers of *Ford and Lee*.

Ford and Lee note (at 101) some of these contexts. However, the variety is perhaps understated. A trust may be the vehicle by which a dead hand controls the next generation, or it may last only as long as it takes to transfer the trust property to the person beneficially entitled. The trust may be used by a trading entity as a security interest to ensure payment,[13] or it may be in itself a sizeable trading entity.[14] It may be created by the oral declaration of a moment, or require detailed preparation by a battery of lawyers. It may be used by individuals to avoid taxation, or by judges to avoid the doctrine of privity.[15] A trustee may be four[16] or forty. A beneficiary may be almost in the grave, or not yet born. Flexible it certainly is. The question is whether in all of these, we find a common thread sufficient to justify a unitary exposition.

Ford and Lee illustrate well in their first chapter the difficulty of defining the trust as an autonomous legal concept. For it must be said that whether it is possible to define the trust as an autonomous category depends on one's vantage point. In their thorough analysis of the distinctions between the trust and other categories time and again they are compelled to define the difference only in terms of the effect of each. This is helpful once someone has authoritatively declared one or other to have been created by the transactions under review. Yet from the point of view of a solicitor seeking to give advice on the effects of certain transactions, or a judge having to make a determination concerning them, a trust may be very hard to distinguish from a bailment or a debt or a contract. Indeed in certain circumstances it may coexist with a contract or debt. The categories are necessary legal constructs, but it should not be assumed that because certain distinctions are of significance from a legal point of view that therefore the parties averted their minds to those issues. In some cases where the law looks for intention on a certain matter in order to classify the arrangement, the relevant party or parties may not have had an intention in regard to that matter.

The breakdown in the classical model of the trust may be seen clearly by an examination of the requirements for an express trust. Even the terminology of an express trust is problematic, for many express trusts are not express at all. They are implied, or inferred, or perhaps imputed to people on the basis of their assumed intent. Perhaps in recognition of this problem in terminology, Ford and Lee do not use the term "express trust" as a major heading in the work. They prefer to speak (at 113) of the trust "expressly created" and stress here, and more fully in their treatment of intention, that such intention may sometimes only be discerned after lengthy consideration of the circumstances, where the court considers that the trust is the most appropriate legal mechanism to carry out the broad purpose which the person intended.

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13 A trust arrangement is one explanation of the Romalpa clause. See *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] ch25.

14 See Ford and Hardingham, "Trading Trusts: Rights and Liabilities of Beneficiaries" in Finn P (ed), *Equity and Commercial Relationships* (1987).

15 *Trident General Insurance Co v McNiece Bros Pty Ltd* (1988) 80 ALR 574.

16 *Re Vinogradoff* [1935] WN 68 in which a four year old girl was held to be trustee under a resulting trust.

Certainty of Intention

When we analyse this intent more closely, we discover that the level of proof of intent appears to vary depending on the context in which the trust is said to arise. At least towards the end of the nineteenth century, the courts required affirmative proof of an intent to create a trust before deeming this to be the effect of precatory words.[17] Similarly, in a series of cases of which *Vandepitte v Preferred Accident Insurance Corp*[18] and *Re Schebsman*[19] are prominent examples, courts insisted upon clear evidence of intent before they would find a trust of the promise in a contract to benefit a third party. More recently, however, in *Trident General v McNiece Bros*,[20] the High Court has given strong indications that this insistence on express evidence of intent will be relaxed and a trust inferred from the circumstances.

