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In Depth

Principal forms of commercial trusts in the UK and the rethinking of traditional approaches

Ruiqiao Zhang

Abstract

Trusts, which originated in common law and are used to protect family landholdings over generations, have developed into a vehicle that is more often used for commercial purposes. This shift has occurred without any systematic understanding of in what form and to what extent trusts can be adopted in a commercial context. Furthermore, few have considered whether existing trust law can adequately govern commercial trusts; that is, whether or not the commercial use of trusts requires a redeveloped trust law regime, distinguished from traditional approaches. This article offers a critical analysis of these issues, identifying and categorising the principal forms of commercial trusts that are currently employed in the UK. It argues that, given the different settings and contexts in which commercial trusts are found, trust law should be developed to serve the way in which trusts are now used in a commercial context.

Introduction

Trusts are ubiquitous across the UK economy and society, with diverse applications and the ability to adapt to new usages. Family trusts, which are used to preserve familial wealth through family settlements, helped carve out the earliest modern trust law parameters. In the mid-Victorian era, many small to mid-sized families held investments and securities in trusts. The burdens of trusteeship that increased in Victorian England gave rise to more investor-friendly trust law and prompted the development of the notion of a trust as a fund. Trusts were an integral part of commercial dealings in England from at least the early eighteenth century. In the early nineteenth century, before the invention of joint-stock companies, they were commonly used as a device to allocate the risk of a commercial party’s insolvency and in corporate structures. Following the rise of a wealthy Victorian middle class, the increase in commerce and later changes in tax law in the early twentieth century, trusts came to encompass shifting funds of personal

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1. This is evidenced in many of the classic Victorian cases on breach of duty by trustees, eg Re Hallett’s Estate (1880) 13 Ch D 696; Speight v Gaunt (1883-84) LR 9 App Cas 1.


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property. These socio-economic changes caused the trust law doctrine to change. Although family trusts can still be found today, they are no longer as significant as they were in what was once a far more socially polarised society that featured a much larger aristocratic class. Evidence shows that the trusts that are found in commercial and business contexts nowadays, which are referred to as commercial trusts in this article, have the most influence on how trust law is adapting; this reflects how trusts are now being used. Trust law cases are becoming increasingly more focused on commercial dealings, rather than familial ones, and the litigation of commercial trust law issues has become more frequent than in the past. The UK Law Commission’s 2006 report on Trustee Exemption Clauses confirms the popularity of commercial trusts.

The increasing importance of trusts in a commercial context requires a rethinking of the traditional approach to trusts; however, there is a dearth of systematic scholarly literature on the topic of how and in what form trusts are used for commercial purposes. This article therefore seeks to remedy this by identifying and categorising the principal types of commercial trusts that are currently employed in the UK. It will both illustrate how business requirements have shaped the evolution of trusts and explore the different settings (distinguished from the traditional approaches) in which commercial trusts are now found. The article concludes by advising that a redeveloped trust law regime that can respond to these changes is now required.

The analysis in this article is particularly focused on unit trusts, pension trusts and Quistclose trusts—each of which are key examples of each principal form of commercial trusts. This article offers an examination of in what form and to what extent trusts have been used in commercial contexts in the UK. This not only provides an opportunity to examine various hypotheses concerning the economics of the trust relationship from a disciplinary perspective, but also sheds light on the legal thinking behind trusts in comparable jurisdictions, a topic which is attracting a growing amount of scholarly interest.

**Principal forms of commercial trusts in the UK**

Commercial trusts exist in a variety of forms in the UK; while the principles that apply to each variety are not identical, they may be similar. For example, many uses have arisen from the same essence of trust: independence of the trust property. These socio-economic changes caused the trust law doctrine to change. Although family trusts can still be found today, they are no longer as significant as they were in what was once a far more socially polarised society that featured a much larger aristocratic class. Evidence shows that the trusts that are found in commercial and business contexts nowadays, which are referred to as commercial trusts in this article, have the most influence on how trust law is adapting; this reflects how trusts are now being used. Trust law cases are becoming increasingly more focused on commercial dealings, rather than familial ones, and the litigation of commercial trust law issues has become more frequent than in the past. The UK Law Commission’s 2006 report on Trustee Exemption Clauses confirms the popularity of commercial trusts.

