Trusts Law

Text and Materials

Fifth Edition

GRAHAM MOFFAT

,

Associate Professor in Law, University of Warwick

With

GERRY BEAN

Partner, DLA Phillips Fox, Melbourne

and REBECCA PROBERT

Associate Professor in Law, University of Warwick



Cootents

	Pref	ace to the fifth edition	page xix
	Ack	nowledgments	xxii
	Tab	le of abbreviations	xxiii
	Use	ful websites	xxiv
	Tab	le of statutes	XXV
	Tab	le of statutory instruments	xlv
	Tab	le of cases	xlvii
1	Tru	sts introduced	1
	1	Introduction	1
	2	The nature of a trust in English law	3
	3	The trust's versatility	4
	4	Manipulating facets of ownership through trusts	5
		(a) The trust's 'tricks'	5
		(b) Summary	12
	5	Equity's rules for enforcing trusts and supplementing their terms	s 13
	6	When is a trust not a trust?	15
	7	The trust and competing legal institutions	15
		(a) Trust and contract	16
		(b) Trusteeship and 'personal representation'	17
		(c) Trust and company	18
	8	Internationalising the trust	21
	9	Imputed trusts	23
	10	Marking the boundaries	28
	11	Focus on social contexts where trusts are used	33
2	The	evolution of the private express trust ⁴	35
	1	Introduction	35
	2	Medieval 'uses' of land	36

	3	The Statute of Uses	41			
	4	The emergence of the modern trust	45			
		(a) The causes of change	45			
		(b) The changes in trusts law and practice	47			
	5	Strict settlements of land and married women's property rights	51			
		(a) Strict settlements	51			
		(b) Strict settlements and trusts	53			
		(c) Trusts for married women	54			
	6	The role of trusts in English law	57			
	7	The jurisdiction of equity	63			
		(a) Equity and the common law	63			
		(b) The Judicature Acts 1873 and 1875	65			
		(c) Law and Equity: fusion or harmonisation?	65			
3	Та	ixation, wealth-holding and the private trust	72			
	1	Introduction	72			
	2	Trust motivation and tax avoidance	75			
	-	(a) Trust founder's motives	75			
		-(b) Tax avoidance, tax evasion and creatures of a similar hue	78			
		(c) Trusts and tax avoidance: a resume	93			
	3	Taxes and the policies underlying them	95			
		(a) Purposes of taxation	95			
		(b) Principles of taxation	97			
		(c) Tax structure	99			
	4	Taxation and redistribution	104			
		(a) Introduction	104			
		(b) Wealth distribution and the importance of inherited wealth	105			
		(c) Estate duty: a voluntary tax?	107			
	5	Trusts and wealth concentration	108			
		(a) A statistical gap: identifying the numbers and size of trusts	108			
		(b) Attributing beneficial ownership in trust funds	110			
	6	Conclusion	112			
4	Creating the trust -1					
	1	Introduction	116			
	1	(a) The centrality of intention	116			
		(b) Maxims of Equity and trust creation	118			
	2	Creating a trust: the requirements outlined	120			
	-	(a) Capacity to create a trust	120			
		(a) Capacity to create a rust(b) The 'three certainties' must be present	120			
		(c) The necessary formalities must be present(c) The necessary formalities must be observed	122			