By contrast with these cases insisting on affirmative evidence of intent to create a trust, there are other cases of established authority in which an intention to create a trust is inferred upon very slight evidence. An example is the High Court of Australia's decision in *Cohen v Cohen*.[21] The husband had acted for the wife in receiving money in relation to three transactions. The first was 9000 German marks which the wife had arranged for the husband to collect. The second was 123 which were the proceeds of sale of some furniture, and the third was 80 which were the proceeds of an insurance claim concerning the wife's jewellery and furs. The question was whether in these transactions the husband acted as the wife's trustee or merely as her agent. The Statute of Limitations barred her action in the latter case but not in the former. It was held in relation to the proceeds of sale of the furniture and insurance money that the wife intended him to account for the proceeds of sale specifically to her and not to have merely a personal obligation to account to her for the money. This inference could not be made with respect to the German marks since it was intended that he should use this money to purchase goods in Germany and to import them to England. The choice between an interpretation that an agency was intended and one that a trust was created turned on inferences as to the parties' intentions. Yet there was really little evidence one way or the other in this regard. Quite possibly, this is an example of a case where they had no intent on those issues which were of legal significance. In any event, the evidence fell far short of an affirmative intent to hold on trust, by the standards used in the precatory trust cases.

Similarly, an intention to hold on trust has been inferred from slight evidence in the de facto relationship cases. As Fullagar J noted in *Thwaites v Ryan*,[22] courts have accepted much less stringent evidence in these cases than in other cases which have concerned questions of intention to create a trust. Examples include *Midland Bank p.l.c. v Dobson and Dobson*,[23] *Grant v Edwards*,[24] and the recent decision of the NSW Court of Appeal (Mahoney

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17 *Re Williams* [1897] 2 Ch 12; *Re Adams and Kensington Vestry* (1884) 27 chD 394.
18 [1933] AC 70.
19 [1944] ch83.
20 (1988) 80 ALR 574.
21 (1929) 42 CLR 91.
22 [1984] VR 65, 91.
23 [1986] 1 FLR 171.
24 [1986] ch638.

JA dissenting) in *Green v Green*.[25] In this last case the majority held that a trust was intended where a man bought a house, in which he allowed one of his mistresses to live. He placed it in the name of a third party. The man apparently told the woman that he had bought the house for her, and said "this is your house". Later this house was swapped for another, and the man instructed his solicitor at one stage to transfer this latter house to the woman, but this legal transfer never eventuated. Gleeson CJ (with whom Priestley JA agreed) reached the view that Mr Green was a joint tenant with her in equity on a rather more generous view of the evidence than commended itself to the trial judge and Mahoney JA. Accepting the statements were made, they do not necessarily imply that she should have beneficial ownership of the property. The words are consistent with an intention that she should have a licence to reside there. Indeed, Gleeson CJ did not consider that Mr Green could have intended her to have outright ownership. Mahoney JA pointed out in his dissent that the claimant had a poor grasp of English, she was very young at the time the beneficial interest was apparently conferred, and that the trial judge had commented on the unreliability of her evidence. He further pointed to evidence that Mr Green had dealt with the property by mortgage (in his son's name) as if he were the sole beneficial owner.

Green v Green may be contrasted with the nineteenth century decision of *Jones v Lock*.[26] In this case, a father, returning from a trip, placed a cheque in the hand of his nine month old son saying "I give this to baby for himself" and then took back the cheque. The Lord Chancellor refused to infer from this a declaration of trust. He commented: "I think it would be of very dangerous example if loose conversations of this sort, in important transactions of this kind, should have the effect of declarations of trust". Was the statement in *Jones v Lock* any less definitive than in some of the de facto relationship cases? Indeed, one would expect that where real property is concerned, a greater certainty of intention would be required than for personalty, consistent with the position regarding contracts for the sale of land. Whatever the merits of the decisions in the de facto cases, such as *Green v Green*, looked at only in formal terms, the decisions are striking.