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**Principal forms of commercial trusts in the UK**

Commercial trusts exist in a variety of forms in the UK; while the principles that apply to each variety are not identical, they may be similar. For example, many uses have arisen from the same essence of trust: independence of the trust property. This makes the trust an ideal tool with which to produce the segregation effect required by modern banking and financial operations (namely, the holding of assets by a manager and the segregation...
of those assets from other assets held by the manager in
their personal capacity or for other persons).\textsuperscript{10}

This article will broadly divide commercial trusts in the
UK into four categories according to their key different
uses or purposes: trusts for investment purposes; trusts
protecting assets in insolvency; trusts underpinning com-
mercial loan arrangements; and trusts relating to share-
holding. Some trusts might fit into more than one
category as they have various functions; such cases will
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\textbf{Trusts for investment purposes: unit trusts
versus investment trusts}

Nowadays, investors who wish to own stocks, bonds or
other financial assets are showing an increasing prefer-
ence for buying shares in a pooled investment vehicle in
which investment professionals select and manage
assets according to guidelines while complying with the
investment objectives.\textsuperscript{11} Such preference makes a trust
an ideal tool for investment purposes; it allows investors
to invest in a trust within which a professional trustee
and/or manager selects from a pooled investment, man-
aging the investment for the benefit of the trust benefi-
ciaries (who are, in most cases, the investors themselves).

In this way, small investors are able to achieve a
diversified investment portfolio that is professionally
managed by a trustee and by investment experts hired
by the trustee. Investors greatly rely on the rate of return
these managers are able to achieve. In other words, the
trust offers expertise and diversification superior to
what would be obtainable by small investors construct-
ing an individual portfolio. The key essence of the
trust—the trustees hold and manage the trust property
in the beneficiary’s interests, rather than their own—
makes the trust a better option (i.e., a safer method) of
investing compared to other vehicles such as compa-
nies, wherein the invested assets become the company’s
assets and the investors are no longer the beneficial
owners. Moreover, a trust, which is largely regulated
by its trust instrument, is considered a more flexible
and less complex application than a corporation.\textsuperscript{12} A
modern investor would hope to choose a vehicle that
allows the free transfer of interests and permits the rules
governing the scheme to be changed where necessary.

Additionally, granting legal ownership (or propri-
etary powers, in civil law) to trustees facilitates a more
efficient use of the trust, especially in commercial con-
texts where quick and reliable decision-making is im-
portant. This quality makes the trust superior to agency
because an agent does not have the discretion permitted
to the trustee. A trustee’s legal ownership also signifi-
cantly reduces transaction costs, because they can de-
vote the trust’s resources to taking advantage of
business opportunities, instead of needing to obtain
the investor beneficiaries’ consent to the transaction.
Consequently, the investor beneficiaries are able to de-
vote their resources to their principal activity, rather
than searching for business opportunities that fall out-
side of their profession.\textsuperscript{13}

In the UK, trust-related investment schemes mainly
come in two forms: unit trusts and investment trusts.

\textsuperscript{10} Michele Graziadei, Ugo Mattei and Lionel Smith, ‘Commercial trusts in European private law: the interest and scope of the enquiry’ in Michele Graziadei, Ugo


\textsuperscript{12} A detailed analysis of what makes a trust more advantageous than a company or other legal vehicles is indicated in my other article: Ruiqiao Zhang, ‘The new role
trusts play in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution’ (2017) 23(4) Trusts & Trustees 453,
461–66.

\textsuperscript{13} Graziadei, Ugo Mattei and Lionel Smith, ‘Commercial trusts in European private law: the interest and scope of the enquiry’ in Michele Graziadei, Ugo Mattei
and Lionel Smith (eds), \textit{Commercial Trusts in European Private Law} (CUP 2005) 41.
The investment trust, although called a trust, is not viewed as a trust today; rather, it takes the form of a company.

Unit trusts

A unit trust in the UK is subject to part XVII chapter III of the Financial Services and Markets Act 2000 (FSMA 2000). Defined in section 237(1) of the FSMA, a unit trust is ‘a collective investment scheme under which the property is held on trust for the participants’. The essential principle of the unit trust is the entrusting of a property portfolio to a trustee and the sale, to participants, of units of interests in this portfolio. It is usually open-ended, both potentially and in practice, such that new investors are able to add funds at any time, acquiring units and enlarging the pool.

The unit trust is constituted by a trust deed made between a trustee and a manager. The trustee and manager must be different persons, and both are corporations. The trustee is usually a well-known bank that legally holds trust assets on behalf of and for the benefit of unitholders, who are the beneficiaries (and the settlors) of the trust and who therefore have beneficial interests in the underlying investment. The trustee provides dividends and capital growth for the unitholder beneficiaries. The manager, who takes on a different role, is responsible for the day-to-day running of the unit trust, including the selection of investments and the administration of the trust fund. The manager sets a value for units according to a formula, and is obliged to buy back units when investors (the unitholders) wish to redeem them. The manager, as an investment expert, is able to identify new areas and asset classes that the trustee may not be aware of due to a lack of sufficient knowledge and expertise in the area.

