

Moffat's Trusts Law

Text and Materials

Seventh Edition

Always the serious student's choice for a Trusts Law textbook, the new seventh edition of *Moffat's Trusts Law* once again provides a clear examination of the rules of Trusts, retaining its hallmark combination of a contextualised approach and a commercial focus. The impact of statutory developments and a wealth of new cases – including the Supreme Court and Privy Council decisions in *Patel v. Mirza* [2016] UKSC 42, *PJS v. News Group Newspapers Ltd* [2016] UKSC, *Burnden Holdings v. Fielding* [2018] UKSC 14, and *Federal Republic of Brazil v. Durant* [2015] UKPC 35 – is explored. A streamlining of the chapters on charitable Trusts, better to align the book with the typical Trusts Law course, helps students understand the new directions being taken in the areas of Trust Law and equitable remedies.

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Preface to the Seventh 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 which 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 3–9); trusts and family breakdown (Chapter 10); trusts and commerce (Chapters 11–14); trusts and non-profit activity (Chapters 15–16); and the internationalisation of trusts (Chapter 17). It is fair to say that changes to the trusts landscape since the last edition have been evolutionary rather than revolutionary, but recent Supreme Court cases, including *Patel v Mirza* [2016] UKSC 42, *PJS v News Group Newspapers Ltd* [2016] UKSC, *Marr v Collie* [2017] UKSC 53, *Morris-Garner v One-Step (Support) Ltd* [2018] UKSC 20, and *Burnden Holdings v Fielding* [2018] UKSC 14, together with the Privy Council decisions in *Federal Republic of Brazil v Durant* [2015] UKPC 35 and *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21, numerous lower court decisions, and 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. We have also sought to take full account of the recent work of the Law Commission as well as statutory changes such as the Charities (Protection and Social Investment) Act 2016 and the Data Protection Act 2018. At the time of writing, the shape of Brexit and the UK's future relationship with the EU remains uncertain, but its potential impact on trusts law has also been noted where appropriate.

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. The taxation of trusts, though a topic of immense practical significance, has, since the first

edition of this book, become so complex an area of law that it is no longer possible to do it justice in a mere chapter. Accordingly, and in light of the fact that this is at heart a work aimed primarily at an undergraduate audience whose trust law courses do not typically include tax law, we have reluctantly bidden the previous editions' taxation chapter farewell. In a further compromise, we recognise that the very detailed covered of charitable trusts in previous editions was not mirrored by most undergraduate trust law courses, and so we have reduced our coverage from three chapters to two, without – we hope! – 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' which 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 as regards 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 which 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 which 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. The first chapter – ‘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 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 coexistence 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, and contributor to the sixth, has retired after a long and distinguished career in academia. Despite his lack of direct involvement in this edition, the intellectual debt owed to Graham cannot be overstated, and his brush strokes remain visible on every page. As regards the division of labour in this edition, Rebecca Probert wrote Chapter 10 (on implied trusts and the family home) and Gerry Bean wrote Chapters 12 and 13 (on trusts in commerce). 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 Caitlin Lisle 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 of July 2019.

Jonathan Garton
Gerry Bean
Rebecca Probert

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Abbreviations

<i>Chesterman:</i>	Chesterman, <i>Charities, Trusts and Social Welfare</i> (1979)
<i>Gardner:</i>	Gardner, <i>An Introduction to the Law of Trusts</i> (3rd edn, 2011)
<i>Goff and Jones:</i>	Mitchell, Mitchell and Watterson, <i>Goff and Jones: The Law of Unjust Enrichment</i> (9th edn, 2016)
<i>Hanbury and Martin:</i>	Glister and Lee, <i>Hanbury and Martin: Modern Equity</i> (21st edn, 2018)
<i>Hayton and Mitchell:</i>	McFarlane and Mitchell, <i>Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies</i> (14th edn, 2015)
<i>Parker and Mellows:</i>	Oakley, <i>Parker and Mellows: The Modern Law of Trusts</i> (9th edn, 2008)
<i>Pettit:</i>	Pettit, <i>Equity and the Law of Trusts</i> (12th edn, 2012)
<i>Snell:</i>	McGhee (ed), <i>Snell's Equity</i> (33rd edn, 2014)
<i>Underhill and Hayton:</i>	Hayton, Matthews and Mitchell, <i>Underhill and Hayton: Law Relating to Trustees</i> (19th edn, 2016)

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.edu.au; www.canlii.org; www.worldlii.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/lawlinks. Two specific websites relevant to Trusts Law are those of the Trust Law Committee (www.kcl.ac.uk/law/research/centres/trustlawcommittee) and the Charity Commission (www.charitycommission.gov.uk).

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