The liberal approach to finding a trust in some of the cases cited may be contrasted with the view expressed in 1672 by Lord Nottingham in *Cook v Fountain*.[27] In that case he said:

> Express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption... the law never implies, the Court never presumes a trust, but in cases of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate.[28]

Further questions need to be asked as to the nature of the intention. Is it subjective or objective? The High Court in *Commissioner of Stamp Duties (Queensland) v Joliffe*[29] insisted that proof of a subjective lack of intent could

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25 (1989) 17 NSWLR 343.
26 (1865) 1 ch App 25.
27 (1672) 3 Swans 586, 36 ER 984.
28 (1672) 3 Swans 586, 591, 36 ER 984, 987.

override the express statement in a bank account that Mr Joliffe held the money for his wife as a trustee. This is rightly criticised by Ford and Lee (at 205) as being inconsistent with the general law in other respects. It may be contrasted with cases such as *Eves v Eves*[30] and *Grant v Edwards* where the objective representations as to intent to confer a beneficial interest have prevailed over subjective and concealed intentions to the contrary. Of course the cases are distinguishable. In *Joliffe*, the fraudulent declaration of objective intent was to avoid legislative restrictions. Mr Joliffe declared himself to be a trustee to evade a restriction on the number of accounts he could hold under the Savings Bank legislation. In *Eves* and *Grant v Edwards* the fraud was on individuals, who acted to their detriment on the strength of the other's apparent intent. But why should one fraud be excused and not the other? Again, in *Eves* and *Grant v Edwards* the trust was constructive, not express. But objective intention was still the motivation for imposing the trust, and an "implied, resulting or constructive trust" needed to be found to overcome the writing requirements of the *Law of Property Act* 1925.

As will be seen, there are important distinctions between the different cases on certainty of intention. Differences of context go some way to explaining the differences of result and provide a certain order and coherence. However, this is not the same kind of order which is provided for in the classical model.

Certainty of Subject-Matter and Objects

The model for an express trust provides not only for certainty of intention, but also for certainty of subject-matter and objects. In addition, someone should be able to enforce the trust. Just as there are difficulties with certainty of intention, so there are difficulties in discussing the question of subject-matter and of objects. Certainty of subject-matter has three aspects to it. First and foremost, there must be property which is the subject-matter of the trust. Second, the extent of that property must be certain. It is insufficient (as Ford and Lee note at 414) for a person to make a trust of "the bulk of my shares".[31] Third, the beneficial interests in that property, where there is more than one beneficiary, must be certain.

Yet in the state of well-established modern authorities, it appears that a valid trust may be created where uncertainty exists in one or more of these respects. For example, in *Ottaway v Norman*[32] it was held that a trust arose where a woman, who had lived in a de facto relationship with Mr Ottaway and received a house from him in his will, promised Mr Ottaway that she would leave it to his son and daughter-in-law. When she left it to others instead, Brightman J held that a trust arose. Yet it appears that during her lifetime, she owned the house absolutely. It was not subject to a trust. The only limitation on her rights of ownership was with regard to testamentary disposition. The court enforced her obligation, and termed it a trust, yet there was no property which was the subject of that trust during the lifetime of the

29 (1920) 28 CLR 178.
30 [1975] 3 All ER 768.
31 *Palmer v Simmonds* (1854) 2 Drew 221, 61 ER 704.
32 [1972] ch698.

"trustee". As the judge explained, the trust was in suspense during her lifetime.

Re Golay's Will Trusts[33] (though perhaps an exceptional case) illustrates how courts may be liberal with the requirement that the quantum of the beneficial interest must be certain. In that case a bequest was upheld which provided that the executors should allow a person to "enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties". Ungoed-Thomas J held that this was not void for uncertainty. He considered that since courts are constantly involved in making objective assessments of what is reasonable, the court could define a reasonable income if need be.[34]

Once again the cases of informal arrangements affecting land provide ample illustrations of cases where a trust has been founded on intentions but where the proportions in which the legal owner holds for himself and his de facto spouse are not revealed by the evidence. The issue of beneficial interests appeared to worry Brightman J in *Eves v Eves*, although he concluded, in line with Lord Denning MR, that the court "should imply that the plaintiff was intended to acquire a quarter interest in the house". Such judicial imputation of intention to the parties may also be found in the Australian cases such as *Hohol v Hohol*[35] and *Vedejs v Public Trustee*[36] in which there is a strong tendency to say that equality is equity.