This shows that a unit trust used for commercial purposes is, in a broad sense, a developed and complex version of the original trust used in a family context. The role of a trustee in the traditional approach is now delegated and shared between two legal persons bound by the trust deed: a trustee in name, who holds the trust assets, and a manager, who selects and runs the investment, makes decisions regarding the value of units and administers the investment fund. In other words, the nature of trusteeship has undergone a gradual evolution to a split trusteeship in unit trusts. It involves splitting the trust obligation into custody and the management of the trust corpus. Kam Fan Sin argued in *The Legal Nature of the Unit Trust* that a unit trust has two limbs. The primary one is that of the trust fund subject to the deed’s provisions and all regulations, which is a trust for a collective purpose rather than a means of disposition. The secondary one arises from the moment of a triggering event for winding up the unit trust. It is a trust for sale or conversion into money for contribution to unitholders on a proportionate basis. The enactment of the Public Trustee Act 1906 to facilitate the simultaneous appointment of a custodian trustee and a trust manager fully
recognised the need for specialisation. Although still governed by equitable principles (for example, no-conflict rule), the liabilities of the trustee and the manager under the unit trust are limited. This is different from the liabilities of the traditional trustee, who would act gratuitously based on the burden of personal duties and unlimited personal liability yet was more likely to be relieved of liability for breaches of trust.

Such complexity in the unit trust is the result of the challenges that intricate business and diversified commercial use have brought to trusts. Professor Rudden conceptualises this new dimension of trust law by distinguishing between the legal regime applicable to things considered as investments and that applicable to things considered as portions of the physical world. Therefore, rules developed and distinguished from traditional approaches are required in order to provide specific and compressive regulations on commercial trusts. For example, a question that needs to be answered regarding the unit trust is how we should define the nature of the manager. Are they a co-legal owner of the trust property (the same as the trustee) or simply a delegate of the trustee? Are they a fiduciary who is liable in equity for breach of duty of care? It is arguable that the tension between the need for effective decision-making power, allowing for the efficient management of the trust, and the power-sharing outcome that occurs as a result of the contractual arrangement (a trust deed made between the trustee and the manager) creates a distorted incentive scheme. In fact, after the second world war, the need to diversify investments—the key to the success of unit trusts—spurred legislative change in several European countries.

**Investment trusts**

The investment trust is the oldest and most widely used type of collective investment scheme. It operated initially as common law trusts for the aggregation of capital invested in non-land assets such as stocks and bonds; however, when the first Companies Act was passed in the 1860s, doubts about the legality of its status led investment trusts to become public limited companies. As such, the investment trust, despite its adoption of the name of trust, is now considered to be a company (more precisely, it is an investment trust company). Unlike a real trust, investors in the investment trust company are shareholders of a corporation and thus have no direct interest in the underlying investments. These investors cannot redeem their investment at will pursuant to the capital maintenance rule of the company.

Having a similar function to the unit trust, the investment trust company is also a collective investment vehicle that pools the money of numerous investors, spreading it across a diversified portfolio of stocks and shares that are selected and managed by professional investment managers. Directors of the investment trust company must act independently

30. This is addressed by the author in Ruiqiao Zhang, ‘Changes and Challenges of the Role of a Trustee in a Commercial Context: Does this Separate Commercial Trusts from Trusts?’ (2021) 42:6 Business Law Review 262, 267–68; A detailed discussion can also be found in Kam Fan Sin, *The Legal Nature of the Unit Trust* (OUP 1997) 170–73.
31. A leading case is *Nocton v Lord Ashburton* [1914] AC 932, 957. It found that the client succeeded on the footing that there was a breach of a duty arising from a fiduciary relationship. Further support of the existence of a fiduciary duty of care can be found in *Woods v Martins Bank Ltd* [1959] 1 QB 55.
33. See for example, in France, Germany and Italy.
34. Clare Świerski, Anthony Stewart, Laura Underhill and Violet Marcel, ‘Investment trusts: tax’ (2016) Practice Law 2 accessed 2 May 2022: Investment trusts were defined as ‘associations of more than 20 persons for the acquisition of gain’, unless registered under the Joint Stock Companies Act 1862 and the Joint Stock Companies Act 1867. The test case of *Skyes v Beadon* (1879) 11 Ch. D. 170 deemed the investment trusts to be illegal, and they were therefore hastily restructured as investment trust companies to avoid being wound up. Although *Skyes v Beadon* was reversed by *Smith v Anderson* (1880) 15 Ch. D. 247, investment trusts continued to be established as companies from that point forward.
35. The Investment Trust (Approved Company) (Tax) Regulations 2011.
36. See *Trevor v Whitworth* (1887) 12 App Cas 409; Companies Act 2006, pt 18.
of the investment managers; the majority of the directors must not be connected to the managers. Both the unit trust and investment trust company enable small investors who do not have enough money to participate in a larger investment by putting their money into a pool. Moreover, they both allow investments to be diversified in different portfolios (i.e., investors can put their eggs in different baskets), allowing said investors to reduce their investment risk. In many cases, it is possible to buy unit trusts and investment trusts with almost identical portfolios that are managed by the same people.

