

CORE TEXT SERIES

# The Law of Trusts

*Eleventh Edition*

J E PENNER

Kwa Geok Choo Professor of Property Law, National University of Singapore,  
Barrister of Lincoln's Inn

With contributions from

JEREMIAH LAU

Sheridan Fellow, National University of Singapore

**OXFORD**  
UNIVERSITY PRESS

# Contents

Abbreviations	xv
Table of legislation	xvi
Table of cases	xix
<b>1 The historical origins of the trust</b>	<b>1</b>
The Court of Chancery and the origin of equity	1
The relationship between equity and the common law	4
The Judicature Acts and the fusion of law and equity	6
Equity's creation of the use and the trust	8
FURTHER READING	13
SELF-TEST QUESTIONS	13
<b>2 The nature of the express trust</b>	<b>14</b>
Express trusts and trusts arising by operation of law (TABOLs)	14
How beneficiaries receive their entitlements under a trust	16
Bare trusts, special trusts, and nominee ships	18
Beneficial, equitable, and legal interests	19
Trustees and fiduciaries	20
The features of the express trust	23
Claiming equitable title against third parties: following and tracing trust property	34
The express trust in legal context	42
A note on the English trust for civil lawyers	47
Trusts in civil law jurisdictions: Quebec and Scotland	48
The nature of the beneficiary's right and the fusion of law and equity	53
FURTHER READING	59
SELF-TEST QUESTIONS	59
<b>3 Express trusts: trusts and powers</b>	<b>60</b>
Fixed trusts, discretionary trusts, and powers of appointment	60
Duties and powers <i>virtute officii</i> (powers given to office holders), personal powers (powers <i>nominatum</i> ), powers 'in the nature of a trust', fiduciary powers, bare and mere powers	66

Interests under fixed trusts	71
The principle in <i>Saunders v Vautier</i>	74
Trusts void on grounds of public policy and illegal trusts	76
The rule against perpetuities	78
Judicial control of discretionary trusts and powers of appointment	80
The validity of dispositive discretions: certainty of objects	82
Excessive and fraudulent exercises of powers	87
'Power to exclude' objects	88
<i>Locus standi</i> to enforce the trust and beneficiaries' rights to information	89
Interests under discretionary trusts and powers of appointment	97
Protective trusts	100
FURTHER READING	106
SELF-TEST QUESTIONS	106
<b>Constructive trusts</b>	<b>108</b>
Effectively declared trusts and trusts that arise by operation of law (TABOLs)	108
Varieties of constructive trust	109
'Anticipatory' constructive trusts	109
Third-party recipients of property transferred in breach of trust	112
Trusts of the family home	114
Fraud and theft	123
The nature of the constructive trust: 'institutional' and 'remedial' constructive trusts	126
FURTHER READING	127
SELF-TEST QUESTIONS	127
<b>8 Resulting trusts</b>	<b>129</b>
Resulting uses	129
Automatic resulting trusts and presumed resulting trusts	130
Presumed resulting trusts (PRTs)	131
The presumption of resulting trust	138
The presumption of advancement	142
Automatic resulting trusts (ARTs)	145
Resulting trusteeship	150

	FURTHER READING	151
	SELF-TEST QUESTIONS	151
<b>i</b>	<b>Formalities and secret trusts</b>	<b>152</b>
	The character and purpose of formalities	152
	Declarations of trusts in land: Law of Property Act 1925, s 53(1)(b)	153
	The doctrine of <i>Rochefoucauld v Boustead</i>	155
	Disposition of subsisting equitable interests: Law of Property Act 1925, s 53(1)(c)	156
	Testamentary trusts: Wills Act 1837, s 9	168
	Informal testamentary trusts: secret and half-secret trusts	169
	FURTHER READING	180
	SELF-TEST QUESTIONS	180
<b>7</b>	<b>Certainty</b>	<b>182</b>
	The three certainties	182
	Certainty of intention: the family gift context	183
	Certainty of intention: the commercial context	188
	'Accounting' and 'tracing' trusts	194
	'Prepayment' trusts	195
	Certainty of subject matter and objects: common issues	196
	Certainty of subject matter: particular issues	201
	Certainty of objects: particular issues	204
	Powers and <i>McPhail</i> trusts	205
	Conditions precedent defining a class	206
	Administrative unworkability and capriciousness	207
	Effects of uncertainty	211
	FURTHER READING	212
	SELF-TEST QUESTIONS	212
<b>8</b>	<b>The constitution of trusts</b>	<b>213</b>
	'Equity will not assist a volunteer'	213
	Perfecting an imperfect gift	216
	Covenants to settle	221