Certainty of objects is also problematic since *McPhail v Doulton.*[37] In this case the House of Lords held that the test for certainty of objects in a discretionary trust should be assimilated with the test for powers. The test is whether the objects of the trust are defined with sufficient particularity that one is able to decide whether a particular person is or is not an object of the trust. In their treatment of this topic (at 516, 517), Ford and Lee do, with respect, gloss over some difficulties with this test. The meaning of the House of Lords' test of certainty was explored in *Re Baden No 2.*[38] In that case, the three judges of the English Court of Appeal offered three different explanations of what the test meant. Ford and Lee adopt Sachs LJ's test of conceptual certainty, without really noting the different approaches of Megaw LJ and Stamp LJ. Discussion of their views is confined to noting the different interpretations of the word "relatives". The differences however went beyond this. Megaw LJ said that the test was satisfied if one could say of a substantial number of people that they were definitely members of the class, while Stamp LJ took a literal view that of any person it must be possible to say that he or she is not a member of the class. After *McPhail v Doulton*, the test for certainty of objects is quite different to the law hitherto. However, in the state of present authority, we are not entirely certain what, in practice, the new test

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33 [1965] 1 WLR 969.

34 The lack of particularity in identifying which flat should be occupied was not mentioned in the judgment, although since the choice lay with the executors, it was not inherently uncertain.

35 [1981] VR 221.

36 [1985] VR 569.

37 *Re Baden's Deed Trusts: McPhail v Doulton* [1971] AC 424. See further, Austin, R, "Discretionary Trusts: Conceptual Uncertainty and Practical Sense" (1980) 9 *Sydney Law Review* 58.

38 *Re Baden's Deed Trusts (No 2)* [1973] ch9.

means. Furthermore, it is difficult to say where the beneficial interests in the property lie. The situation is perhaps analogous to that under an unadministered estate.[39]

The Beneficiary Principle

The difficulties created by the beneficiary principle are too well-known to call for detailed comment. The exceptions are numerous. Trusts for masses, monuments, tombs, animals, and even blood sports have been upheld. These were described as "occasions when Homer has nodded" by one English judge.[40] Homer's influence is not confined to giving effect to the idiosyncratic wishes of English testators. The Quistclose trust,[41] so useful in commerce, may also be explained as a non-charitable purpose trust. The conflicting cases on the beneficiary principle clearly illustrate the problem that courts have been unwilling to be constrained by the nineteenth century model if this means striking down trusts which are otherwise perfectly workable and provide little risk of fraudulent misbehaviour by trustees.[42]

The Future of the Law of Trusts

The difficulties in the way of treating the trust as a coherent and singular entity can only be touched upon in the space of a brief review article.[43] It is a problem which is magnified when resulting and constructive trusts are brought into the picture. As Ford and Lee themselves note (at 2201, 2202) the constructive trust in particular is difficult to expound as a coherent conceptual unity, and its doctrinal boundaries are at present incapable of precise definition.

What then of the future of the law of trusts, and what implications does this have for the writing of treatises? It is not the intention of this writer merely to traverse the well-covered ground of legal realism. Still less to nail his colours to the mast of critical legal studies. There is still an important place for the teaching of trusts, and for treatises on the area. Ford and Lee's valuable work can guide students and practitioners through the law of many types of express trusts, and provide an introduction to, if not a coherent statement of, resulting and constructive trusts. The extensive treatment of trustees' powers and duties and the rights of beneficiaries is both comprehensive and meticulous.

It is the notion that all trusts can be explained by the same rules which must be abandoned, but not to the seas of uncertainty. For while some areas of the law are uncertain and in others, the law has not charted a consistent course, the law of trusts is far from random. We may at times perceive chaos, but there are patterns within that chaos. Scientific theory may again provide a metaphor. Chaos theory[44] acknowledges that some aspects of the natural

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39 *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694.