**Trusts protecting assets in insolvency: pension trusts, employee benefit trusts and client and customer money trusts**

A key function of the trust is to protect assets as a shield against the claims of other people (e.g., the creditor of the settlor or trustee) in the event of insolvency or death. The trust is adopted in order to organise assets and affairs in advance, safeguarding against potential losses that might arise from a future calamity. This makes the trust popular in family contexts and for commercial uses. The commercial trust that arises in insolvency cases might be both similar to and different from that which arises in instances of personal bankruptcy.

The use of trusts in insolvency is largely reinforced by the foundational principle of trust law, which states that trust property is separated from the property of the trustee, settlor or other person. Trust law requires the trust property to be earmarked appropriately (such as by being put into a separate account) in order to prevent the trustee from commingling the trust property with their own property.

In the UK, there are various types of trusts that can be adopted to protect assets in insolvency, including pension trusts, employee benefit trusts, and client and customer money trusts.

**Pension trusts**

Trusts have become very important in a pension context due to the spotlight on the need to make financial provision for retirement. Pension provision is one of the biggest socioeconomic projects of recent years and the attractiveness of the trust arrangement in terms of its ability to safeguard assets over a long retirement period was crucially recognised by the Report of the Pension Law Review Committee and the Pension Act 1995. Section 252 of the Pensions Act 2004 requires an occupational pension scheme that has its main administration in the UK to be established under irrevocable trusts before the trustees or managers accept any funding payment.

A pension trust, which arises from a contract of employment, establishes a means by which deferred compensation can be paid out to putative beneficiaries in their retirement. Under the trust mechanism, the employer, acting as the trust settlor, creates and makes consistent contributions to a separate trust in order to defray pension promises. The employer’s insolvency does not disrupt the pension scheme because the trust segregates and protects the assets from the claims of the employer’s general creditors. These assets are available to pay members’ pensions, regardless of whether or not the employer stays in business, as present and future employee beneficiaries look to the trust, not to the bankrupt employer.

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43. ibid, s 252.
44. A pension trust is a specialised and complex subject closely connected with a pension scheme and pension law. Given its word limit, this article will only discuss the fundamental rules of pension trusts from an overview perspective. There is detailed literature on pension trusts, including scholarly output and specialised practitioner work. Information and references can also be found on the websites of The Pensions Regulator and Pension Protection Fund.
45. See eg RE Kayford Ltd [1973] 1 All ER 604; Heritable Reversionary Co Ltd v Millar [1892] AC 598.
for payment of their pensions. Thus, the employees are guaranteed an income, although deferred upon retirement, under the pension trust.

The trustee holds the pension scheme’s assets and is responsible for managing and administering the scheme and its investments. For example, in this age of deficits rather than surpluses, they have key powers to set the ongoing contribution rate from the employers, veto changes proposed by the employers and to wind up the pension scheme, which usually triggers an immediate funding obligation on the employers. The trustees must exercise their powers and discretions according to their fiduciary duties and in the best interests of the scheme members. While the trustees can delegate tasks to various specialists, such as fund managers, the responsibility for them remains with the trustees.

Out of all the different types of commercial trusts, the pension trust is the only one that has been assimilated into conventional trust law. For example, same as a traditional family trust, it commonly allows for a gratuitous transfer. Because of this, the pension trust is the most recognisable commercial trust from the viewpoint of the traditional personal trust.

The pension trust has similarities with traditional trusts but also has stark differences. One of the principal tenets of the Pension Act 1995 was its accommodation of the reality that beneficiaries under a pension scheme differ from those under a standard trust arrangement. Under a traditional trust, the beneficiaries are granted trust interests with no pre-obligation to provide a service or contribute to the trust. Contrastingly, the employee beneficiaries of a pension trust have paid for their interests by contributing to it and working for the employer. Another main deviation of pension trusts from private family trusts is that employers (settlors) in pension trusts are granted more powers and discretion. It is common in pension trusts for the trust deed to include an express provision for the employer to have various important powers, including the ability to appoint and remove the trustees. There has also been controversy on whether the trustee should consider the employer’s interests when managing the pension trust. Some cases suggest a broader view arguing that it would be legitimate for trustees to regard the employer’s interests in the appropriate circumstance. Nonetheless, the Pension Regulator seems to side with the narrow view that only the members’ interests shall be considered. Its guidance and public pronouncements indicate that trustees of defined benefit schemes with a deficit should treat themselves as creditors of the employers in the same way as banks.