	(d) The trust must either be completely constituted or supported	
	by valuable consideration	122
	(e) The trust must not infringe the rules relating to perpetuity,	
	•) inalienability and accumulation	122
	(f) The trust must not be intended to defraud creditors or	
	otherwise be contrary to public policy	122
3	Formalities	123
5	(a) Foreword: creation of trusts and dealings in equitable interests	123
	(a) Foreword: creation of trusts and deamings in equitable interests:(b) Creation of trusts and disposition of equitable interests: inter	125
	vivos formalities	125
	(c) Complete constitution of the inter vivos trust	136
	(d) Creation of trusts and disposition of equitable interests:	100
	testamentary formalities	146
4		160
4	Intention ₍ to create a binding trust obligation (a) Certainty of intention	160
	(b) Certainty of subject-matter	173
	(c) Incomplete constitution and the role of intention	175
	(d) Intention to create a binding trust obligation: conclusion	192
~		
5	Trusts creation and resulting trusts	193
6	The Vandervell saga	197
	(a) The background	197
	(b) Stage 1: 1958-1961	199
	(c) Stage 2: 1961-1965	201
	(d) Epilogue	204
C	reating the trust – II	206
1	Introduction	206
2	Trusts and powers	209
2	(a) Trusts and powers distinguished	209
	(b) Trusts and powers compared: discretionary trusts and powers	207
	ofappointment	212
	(c) Trusts, powers and 'trust powers'	214
	(d) Conclusion	215
3	Certainty of objects	216
5	(a) The developing law: discretionary trusts and mere powers	210
	(b) Mere powers, certainty of objects and <i>Re Gulbenkian's</i>	210
	Settlement Trusts	221
	(c) Discretionary trusts, certainty of objects and <i>McPhail v</i>	221
	Doulton	224
	(d) Certainty of objects: some unresolved problems	231
	(e) Conclusion	243
		213

	4	The nature of a beneficiary's interest	247
		(a) The 'great debate'	247
		(b) Equitable ownership and the discretionary trust	249
		(c) Cheese, the nature of the beneficiary's interest and	
		discretionary trusts	250
		(d) From 'equitable interest' to 'equitable right' and beyond	252
	5	The beneficiary principle in modern trusts law	254
		(a) Introduction	254
		(b) The principle established	255
		(c) The principle undermined?	258
		(d) A 'protector' postscript	265
6	Tr	usts and public policy .	267
	1	Introduction	267
		(a) Public policy and freedom of disposition	268
		(b) Limitations in gifts, public policy and legal logic	268
	2	Family trusts and creditors	271
		(a) Trusts, insolvency and public policy	271
		(b) Protective trusts	275
		" (c) Attempts to safeguard property from the creditors of the trust	
		founder	291
	3	Other purposes contrary to public policy	305
		(a) General	305
		(b) Racial and religious discrimination	306
		(c) A statutory limitation on freedom of testation	309
		(d) Statutory limitation on dispositions to defeat the claims of a	
		spouse	310
	4	Trusts, illegality and public policy: a case for reform?	310
	5	Public policy and perpetuities	316
		(a) Introduction	316
		(b) The'rules'outlined	318
		(c) The 'dead hand' and the rule against perpetuities: a rule	
		without a reason?	320
7	Fl	exibility in relation to beneficial entitlement	323
	1	Introduction	323
	2	Premature termination of trusts	325
		(a) The 'rule' in Saunders v Vautier	325
		(bj^ The explanation for and limits of the rule	327
	3	Variation of trusts	329
		(a) Introduction	329
		(b) Pre-1958 jurisdiction	329

	(c) The roads to 1958	334
	(d) The Variation of Trusts Act 1958	340
	(e)Conclusion	354
4	Flexibility in relation to capital entitlement and the power of	
	advancement	355
	(a) Introduction	355
	(b) The statutory power of advancement	355
	(c) 'Advancement or benefit'	358
5	Flexibility in relation to income entitlement and the power of	
	maintenance	364
	(a) Introduction	364
	(b) The statutory power of maintenance	365
	(c) Conclusion	369
ть	a taxation of privata tructs	371
	taxation of private trusts	
1	Tax planning and the trust	371
2	The taxation of trusts: an introduction	375
3	Income tax (IT)	376
	(a) Taxation of the individual	376
	(b) Taxation of the trust	377
	(c) Anti-avoidance measures	381
4	Capital gains tax (CGT)	383
	(a) General	383
	(b) Trusts	385
5	Inheritance tax (IHT)	388
	(a) Introduction: estate duty to inheritance tax – a return journey?	388
	(b) Inheritance tax in outline	390
	(c) Settled property: a continuous revolution?	393
	(d) Pre-22 March 2006 rules: interest in possession trusts	395
	(e) Pre-22 March 2006 rules: 'relevant property'	401
	(f) Pre-22 March 2006 rules: accumulation and maintenance	
	trusts	403
	(g) Post-21 March 2006 rules	406
	(h) Inheritance tax and trusts: conclusion	408
6	Conclusion	414
Aı	n introduction to trustees and trusteeship	420
1	Introduction *	420
2	Trusteeship: moral obligation and a profit motive	421
	(a) A model of trusteeship	421
	(b) The influence of the traditional model	423