40 *Re Endacott* [1960] Ch 232, 250 per Harman LJ.

41 *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567.

42 See eg, *Re Denley's Trust Deed* [1969] 1 Ch 373.

43 See further, Austin, R, "The Melting Down of the Remedial Trust" (1988) 11 *UNSWLJ* 66.

44 Gleick, J, *Chaos: Making a New Science* (1987); Stewart, I, *Does God Play Dice? The Mathematics of Chaos* (1989).

order are unpredictable and incapable of reduction to scientific laws. For example, long term weather patterns are difficult to predict because of the sensitive dependency of weather on initial conditions. At the same time, some aspects of nature which appear chaotic have within them complex and orderly patterns. Period-doubling, bifurcations, and the Feigenbaum sequence have all become established in the language of science through the study of behaviour in dynamic systems which at first sight appear random. There are determinable patterns which lead to the onset of random behaviour in dynamic systems. Furthermore, after a chaotic period, there may be a further settling down to orderly behaviour again. Remarkably, not only is there order within chaos, but as Feigenbaum discovered, different chaotic events follow the same chaotic patterns. Similarly, as Mandelbrot showed, patterns within nature sometimes repeat themselves at ever smaller scales. They have the characteristic of self-similarity. Fractal geometry now joins Euclidian geometry as another way of seeing order in nature.[45]

This revolution in modern science is coming about because researchers have chosen to explain disorder rather than order, and to see the data which does not fit not as an experimental aberration but as the key to understanding scientific laws in a different way. It required a change of perception, aided by the speed of modern computers in the constant repetition of equations. For as long as scientists looked only for order, influenced by a worldview of a deterministic universe, they found only what they were looking for, and left other aspects of nature unexplained.

This may seem remote from the law, and in one sense it is. There is no reason why law should in any way imitate science. Indeed the scientific metaphor may be a residue of the natural law fallacy. Yet at the same time, the issue of how our worldviews influence what we look for and what we discover is as relevant to the social sciences as to the natural sciences. Ford and Lee begin with a premise that the law of trusts should be expounded as an orderly and logical system, and that the trust is capable of exposition as a unitary concept subject to further subcategorisation. At many points they criticise decisions which are disorderly by reference to those logical patterns. At other times they accept judicial rationalisations and reconciliations at face value.[46] In so doing, readers may gain an unrealistic impression of what is actually happening in the law. Disorder is masked rather than being identified and discussed.

Yet this disorder in the law of trusts may be analysed without recourse to jurimetrics. The fact of disorder, that is the breakdown of the classical model and the turbulence within the law of resulting and constructive trusts over the last few years, needs to be acknowledged. At the same time, there are obvious patterns within this disorder which can lead to an exposition of the law which

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45 Mandelbrot, B, *The Fractal Geometry of Nature* (1982).

46 For example, they cite without criticism (at 2113.1) as part of the law of resulting trusts Mason and Brennan JJ's bewildering reconcilation of the decision in *Bloch v Bloch* (1981) 37 ALR 55 with their reasoning in *Calverley v Green* (1984) 155 CLR 242, 262. According to their Honours in the latter case, a distinction is to be drawn between somebody who intends to purchase property subject to a mortgage and somebody who intends to purchase a property which will eventually be free from a mortgage.

allows for a more accurate portrayal of what is happening and a better prediction of what will happen in the future.

We must look therefore for the patterns which explain the course of judicial decision-making where it departs from the traditional model of the trust. This may lead to new categorisations. The appearance of chaos in the cases discussed above hides a deeper order. For example, we may see in the cases on certainty of intention that the level of proof of intention varies depending on the context. Clear evidence of intention will need to be shown before it is found that a trust obligation exists where otherwise there would be no obligation whatsoever. But much slighter evidence will be sufficient where it is not in doubt that some form of obligation is intended but where the form of that obligation is in doubt. This is the difference between *Jones v Lock* and *Cohen v Cohen*. In *Cohen*, only the form of the legal obligation was in question, and very slight evidence tipped the balance in favour of finding a trust, whereas in *Jones v Lock* the issue was whether any legally binding obligation was voluntarily created. At least towards the end of the nineteenth century courts looked for clear evidence of an intention to hold on trust before imposing obligations on people who would otherwise hold that property absolutely. *Cohen* and for that matter the resurrection of the trust of the contractual promise concept in *Trident General Insurance Co v McNiece Bros*, illustrate the judicial approach where the issue only goes to the form of obligation and not to its very existence.