The pension trust can be organised in a multiplicity of legal forms, including trusts, foundations and associations. And its tax environment is separate from private family trusts. In practice, there are undesirable tax implications in many private trusts if the settlor retains an interest in the trust. A pension trust has no adverse tax effect if its settlor retains some form of powers.
control or interest. 60 Although fundamental trust principles govern pension trusts, many provisions of the trust legislation are not applied, 61 including the rule against perpetuities. 62 And it is not certain that existing case law for private trusts can always be taken as a realistic guide for pension trusts. 63

**Employee benefit trusts**

Another type of trust set up by a company to benefit current or former employees is the employee benefit trust; this trust, in turn, helps the company to attract and retain high-quality employees. The employee benefit trust is created by a company through a trust deed in order to hold and transfer its shares to employees in certain events or via a share scheme. 64 Examples of the uses of employee benefit trust include share plan trusts (which hold a company’s shares until they are transferred to employees), cash-funded employee benefit trusts (where payment of a bonus is to be deferred until certain future events occur) and medical benefit trusts (which are an alternative to conventional health insurance).

Although the settlor company will make recommendations on the use of the trust property that will usually be followed by the trustee, the trustee holds the trust property under their own legal ownership, independent of the settlor company, and has wide discretion in the distribution of the trust fund. Former and current employees of the company and their subsidiaries, families or dependants are the beneficiaries of the trust. 65 The trust is maintained when the settlor company becomes liquidated or wound up or changes ownership, and any creditors of the company have no claim over the trust property.

The employee benefit trust creates an internal share market wherein employees can acquire and sell shares; this prevents shareholder dilution as the trust provides an opportunity to acquire and sell existing shares instead of issuing new ones. However, there are potential disadvantages to consider when creating an employee benefit trust; namely, if the shares are acquired and designated (i.e., earmarked) for a particular purpose before they are distributed to the beneficiaries, this may be subject to pay-as-you-earn (PAYE) taxation. Additionally, should the shares increase in value, the trustee may be subject to a taxable gain.

**Client and customer money trusts**

The value of the trust in providing asset protection in solvency also promotes the formation of a client and customer money trust; 66 this protects the client or customer’s assets from their manager’s insolvency by separating the customer’s assets from those belonging to the manager in their personal capacity. 67 In many areas, the client and customer trust is implied by law.

The Financial Conduct Authority (FCA) requires that, unless otherwise permitted, client money is kept separate from a firm’s own money, and a firm’s creditors are not entitled to the client money should the firm become insolvent. 68 For example, a law firm should set up a client account for client money held on trust that is separate from its office (or private) account, so that its clients’ money will be safe if the law firm becomes insolvent. Similarly, in insurance, when a customer pays a premium to a broker, that money is protected from the broker’s potential insolvency in the period before the money is passed to the insurance provider.

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61. ibid para 2.17–34 and ch 3.
64. The company’s board of directors must approve the trust in a formal minute and lay out reasons for its creation. Acquisition of shares by the employee benefit trust is usually funded by the company through a loan, outright contribution or a guarantee of bank loan. Company funding must comply with rules on financial assistance re acquisition of its own or parent company’s shares.
65. Examples of the benefits to be received by the beneficiaries are free shares of the company, options to purchase shares at a discounted price or income form the shares to be paid as dividends.
66. Client and customer money trusts appeared in the mid-Victorian English case law, eg *Re Hallett’s Estate* (1880) 13 Ch D 696; *Thomson v Clydesdale Bank* [1893] AC 282. The primary issue in those cases was whether the solicitor or broker held the funds in a fiduciary or quasi-trustee capacity so as to entitle the claimant to equitable proprietary relief.
A client and customer trust may also establish when a company is experiencing financial difficulties and may be heading for insolvency. That company could potentially continue to trade as long as new money taken from customers is held on trust, so that it can be returned to the customers if the company becomes unable to fulfil their orders.

**Trusts underpinning commercial loan arrangements: Quistclose trusts and security trusts**

In the dedicated study of trusts in commerce, we can see that trusts can also be found underpinning commercial loan arrangements, due to the vehicle’s comparative advantages over ordinary contractual principles. The trust form is adopted because those who lend money to others want to ensure that they themselves are protected from bankruptcy or insolvency. Typical examples of this form of trust are Quistclose and security trusts.

**Quistclose trusts**

The term ‘Quistclose trust’ derives from the case *Barclays Bank Ltd v Quistclose Investments Ltd* 69; this type of trust arises as a result of a loan for a specified purpose. Quistclose, an investment company, advanced £209,000 to Rolls Razor in order to allow the latter to pay a dividend that it had already declared. The sum was paid into a special account with Barclays Bank, with whom Rolls Razor had an existing overdraft. Quistclose would have been an ordinary creditor if Rolls Razor had paid the dividend, but Rolls Razor was in trouble and went into liquidation before paying it. Barclays sought to count the money in the special account against Rolls Razor’s overdraft, but the House of Lords opposed this action and held that Rolls Razor held the money on trust to pay the dividend and that, upon its failure to do so, the money was held in trust for Quistclose. Lord Wilberforce took the view that a primary trust existed in favour of the shareholders. Then, on the failure of the primary trust, a secondary trust existed in favour of the original lender, Quistclose.70 That is, where the stipulated purpose for which money is advanced cannot be carried out, the provider of the money can recover their property through a secondary trust that arises from the failure of the primary purpose. However, the leading authority now claims that, in the standard case, the beneficiary interest remains with the lender during the lifetime of the so-called ‘primary trust’, which accordingly has the sole right to enforce it.71