	(c) The decline of gratuitous trusteeship(d) Present demography of trusteeship	423 425
	(d) Present demography of trusteesnip(e) Trustee Act 2000: a summary	425 426
3	Trusteeship and trustees: an introduction	427
-	(a) Trustees: capacity and numbers	427
	(b) Special types of trustee	428
	(c) Special forms of trusteeship	430
4	Trustees' duties and powers: an outline	432
	(a) Trustees' duties	432
	(b) Trustees' powers	433
	(c) Duties and powers: a synthesis	434
5	Conflict of interest and duty	435
6	Trustees and direct remuneration	437
	(a) Introduction	437
	(b) Remuneration: the rules	440
7	Trusteeship and indirect remuneration	447
	(a) Directors' fees	447
	(b) Commission and analogous profits	451
8	Dealings with the trust fund or beneficiaries	452
	(a) Introduction: 'self-dealing' and 'fair-dealing' rules	452
	(b) 'Self-dealing' rule and the purchase of trust property	452
	(c) 'Fair-dealing' rule: dealings with a beneficiary including purchase of the beneficial interest	456
	purchase of the beneficial interest	450
9	Conflicts of interest and duty: the wider picture	458
As	pects of the management of trusts	460
1	Introduction	460
2	Duty of care	461
	(a) From the 'prudent man' to a statutory duty of care	461
	(b) A statutory duty of care: Trustee Act 2000, s 1	463
3	Investment	466
	(a) Introduction	466
	(b) The investment marketplace(c) Communication of the standard sta	469
	(c) Commerce, the courts and the development of trustee investment law	474
	(d) Powers of investment and the Trustee Act 2000	4/4
	(e) Investment management, risk and liability for loss	495
	(f) ^Investment and the Trustee Act 2000: a panacea for all ills?	501
4	Impartiality and investment	505
	(a) Introduction	505
	(b) The 'annual harvest' and some problems of capital and income	507

	(c) The scope of the duty to act impartially	510
	(d) Reform and the principle of impartiality	513
5	Delegation	518
	(a) Introduction: from prohibition to the Trustee Act 2000	518
	(b) Trustees' powers of delegation and the Trustee Act 2000	520
Tr	usteeship, control and breach of trust	532
1	Introduction	532
2	Appointment and removal of trustees	535
	(a) The role of the settlor	535
	(b) Appointment of new or additional trustees	536
	(c) Retirement and removal of trustees	541
3	Controlling trustees' discretion	543
	(a) Trusts, powers and discretions	543
	(b) Exercising the discretion	544
	(c) The rule or principle in Re Hastings-Bass (deed)	549
	(d) Beneficiaries' access to information	554
	(e) Conclusion	564
4	Pursuing a remedy	568
	(a) Introduction to trustee liability	568
	(b) Breach of trust and compensation claims: a classification	569
	(c) The measure of liability	573
	(d) Liability of trustees: personal or collective?	588
	(e) Relief of trustees	589
	(f) Protection of time	599
5	Proprietary remedies	602
	(a) Tracing: an introduction	602
In	plied trusts and the family home	604
1	Introduction	604
2	Legal starting-points	606
	(a) Express and implied trusts	606
	(b) Resulting and constructive trusts	607
3	Implied trusts and family property law	608
	(a) The common law	609
	(b) Statutory reform: the Married Women's Property Act 1882	609
	(c) Section 17: signs of community?	610
	(d) The House of Lords' rules: <i>Pettitt</i> and <i>Gissing</i> *	610
	(e) Family law reformed	611
	(f) Matrimonial property law and the ongoing marriage	612
	(g) Unmarried couples	613
	(h) Other family relationships	614

