

Moffat's Trusts Law

This latest edition of *Moffat's Trusts Law* has been fully revised and updated to cover recent statutory developments and explore the impact of a wealth of new cases, including the Supreme Court decisions in *Pitt v Holt* (2013), *FHR European Ventures v Cedar Capital Partners* (2014) and *Williams v Central Bank of Nigeria* (2014). It has been restructured to incorporate a new chapter on the internationalisation of the trust, which provides an understanding of the new directions being taken in the areas of trust law and equitable remedies. Supplementary material includes an online chapter on occupational pension schemes. With suggestions for further reading guiding the student to contemporary debates, this leading textbook retains its hallmark combination of a contextualised approach and a commercial focus, and remains the serious student's textbook of choice.

Jonathan Garton is a Professor of Law at the University of Warwick. His research interests are in the law of trusts, with a particular focus on charities, and he has written widely in this area. He was Specialist Adviser to the Public Administration Select Committee, assisting its 2012–13 inquiry into the regulation of the charitable sector, and is on the international advisory board of the Australian Nonprofit Model Law Project.

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Moffat's Trusts Law

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Sixth Edition

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Preface to the sixth edition

This book seeks to present the law of trusts in a different way from conventional texts. The underlying premise is that an investigation of the social and legal contexts in which trusts commonly appear, and of the functions that trusts perform within these contexts, is an essential prerequisite to a proper understanding of trusts law. Developments that have occurred in the relevant social and legal contexts since the first edition of this book have confirmed our conviction in the value of this approach. The bulk of the book is therefore divided into five parts: trusts and the preservation of family wealth (Chapters 3–10); trusts and family breakdown (Chapter 11); trusts and commerce (Chapters 12–15); trusts and non-profit activity (Chapters 16–18); and the internationalisation of trusts (Chapter 19). The last of these, which explores not just the English trust's export to other common law jurisdictions and offshore financial centres, but also civilian responses such as the Italian *trusts interni* and the French *fiducie*, is new to this edition, which also takes full account of the recent work of the Law Commission as well as statutory changes, including the Charities Act 2011, the Trusts (Capital and Income) Act 2013, and the Inheritance and Trustees' Powers Act 2014. Important recent cases, notably *Jones v Kernott*, *Pitt v Holt*, *FHR European Ventures v Cedar Capital Partners* and *Williams v Central Bank of Nigeria* in the Supreme Court, together with an outpouring of academic literature, have all in their different ways contributed to a continuing debate about trusts law, particularly in its relationship to other areas of the common law, and the effect of these influences is evident in all five parts of the book.

As with any new edition, some compromise is inevitable when balancing the desire to retain existing materials with the need for exposition on recent developments if the book is not to increase in size unduly. Happily, the internet now offers something of a solution, and the chapter on occupational pension schemes – a significant commercial context for the trust, but sadly one infrequently taught on undergraduate courses – which featured in previous editions remains, but as an online resource available in updated form at www.cambridge.org/9781107105485. Another infrequently taught area on undergraduate courses, but one of considerable practical significance, is taxation of trusts. In a further compromise we have tried to strike a balance by reducing

our coverage to a single chapter without sacrificing an understanding of the contextual and conceptual relevance of the topic.