Therefore, a Quistclose trust refers to the form of trust that commonly arises where a loan is made on terms ensuring that if money or other property cannot be used for the purpose for which it is advanced, it will be returned to the lender. In essence, its arrangement shows some of the features of a resulting trust.72 The effect of the Quistclose trust is not to provide security for repayment of the loan73 but to reserve in the lenders the beneficiary interests in the money or property until it is used for the designated purpose. Thus, the lenders are provided with some proprietary security whether their borrowers are solvent.74

A Quistclose trust does not necessarily arise merely because money is paid for a particular purpose.75 And it is not enough that a lender has a purpose or motive in advancing the money to the borrower. In every case, the question is whether the parties intended the money to be at the borrower’s disposal by requiring that it should not

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70. ibid 582. Lord Wilberforce stated: ‘In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the divided, could not be carried out, is clear and I can find no reason why the law should not give effect to it’.
71. *Twinsectra v Yardley* [2002] 2 AC 164. Lord Millet argued that there will normally be only one trust throughout, and that the characterization of the so-called ‘primary trust’ is a power, rather than a trust in the strict sense.
72. ibid [92]. Referring to and endorsing Dr. Chamber’s model of resulting trusts, Lord Millett characterised the Quistclose trust as a resulting trust that ‘responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it. Insofar as the transfer does not exhaust the entire beneficial interest, the resulting trust is a default trust which fills the gap and leaves no room for any part to be in suspense’.
73. ibid [72].
74. ibid [13] and [100].
75. ibid [73]. This was applied in *Shalson v Russo* [2005] Ch 281 [128]–[30].
be applied for any purpose other than that stipulated. Millet provides the best explanation of scenarios where loans will be treated as giving rise to Quistclose trusts. For example, if an arrangement can be interpreted as one in which the borrower, essentially, is spending the lender’s money to achieve a purpose that the lender cannot achieve by spending their own money directly, a Quistclose trust arises. The resulting trust may only be necessary in cases where it is unclear that a lender expressly intended to create a trust but clear that he did not plan for the borrower to have the free disposal of the money.

A Quistclose trust must be structured to keep the money or other property separate from the borrower’s other assets, strengthening the inference that the borrower does not have the property at their free disposal and that they are not simple contract debtors. In Quistclose and Carreras Rothmans, for example, special bank accounts were set up to receive the money. In absence of such separation, no trust is created, simply a contract; a trust only emerges when it concerns a specific fund. R v Common Professional Examination Board, Ex Parte Mealing-McLeod asserts that there is no intention to create a trust when the money on loan has not been separated, even if the contract of loan includes a provision stating: ‘You must use the cash loan for any purpose specified overleaf . . . You will hold that loan, or an part of it, on trust for us until you have used it for that purpose’. In other words, regardless of whatever has been explicitly expressed in the loan contract, it is still advisable to look at how the money has been advanced.

The specific rules of the Quistclose trust provide an example of how commercial trust law has developed in a way that means it operates differently to the law concerning private or familial arrangements, and that this development is necessary given the desire to use trusts in business dealings. The Quistclose trust can be considered as a complex form of the traditional trust, firstly in the sense that it essentially involves a trust combined with a loan and secondly in the sense that the trust only exists either before the money or property are used for the particular purpose agreed in the loan or when the property is used beyond that purpose. The Quistclose trust will end once the specific purpose agreed between the lender and borrower is achieved, whereupon the relationship between these two parties will turn into a normal relationship between a creditor and debtor of the loan.

Quistclose trusts represent a departure from regular loans, which are the default position when money is lent in a commercial context. Normally, if A lends money to B, B immediately becomes the legal owner of the money and A is simply an ordinary creditor who has no beneficial interests in the money. If B spends the money other than in the way that has been agreed to, B just commits a breach of contract, which does not result in the money returning to A. In comparison, under a Quistclose trust, in cases where either the purpose fails or a court determines that a given application as not valid, the money is to be returned to A.