Contents

	4	The family home in joint legal ownership (a) Express declarations	615 616
		(b) No express declarations	617
	5	The family home in sole legal ownership	624
		(a) Resulting trusts	624
		(b) Constructive trusts	627
	6	The rules in context	649
	7	New directions?	654
		(a) Underlying policy issues	654
		(b) A reallocative scheme	664
	8	Conclusion	667
13	Tr	usts in commerce I: occupational pension schemes	669
	1	Introduction •	669
		(a) Commerce and the trust	669
		(b) Trusts law and occupational pension schemes: introduction	670
	2	Significance of occupational pension provision	672
		(a) The welfare significance of occupational pension schemes	672
		.(b) A financial profile of pension schemes	676
		(c) Occupational pension schemes and industrial relations	677
		(d) Maxwell and legal change	678
	3	The legal framework of occupational pension schemes	679
		(a) The use of trusts for pension provision	679
		(b) Trusteeship and conflicts of interest in the OPT: a prologue	681
	4	The administration of the pension scheme	683
		(a) Investment policy and practice	683
		(b) The occupational pension scheme: ownership, entitlement	600
		and control(c) Governance: members' rights and remedies	690 704
	~		
	5	Conclusion	709
14	Tr	usts in commerce II: commerce and equitable remedies	713
	1	Introduction	713
	2	Tracing	716
		(a) Tracing: an introduction	716
		(b) Tracing and claiming at common law	721
		(c) Tracing and claiming in Equity	725
		(d) [^] The limits to equitable tracing and equitable proprietary	
		claims	731
		(e) The personal claim in equity	738

3	Subrogation	740
4	'Strangers', equitable personal liability, 'constructive trusteeship'	
	and-commercial considerations	742
	(a) Introduction: the two categories of constructive trusteeship'	
	or 'equitable personal liability'	742
	(b) Recipient liability and 'knowing receipt'	746
	(c) Accessory liability and 'dishonest assistance'	758
5	Injunctions	770
	(a) Introduction	770
	(b) Types of injunction	770
	(c) 'Holding the ring': interlocutory (or'interim') injunctions	771
	(d) Securing the assets: 'freezing orders' ('Mareva' injunctions)	
	and 'search orders' ('Anton Filler' orders)	776
6	Specific performance	786
7	Equitable damages	788
	(a) Introduction	788
	(b) The jurisdictional question	789
	(c) Exercising the discretion	789
	(d) The measure of damages	791
	(e) Losses, gains and a blurring of boundaries	792
Tı	rusts in commerce III: commerce, credit and the trust	795
1	Introduction	795
2		797
2	Consumer prepayments and the trust(a) The prepayment problem	797
	(b) Remedies	797
	(c) Conclusion	803
3	Loans, security and the trust	803
5	(a) Protecting the lender's interest	803
	(b) The <i>Quistclose</i> trust	804
	(c) The enforceability puzzle: a 'new model' commercial trust?	807
	(d) Alternative explanations	809
	(e) <i>Quistclose</i> and remedial constructive trusts	816
4	Reservation of title and the equitable tracing doctrine	817
	(a) Unsecured creditors, freedom of contract and reservation of	
	title clauses	817
	(b) The commercial framework	819
	(c) Romalpa, unmixed goods and the requirements for an	
	equitable tracing claim	820
		820
	(d) Reservation of title, mixing of goods and the limits of	820
		820 824 829