The enforcement of covenants to settle by equity	223
The enforcement of covenants to settle at common law	224
The trust of the benefit of a promise to settle	227
Fortuitous vesting of the trust property	231
Concluding considerations	234
FURTHER READING	234
EXERCISE QUESTIONS	235
<b>Trusts and purposes</b>	<b>236</b>
The beneficiary principle and the invalidity of private purpose trusts	236
Anomalous valid purpose trusts	240
Powers for purposes	241
An enforcer principle?	243
Valid trusts for persons 'limited by a purpose': <i>Re Sandersons Trust</i>	245
The bare trust with mandate and <i>Quistclose</i> trusts	250
Gifts to unincorporated associations	256
The dissolution of unincorporated associations	261
Less than unincorporated associations: the case of political parties	265
The rule against perpetuities	266
FURTHER READING	267
EXERCISE QUESTIONS	267
<b>The trust up and running</b>	<b>269</b>
The duty of investment	269
The Trustee Act 2000	270
The standard of prudence in making trust investments	272
'Social' or 'ethical' investing	275
The delegation of trustee functions	278
The power of maintenance	279
The power of advancement	281
Appointment, retirement, and removal of trustees	284
Custodian, nominee, managing, and judicial trustees	286
Variation of trusts	287
FURTHER READING	290

SELF-TEST QUESTIONS	290
<b>Breach of trust</b>	<b>292</b>
The array of claims that can arise when a breach of trust occurs	292
The difference between breach of trust and breach of fiduciary requirements	297
The trustee's liability to account, the performance interest in a trust, and personal claims against the trustee	298
Liability of trustees <i>inter se</i>	317
Beneficiaries' consent to a breach of trust	318
Trustees' relief from liability under Trustee Act 1925, s 61, trustee exemption clauses, and ouster of trustee duties	319
<i>De facto</i> trusteeship, or trusteeship <i>de son tort</i>	326
Liability for procuring or assisting in a breach of trust	327
Proprietary remedies for the misapplication of trust property	330
Tracing	332
Proprietary claims to traceable proceeds: charges and equitable ownership	341
Subrogation claims reliant upon tracing	348
Tracing at common law and the quest for a fiduciary relationship	351
Personal claims against recipients of trust property or its traceable proceeds: knowing receipt and knowing dealing	355
Limitation of actions	360
FURTHER READING	361
SELF-TEST QUESTIONS	362
<b>Restitution, unjust enrichment, and the law of trusts</b>	<b>364</b>
Introduction	364
A brief history of unjust enrichment and restitution	366
Unjust enrichment and restitution	368
Personal and proprietary restitution	369
Unjust enrichment and resulting trusts	370
Tracing and restitution	372
The restitutionary analysis of recipient liability	374
FURTHER READING	382
SELF-TEST QUESTIONS	382

<b>The law governing fiduciaries</b>	<b>384</b>
The 'duty of loyalty': fiduciaries, employees, and others	384
The 'no conflict' rule	391
Authorised profits	402
Unauthorised profits and the liability to account for them	406
The self-dealing and fair dealing rules	411
The proprietary and personal nature of the liability to account	413
Equitable compensation for breach of fiduciary obligation	421
Secondary liability for breach of fiduciary obligation	422
FURTHER READING	426
STATUTES AND CASES	427
<b>Charitable trusts</b>	<b>429</b>
Introduction	429
Fiscal benefits	430
The conditions for charitable status	432
The charitable character of public purpose trusts	432
Trusts for the relief of poverty	436
Trusts for the advancement of education	436
Trusts for the advancement of religion	438
Trusts for other purposes beneficial to the community	439
The public benefit requirement	442
A charity must be for exclusively charitable purposes	445
Preservation from failure: the cy-pres doctrine	449
FURTHER READING	453
5 FURTHER QUESTIONS	453
Select bibliography	455
Index	465