Once the borrower trustee fulfils the terms of the trust (i.e., uses the trust property for the particular purpose of the loan) the Quistclose trust turns into a pure loan (with the borrower liable to pay back the lender the money at whatever interest rate has been agreed), because no money or property is now held on trust. If the borrower trustee spends the money on a purpose beyond the agreed loan purpose, it will be a breach of the trust, while if the borrower goes insolvent before spending the money according to the stipulation, the lender retains the equitable beneficial interest in the money under the trust, and so is safe from the borrower’s

76. ibid [73]–[76].
77. ibid.
81. Although there are cases that seem to advise that a separate account is not an absolute requirement for a Quistclose trust (or even that it is not necessary to segregate funds) at the very least the money must be earmarked for the particular purpose and no other. However, payment into a special dedicated account is the clearest way of evidencing this segregation. See eg Re EVTR [1987] BCLC 646; Re Farepak [2006] EWHC 3272 (Ch); Cooper v PRG Powerhouse Ltd [2008] EWHC 498; Maundy v Brown [2011] EWHC 377 (Ch).
Security trusts

Another example of a trust used to underpin commercial loan arrangements is the security trust. A security trust is an express trust that usually arises from a security trust deed or under security provisions from another agreement or document. It is created to hold security over a debtor’s assets for the benefit of their lenders (investors) who are the beneficiaries of the trust. This results in the trustee having a range of responsibilities that work to ensure the fulfilment of payments. In cases of syndicated loans, one of the lenders is often chosen to act as the trustee. Broadly speaking, situations wherein security trusts are used might be those in which trusts hold corporate assets for debenture holders, where trusts hold real estate for syndicated mortgage lenders, or with trusts that involve project finance, with a multi-layered debt structure.

The security trust seems to recall and replace the old pattern of bank-intermediated financing, being more advantageous than conventional financing given that the trust is bankruptcy remote; that is, the investor is no longer a simple lender but the owner of a beneficial interest in a distinct pool of trust assets, and should the debtor become insolvent, the trust would not be affected. Moreover, the security trust can be advantageous when there is a large group or diverse groups of lenders or when there are changes to the beneficiaries. When changes to the trust occur, such as selling a loan, it is not necessary to amend the security documents, as opposed to when a security is held by one of the lenders.

What makes a security trust significantly different from a traditional family trust is that the beneficiaries under the security trust can regulate or agree upon the terms under which the security will be enforced; the trustee may then simply enforce the security or release assets following instructions from the (majority of the) beneficiaries.

Trusts relating to shareholdings: voting trusts

Shares are an enormously popular type of trust property and there have been many instances where attempts have been made to create trusts of...
shares. 

A voting trust is referred to as a trust of company shares. It is used by shareholders, mainly minority shareholders, of a company; put simply, these shareholders collectively transfer their voting rights to a trustee for a period of time. The shareholders are both the settlors and the beneficiaries of the trust. The trustee, holding their voting rights, will then be able to vote on company matters for the benefit of the beneficiary shareholders as one unit. The trustees exercise the voting rights subject to the trust instrument and their fiduciary duty. The voting rights will be transferred back to the shareholders once the period terminates.

The voting trust can be used by shareholders to achieve various objectives and benefits. Firstly, the unified vote may better enable shareholders to maintain their control in the company, especially when the group is made up of minority shareholders whose position would be weaker if they were taken individually. By pulling their voting rights together, the shareholders create a block that is able to approve or prevent a decision made by the company through an ordinary or special resolution. Granting voting rights to a trustee also allows shareholders to play a more passive role in the company, which might be preferable to them if they are involved in other business activities.

Commercial trusts: A different setting for a different context

From the different forms and uses of trusts discussed above, we can see that, while trusts and their associated obligations have been found to be extremely useful in commercial contexts, the complexity and sophistication of the commercial uses of trusts are indicative of a law that is struggling to keep abreast of dynamism and innovation in this area. Commercial dealings appear to be providing a new paradigm for trust law in the twenty-first century as they become applied across different social and economic spheres, and might even become more significant still.

Commercial trusts have come to dominate certain types of modern business and financial transactions, which contrasts sharply with the traditional view of trusts. ‘Once economic life had been more complex, there were more demands on trustees’ ability to manage trust assets. This might be difficult for trustees who die not possess either the ability or the time to look after affairs of their friends.

This led to the emergence of corporate trustees, which brought a differentiation in functions between trustees. The role of a commercial trustee (especially those involved in business transactions or trade) is usually played by a limited liability company—a ‘corporate trustee’ or ‘trustee company’. The trust instrument grants the corporate trustee the fullest possible powers; this is crucial to the commercial use of trusts as it enables the effective management of the business.