16	Trusts in commerce IV: fiduciary relationships, commerce	
	and the trust	833
	1 Introduction	833
	2 Fiduciary relationships and breach of fiduciary duty	835
	(a) Identifying the 'fiduciary relationship'	836
	(b) Remedial constructive trusts	845
	(c) Fiduciaries, breach of confidence and undue influence	851
	(d) Defining the content of fiduciary duties: conflicts of interest	
	and the 'secret profits' rule	855
	(e) Fiduciary duties: some policy considerations	874
	3 Remedies	881
	(a) The problem of bribes(b) Equitable compensation	881 884
	4 A postscript	885
17	Trust, contract and unincorporated associations	887
	1 Trusts within the rules of an association	887
	2 Bequests to an association	889
	•(a) The problems outlined	889
	(b) The relevant authorities	891
	(c) Conclusion	900
	3 Destination of assets on the dissolution of an unincorporated	
	association	903
18	An introduction to the law of charity	913
	1 Introduction	913
	2 Charity, the state and charity law: a background	920
	(a) The late Middle Ages to the late eighteenth century	920
	(b) From the Industrial Revolution to the emerging welfare state	922
	3 Charity in a welfare state	930
	(a) New roles for philanthropic organisations	930
	(b) The demography of charity	934
	4 'Privileges' of charitable status	940
	(a) Privileges of charitable trusts under trusts law	940
	(b) The fiscal privileges of charities	952
	(c) Charities and discrimination	959
	5 Conclusion	961
19	A legal definition of charity'	964
	1 Introduction	964
	(a) An agenda for change	964

	(b) The Charities Act 2006	966
	(c) Summary	968
2	Procedure governing registration as a charity	971
3	The categories of charity	974
	(a) Prevention and relief of poverty	974
	(b) Advancement of education	978
	(c) Advancement of religion	982
	(d) The advancement of health or the saving of lives	990
	(e) The advancement of citizenship or community development	991
	(f) The advancement of the arts, culture, heritage or science	992
	(g) The advancement of amateur sport	993
	(h) The advancement of human rights, conflict resolution or	
	reconciliation or the promotion of religious or racial harmony	
	or equality and diversity	994
	(i) The advancement of environmental protection or	
	improvement	995
	(j) Relief of those in need by reason of youth, age, ill-health,	
	disability, financial hardship or other disadvantage	996
	 (k) The advancement of animal welfare (i) The advancement of animal welfare 	997
	(1) The promotion of the efficiency of the armed forces of the	
	Crown, or of the efficiency of the police, fire and rescue services or ambulance services	998
4	Recognising new charitable purposes under CA 2006, s 2(2)(m)	998
5	State/charity relations: a comment	1003
6	Recreational purposes and the Recreational Charities Act 1958	1004
7	Charities: an international postscript	1006
8	Public benefit	1006
	(a) Introduction	1006
	(b) A'personal nexus test'and the advancement of education	1008
	(c) A relief of poverty anomaly: 'poor relatives' and 'poor	
	employees'	1009
	(d) A flexible approach and a'question of degree test'	1011
	(e) A'class within a class'test	1016
	(f) 'Section of the public': an interim conclusion	1017
	(g) Charging fees and distributing profits	1017
	(h) Conclusion: public benefit, 'section of the public' and altruism	1021
9	Charities and political activity	1023
	(a) The scope of the principle t	1023
	(b) The principle in practice	1026
	(c) The principle assessed	1028
10	Reform and the definition of charity'	1032

20	The regulation of charities		1036
	1	Introduction	1036
	2	The Charity Commission	1038
		(a) Structure and functions: an outline	1038
	3	Cy-pres and matching charitable purposes to social needs	1043
		(a) Introduction	1043
		(b) Co-ordination of activities	1045
		(c) Modernisation under the cy-pres doctrine	1046
		(d) 'Small' charities	1052
		(e) Conclusion	1053
	4	Honesty and efficiency in charity management	1055
		(a) Introduction	1055
		(b) Detecting and preventing maladministration	1057
		(c) The limits of the supervisory framework ·	1074

Index

1081