Our approach requires that, within each part of the book relevant rules of trusts law are investigated usually only after the reasons why trusts are commonly created within the particular social and legal context – whether expressly by individuals or groups seeking to achieve particular purposes, or by court order – have first been studied. In the working out of this approach, express trusts and non-express trusts receive distinctly different treatment. Express trusts are depicted primarily as property-holding devices or ‘institutions’ that have been created, modified and refined by generations of practising lawyers in response to the particular purposes sought to be achieved by their clients. The law governing such trusts is presented as the judicial and, to a lesser degree, the legislative response to the aspirations of trusts lawyers and their clients (particularly with regard to the rules determining whether novel forms of trust should be treated as valid), and to the numerous legal problems arising in the course of enforcement of valid trusts. The book shows how, in the main, this response has been supportive; otherwise English law would not include the highly sophisticated body of principles that we call trusts law. But circumstances in which judges or legislators have placed a check on the fulfilment of trust founders’ objectives are also noted, along with the reasons why this should have occurred. In relation to non-express trusts, the focus of the book is chiefly on the relatively familiar theme that these contribute a quasi-remedial device for judicial innovation on grounds of ‘equity’. But recourse to relevant contextual material paves the way for a discussion of how far ‘equity’ has in fact been achieved in specific social situations, and whether other express or implicit objectives – for example, legitimisation of practices that might otherwise call for redress – are being pursued. The contexts in which these issues are most fully investigated are those of (1) family breakdown, where resulting and constructive trusts and proprietary estoppel have been prominent in a judicial search for some degree of ‘equity’ for non-earning (usually female) de facto spouses; and (2) commerce, where a battery of remedies, including a constructive trust, may be invoked in response to ‘inequitable’ behaviour by those in trust-like positions.

Although this way of classifying and analysing trusts law might seem to fragment the subject unduly, there is continued emphasis in the book on the unifying influence of the trust concept itself. Chapter 1 – ‘Trusts introduced’ – illustrates how the ‘trust idea’ in English law remains generally constant, despite having immense ‘elasticity’ (to quote Maitland), such as to render it useful in numerous social situations over several hundred years. This general proposition is reiterated later in the book. Nevertheless, there is a tension between fragmentation of the subject-matter of study and the notion of the ‘trust idea’ as a unifying feature. We suggest, however, that this reflects a source of tension within the subject itself, namely, the competing influences on the legal development of the claims of pure conceptual clarity as against

pressures for pragmatic resolution of practical problems. An adequate understanding of trusts law requires that both these influences be taken into account by the student. Account also needs to be taken of one additional source of tension in the development of trusts law. A particular feature of our system of private law is the co-existence of overlapping jurisdictions. Circumstances can arise where the jurisdictions of the law of restitution, the law of trusts and even the law of tort can seem to overlap. It is at these points that tension can occur. We suggest that it is important to appreciate that efforts to minimise or remove any resulting dissonance may be a formative influence in recent developments, particularly in the area of remedies for breach of trust or other 'inequitable' conduct.

In form the book is not an orthodox text, nor a set of cases and materials of a familiar type, but something in between. Textual commentary increasingly predominates, but extracts – sometimes quite long – from leading cases, statutes and relevant historical and empirical materials are also included. We assume that teachers using the book for a full-year undergraduate LLB course may want to indicate further cases and articles to be read. Many that are appropriate for this are mentioned in the text.

Many people have contributed to the production of this book. A change from the last edition is that Graham Moffat, the main author of the first five editions, has stepped down from this role, passing the baton to his University of Warwick colleague Jonathan Garton. Despite his reduced role, the intellectual debt owed to Graham is considerable and his co-authors are delighted to see this recognised in the renaming of the book as *Moffat's Trusts Law*. As regards the division of labour in this edition, Graham Moffat remains responsible for Chapter 3 and the new Chapter 19, along with the online occupational pension schemes materials, whilst Rebecca Probert contributed Chapter 11, and Gerry Bean contributed Chapters 13 and 14. Jonathan Garton bears responsibility for the remainder of the book. Much of the scholarship of Michael Chesterman, the co-author of the first edition, remains in this edition, particularly in the area of trust history, and is gratefully acknowledged. We are grateful to Helen Francis and the publishing team at Cambridge University Press for their support and encouragement, and for efficiently producing the index and tables of cases and statutes. The authors would also like to acknowledge the assistance of many trusts students in responding over the years to ideas about trusts law put to them in the classroom and writing learned essays on trusts. Last and most important, as any writer knows, the gratitude owed to family tolerance cannot be overstated.

We have sought to take account of the law as at 31 October 2014.