Trident General also illustrates the limitations involved in treating the law of trusts in isolation from other areas of the law. In their discussion of this case, Ford and Lee note (at 411) the statements of members of the High Court concerning the circumstances in which a trust will be inferred from a contractual intention to benefit a third party. However, the issue is presented only with reference to the question of whether it is necessary to show an affirmative intent to create a trust of the promise. With respect, it is not on this issue centrally that the judges of the High Court may be seen to differ from the Privy Council in *Vandepitte v Preferred Accident Insurance Co of New York*. The issue was not whether a trust can be inferred from circumstances but whether it should be. The heart of the divergence is a difference of attitude to the doctrine of privity of contract, and ultimately to the judicial role. There was sharp disagreement in the High Court on whether the Court had the power by judicial fiat to abrogate the doctrine of privity entirely. Yet only Brennan and Dawson JJ supported the doctrine in principle. Deane J was strongly inclined to allow the trust of the promise to be used as a means of circumventing the doctrine of privity in cases where a clear intention to benefit a third party is evidenced. It is only against the background of the debate about the doctrine of privity that one can understand this area of the law, since the earlier decisions show a determination not to allow the trust of the promise idea to undermine fundamental contractual doctrine.

The above distinction between questions of the existence of an obligation and questions only of form explains some of the cases on certainty of intention, but not all. One must also consider as a further category those cases where in strict legal terms an alleged promise to confer a beneficial interest is voluntary but where the plaintiff has a strong moral claim. In these cases also, one may find that weak evidence of intent is sufficient. In the plethora of

cases arising from de facto relationships a variety of approaches have been taken in terms of legal analysis. In many cases, the discovery of an intention to hold on trust has been the means by which a moral claim has been satisfied, even though the evidence, especially as to quantum of the beneficial interests, has been quite vague. Historical and sociological perspectives illuminate the reasons why, over the last thirty or so years, there has been this recognition of the moral claims of spouses and de factos to a share in the property of the other on the breakdown of cohabitation.[47] The difference in context of these "intention" cases helps to explain the results, but it is only by consideration of this external frame of reference that the cases follow an obvious pattern. The requirements of certainty of intention cannot explain the differences.

Patterns may also be seen when one draws together the various cases which involve trusts in relation to statutes, such as *Commissioner of Stamp Duties v Joliffe*. These may be illuminated by consideration of the attitudes of judges to statutes historically. In an article in 1908, Roscoe Pound noted four ways in which the courts might respond to legislation.[48] They might treat it as a source of principle from which to reason, and hold it as a later and more direct expression of the general will, of superior authority to judge made rules; or they might treat it in the same way, but as having only an equal authority to judge-made law; or they might refuse to receive it generally into the body of the law and give effect to it directly only — but with a liberal interpretation to cover the whole field it was intended to cover; or the court might give it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. He considered the fourth approach to be the orthodox common law attitude in the nineteenth century, although there were trends towards the third approach in the twentieth century. The decision in *Joliffe* is an example of the fourth approach. In reference to taxation statutes however, a number of cases have indicated a willingness to abandon the strict internal logic of trust law in favour of giving effect to the general tenor and purpose of the statute. *Baker v Archer-Shee*[49] and *Oughtred v IRC*[50] are examples of this.