It has been assumed that the trustee is not to be held personally liable beyond the value of the trust property and has the right to exhaust the trust fund, if need be, in order to satisfy creditors’ claims. A creditor will not receive payment out of the assets of the commercial trust if their transaction was ultra vires the trust. In short, there is clearly a new

92. Sarah Wilson, Todd & Wilson’s Textbook on Trusts & Equity (12th edn, OUP 2015) 36.
94. Minority shareholders may obtain more protection from the voting trust than through shareholders agreement because they are not subject to the defences available under normal contract law.
100. The corporate trustee can be of one two types: a corporate trustee for just one set of assets with one trust deed as one single business venture, or a trustee company that is responsible for several trusts. In general, the trustee company itself has few or no assets of its own, aside from its right to indemnity out of the trust assets.
102. See Octavo Investments Pty v Knight (1979) 144 CLR 360; RWG Management Ltd v Commissioner for Corporate Affairs [1985] VR 385 (however, the trustee may not have such a right in which event he will be personally liable up to the relevant limit without any right of reimbursement).
103. Re Johnson (1880) 15 Ch D 548, 552.
awareness of the current role played by the trust outside the traditional context; this corresponds with the impressive growth of fiduciary law.\(^{104}\)

The differences between commercial and traditional trusts have already triggered a trust law reform. Scotland conducted a momentous review and reform of its trust law in 2014.\(^{105}\) The UK Law Commission has also committed to review trust law in its Thirteenth Programme of Law Reform.\(^{106}\) The commission has taken the view that those who create trusts in commercial dealings do not require the same protection as those who might ordinarily have created trusts. Commercial trusts raise different considerations to those traditionally used. An outcome of the project, aptly titled Modernising Trust Law for a Global Britain, is eagerly expected.\(^{107}\) Although still in its early stages, it has been confirmed that ‘the reform project reviewing the law of trusts would consider an outdated area of the law, with a view to modernising trust law to enhance the competitiveness of this jurisdictions’ trust services in a global market’.\(^{108}\)

Moreover, judicial interpretations of trust law (for instance, in the House of Lords case \textit{Target Holdings v Redferns}\(^{109}\) and the Supreme Court case \textit{AIB Group (UK) plc v Mark Redler & Co Solicitors}\(^{110}\)) reveals an inclination in the higher courts that leans towards recognising the distinction between traditional trusts and commercial trusts and adjusting and developing traditional approaches when they apply in a commercial context. In \textit{Target Holdings v Redferns}, Lord Browne-Wilkinson said:

It is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind.\(^{111}\)

In \textit{AIB v Redler}, Lord Toulson specifically identifies the difference between traditional and commercial trusts and importance of the element of the underlying contract engaged in the commercial trusts to the decision; that is, in this case the fact that the trust is part of the machinery affecting the performance of a contract is relevant to the loss the bank suffered due to the breach of trust. This is because it would be artificial and unreal to look at the trust in isolation from the obligations that were originally why it was brought into being.\(^{112}\) Moreover, in what is taken as a long-standing judicial acknowledgement, Lady Hale stated in \textit{Stack v Dowden} that “context is everything” in the law: ‘the domestic context is very different from the commercial world’.\(^{113}\)

Therefore, this article argues that commercial trusts exist in varied forms and recognises how their contexts differ from traditional family trusts. Accordingly, specific rules need to be developed that coincide with different types of trusts and respond to the evolved role of trustees and other parties. Rules can be created and abandoned as need dictates, as history can confirm, acknowledging different analyses and accounts of the trust in English and Scots law. The procedures and requirements that derive from the particular familial uses of trust apply uniquely to that type of trust and should be abandoned or modified to suit a commercial context. Commercial trusts are still trusts, and the essential principles of trust that make the trust an advantageous legal vehicle remain; however, the evolved use

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\(^{107}\) ibid para 2.22.

\(^{108}\) ibid para 2.24.

\(^{109}\) \textit{Target Holdings v Redferns} [1996] AC 421.


\(^{111}\) \textit{Target Holdings v Redferns} [1996] AC 421, 435.


\(^{113}\) \textit{Stack v Dowden} [2007] UKHL 17.
of this vehicle in a commercial context requires a redeveloped trust law regime, distinguished from traditional approaches.

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Conclusion

Trusts nowadays are vastly more important in a commercial context than in family trusts, and are now one of the key indicators of financial law. At the heart of complex commercial dealings, the trust becomes a popular structural basis for a range of uses, including investment, protection in insolvency, securitisation, and shareholding. That is, in fast-changing, highly sophisticated and complex environments, the trust serves as an extremely useful mechanism for achieving fair play in a variety of contexts, corresponding with commercial rhetoric and an intent to play fair in the face of the unexpected.

The diversified uses and increasing prominence of trusts in business and commerce have become the strongest influence on the nature of trust law in the twenty-first century. In response to the special and complex arrangements engaged in the commercial use of trusts, this article concludes that a redeveloped trust law regime, distinguished from traditional approaches, is required. The trust law is up for review and reform.

This article is of great research significance because it is the first to offer a systematic understanding of in what forms and to what extent trusts have evolved in commercial uses, compared to traditional approaches, and answers the question as to whether or not trust law needs to be developed to meet the new use of trusts in a commercial context. Its analysis provides great legal certainty for commercial trusts, which will be welcomed by both scholars and legal practitioners.

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117. ibid 37.