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Gerard Bean
Rebecca Probert*

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Basil Blackwell Ltd and R B M Cotterrell, *Journal of Law and Society*; Basil Blackwell Ltd and L Holcombe, *Wives and Property* (1983); Brookings Institution, R Barlow et al, *Economic Behaviour of the Affluent* (1966); Butterworths' Division of the Lexis-Nexis Group, The All England Law Reports; Canada Law Book Inc, Dominion Law Reports; *Cambridge Law Journal*; Foundation Publications, *American Bar Foundation Research Journal*; Council of Law Reporting for New South Wales, *New South Wales Law Reports*; Crown Copyright; Various Acts of Parliament; Incorporated Council of Law Reporting; Law Reports; Her Majesty's Stationery Office for the extracts from the Charity Commission Annual Reports; *Report of the Committee of Enquiry into the Public Trustee Office* (1972); *Report of the Insolvency Law Review Committee* (1982); Select Committee on a Wealth Tax (1975); CTT and Settled Property (1980); Law Commission, Law Commission No. 278, *Sharing Homes: A Discussion Paper* (2002); Consultation Paper No. 179, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2006); Bernard Levin and Times Newspapers Ltd, *The Times*; C T Sandford, *Hidden Costs of Taxation* (1973); Little Brown & Co, R Pound (ed), *Perspectives of Law* (1964); Ministry of the Attorney-General of Ontario, *Ontario Law Reform Commission, Report on the Law of Trusts* (1984); *New York University Law Review*; Oxford University Press, *Oxford Journal of Legal Studies*; *Pennsylvania Bar Association Quarterly*; SLS Legal Publications, G W Keeton, *Modern Developments in the Law of Trusts* (1971); Thomson, Sweet & Maxwell for the extracts from J Edey and B Yamey (eds), *Debits, Credits, Finance and Profits* (1974); D J Hayton, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (12th edn, 2005); A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th edn, 2008); G W Thomas, *Taxation and Trusts* (1981); Tolley Publishing Ltd, T Sherring, *Taxation of UK Trusts* (1990); *Conveyancer and Property Lawyer*; Fred B Rothman & Co, *University of Pennsylvania Law Review*; Consumers' Association, *Which?*; Yale Law Journal Company Inc, *Yale Law Journal*.

Abbreviations

Chesterman:	Chesterman, <i>Charities, Trusts and Social Welfare</i> (1979)
Gardner:	Gardner, <i>An Introduction to the Law of Trusts</i> (3rd edn, 2011)
Goff and Jones:	Mitchell, Mitchell and Watterson, <i>Goff and Jones, The Law of Unjust Enrichment</i> (8th edn, 2011)
Hanbury and Martin:	Martin, <i>Hanbury and Martin, Modern Equity</i> (19th edn, 2012)
Hayton and Mitchell:	Hayton and Mitchell, <i>Commentary and Cases on the Law of Trusts and Equitable Remedies</i> (13th edn, 2010)
Parker and Mellows:	Oakley, <i>Parker and Mellows: The Modern Law of Trusts</i> (9th edn, 2008)
Pettit:	Pettit, <i>Equity and the Law of Trusts</i> (12th edn, 2012)
Snell:	McGhee (ed), <i>Snell's Equity</i> (32nd edn, 2010)
Underhill and Hayton:	<i>Underhill and Hayton: Law Relating to Trustees</i> (18th edn, 2010)

Useful websites

None of us can ignore the vast range of internet sources now available and most students will have access to online resources such as Westlaw and/or Lexis. Other general websites that the reader may find useful are: www.bailii.org; www.austlii.org; www.canlii.org; www.wordlii.org; www.lawcom.gov.uk; and perhaps most useful of all is the invaluable 'hub' or 'gateway' maintained by the law librarian at Kent University: www.kent.ac.uk/library/subjects/law links. Two specific websites relevant to Trusts Law are those of the Trust Law Committee (www.kcl.ac.uk/schools/law/research/tlc) and the Charity Commission (www.charitycommission.gov.uk).

This book's online chapter on Occupational Pension Schemes can be found at www.cambridge.org/9781107105485.

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