The relationship between equity and statutory formalities is itself a topic of some interest. The old maxim that equity will not allow the Statute of Frauds to be a cloak for fraud only explains some of the cases where equity allows rights to property despite a failure to comply with statutory formalities. Parallels with the restrictive approach to the operation of the statute taken in *Joliffe* may be seen in the enforcement of half-secret trusts (in which the court need have no concern about preventing fraud). This is difficult to reconcile with the spirit and intent of the *Wills Act* even if one accepts the theory that the trust arises inter vivos and not under the will. It is to be seen also in the curious decision of the High Court of Australia in *The Commissioner of Probate Duties (Victoria) v Stocks*[51] that a distinction must be drawn between

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47 Notably the feminisation of poverty even with the discretionary system under the *Family Law Act* 1975 (Cth). See McDonald, P (ed), *Settling Up* (1986).

48 Pound, R, "Common Law and Legislation" (1908) 21 *Harvard LR* 383 at 385.

49 [1927] AC 844.

50 [1960] AC 206.

51 (1976) 135 CLR 247.

a person's intention to create a trust and intending those circumstances in which a trust is created by statute.[52]

The law of trusts cannot be presented as if it were timeless and without social context. Ford and Lee's account gives an impression of order which takes little account of the ebbs and flows of history in relation to the utilisation of trust doctrines in "hard cases". The future of scholarship in the law of trusts must be with an attention to context and an explanation of the use of the trust by individuals, corporations and judges to achieve a variety of goals. Moffatt and Chesterman's *Trust Law — Text and Materials* (1988) is a step in the right direction. The trust can no longer be taught as a logical abstraction.

Some restoration of the classical model remains possible. The model has suffered from that curious reductionism which treats all equitable rights to money or property as arising under an express, resulting or constructive trust. *Grant v Edwards* and the Australian cases of similar ilk such as *Hohol v Hohol* and *Green v Green* would have been better decided by reference to estoppel doctrine.[53] Greater clarity emerges in the law of constructive trusts if one distinguishes between the remedies of a constructive trust and an account for profits.[54] *Ottaway v Norman* can be explained if one resurrects the almost forgotten notion that there can be equitable obligations in regard to property which are not trusts.[55] Nonetheless much disorder remains. Studying this disorder will reveal complex patterns which illuminate the use of the trust in modern society. By contrast, our attempts to explain the law of trusts altogether in a logical and coherent manner hide that which is most interesting for understanding directions the law may take in the future.

Ford and Lee is within its own terms a work of the highest quality. Yet its terms no longer have the explanatory power that they once did, and insistence on an analysis of the modern law by reference only to its internal consistency is more likely to cloud a proper understanding than to assist it. In some areas, as the policy of the law settles, chaos will give way to new order. In others, we will have to be content with an order of a different kind to our Newtonian, and Benthamite, forbears.

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52 Similarly, the view of Griffith CJ in *Anning v Anning* (1907) 4 CLR 1049 that an equitable assignment may occur where a donor of a chose in action has done everything he or she needed to do, is hard to reconcile with the statutory requirements for the transfer of different kinds of property. It is unclear why equity should play any role when statutory formalities have not been complied with unless there are special reasons of conscience to attract equitable rights and remedies. This issue of equity's attitude to statute lies at the heart of the debate between Griffith CJ and Isaacs J in *Anning*, and the debate is continued in *Corin v Patton* (1990 64 ALJR 256) especially in the conflicting views expressed by Mason CJ, McHugh J and Deane J on the one hand, and by Brennan J on the other.

53 Parkinson, P, "Doing Equity Between De Facto Spouses: From *Calverley v Green* to *Baumgartner*" (1988) 11 *Adel LR* 370 at 398-404.

54 Hanbury and Maudsley, *Modern Equity* (12th edn by J Martin, 1985) at 303-305.

55 *Gill v Gill* (1921) 21 SR (NSW) 400; *Jacobs' Law of Trusts in Australia* (5th edn by R P Meagher and W M C Gummow, 1986) at 32-35.

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