

Equity and Trusts

Eighth Edition

Alastair Hudson



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Preface

Equity is a fascinating and subtle area of law; the law of trusts is by turns a technically progressive, practical and theoretically complex topic. This book constitutes a comprehensive analysis of both equity and the law of trusts, suitable for undergraduate and postgraduate courses, and (as suggested by reviews of the previous edition) it is widely used by legal practitioners and has been cited in the courts of several jurisdictions.

This subject has everything: birth, life, greed, sex, lies, truth, conscience, bitterness, vengeance and death – and then what comes after death. The rules of equity, and in particular the trust, are the ways in which English law deals with so many of these things. This book is meant to *teach* students and others interested in this subject, and to deal forthrightly with the issues which this subject raises: both subtle technical issues and contextual, social issues. To say that it is a teaching aid does not mean that it is not intended to be an academic or scholarly book. On the contrary I have had two aims in writing it: to explain the law of trusts in an accessible way and also to address all of the major academic debates that currently surround the complex principles of equity and the law of trusts. It explains the concepts by using easy-to-understand examples from real life, together with my ‘cognitive reinforcement’ teaching technique, and detailed analyses of the key cases and principles.

Important information for the student reader: how to read this book

It is important that you read this Preface before you start reading the rest of the text. It is then very important that you read the first two chapters, which will explain the vital underpinnings for the whole of the rest of the book.

This book has been written in a way that is slightly different from other trusts textbooks. Each chapter and each individual section begins with an overview of the relevant legal principles in that area. These summaries serve as a shorthand note of the discussion that follows. Importantly, they will give an outline of the subject matter to come. The secret to reading textbooks and cases is to know what the core legal principles are before you start to read. Without that knowledge you will find it very hard to understand the detail of the discussion. In this book each major principle is illustrated with a factual example to show how the ordinary world is understood through a trusts law analysis. That way, the discussion that follows will make more sense and the major issues will stand out more clearly.

After the summary, the remainder of the section will explain how those principles work. Those sections will be designed as problem-solving discussions – examining the real-life issues which have led to development of the law of trusts and the principles of equity.

Discussion will be primarily of the most significant cases, set against accounts of the academic analysis of each subject.

Equity and trusts is a topic in which it is possible for a student to score very high marks in essays and examinations because there are a number of very sophisticated ideas bound up in it. If you deal with them well, you will shine. Therefore, importantly for you, this text and its two companion websites include discussion of all of the major academic and judicial debates in the area (with a few more besides): there are podcasts on each individual topic, and full lectures online too. These ideas are usually considered towards the end of each chapter after the basic material has been explained at the outset. A glossary of essential terms is also supplied, which may prove useful in those dark early days.

The significance of the painting on the cover of this book

The painting on the cover of the paperback edition of this book depicts a young woman, clearly in some distress, consulting a lawyer. The painting is set in the late 18th century. While the woman is in full flow telling her story to the older man, he is clearly unsure whether or not to believe her, or at the very least is readying himself to disagree with her. The young clerk who is leaving by a door at the left of the painting appears to have stopped in mid-stride, surprised at what the young woman is saying. At the time, women's position under English law was tenuous. Indeed, it was often only through trusts (as discussed in Chapter 2 of this book) that it was possible to protect women both against arrangements which tended to prioritise men and against the dangers of having their property taken from them by unscrupulous husbands because (at that time) any property belonging to a woman would ordinarily pass to her husband on marriage. Only a trust could ensure that a woman could maintain the use of that property after her marriage. In Jane Austen novels, the young women who were threatened with losing their homes when their fathers died (and the house passed to the next male heir in their extended family) could only have been protected by differently drafted trusts. So, this painting depicts the difficulty which a young woman would have both in protecting herself and in finding lawyers who were enlightened enough to fight for their rights. A trust could be the protector for a young woman, by making it impossible for her home to be taken away from her; or it could be the device which condemned her to penury, by allocating the ownership of her home to other people.

The structure of the book

Part 1 is essential background material for the student reader, as it considers the fundamental principles of equity and explains the basic structure of the trust. No student of this subject will get far without a sure understanding of this basic material. Part 2 considers the nature of express trusts and the formalities necessary for their creation, which form the basis of all courses on express trusts law.

Part 3 considers the administration of express trusts and the responsibilities imposed on trustees by case law and by statute. The global financial crisis and the collapse of the US investment bank Lehman Brothers has given rise to a large amount of important case law on the certainties necessary to create a trust. As the author of *The Law of Finance*, it has been possible for me to synthesise the discussion of these fascinating but complex new cases with the relevant principles of financial practice and financial regulation. There continues to be a detailed discussion of the fiduciary duties of trustees, including significant developments in

the decision of the Supreme Court in *Pitt v Holt*, and also on the rights of beneficiaries to information from trustees.

Part 4 analyses resulting trusts, constructive trusts, equitable estoppel and the nature of fiduciary liabilities: these areas are central to the study of trusts law and also pivotal in the scholarly debates about equity, trusts and unjust enrichment. There has been a large amount of new case law, particularly in relation to the treatment of bribes and commercial joint ventures.

Part 5 considers the interaction of principles of trusts law and proprietary estoppel with equitable principles of unconscionability and family law in relation to the acquisition of rights in the home. Chapter 15 has been extensively updated to account for the decision of the Supreme Court in *Jones v Kernott* and its impact on the interpretation of the decision of House of Lords in *Stack v Dowden* and previous case law. This is one of the most dynamic areas of equity and trusts: the discussion sets out a categorisation of the various streams of case law, before considering in detail the particular problems raised by equitable estoppel, relationship breakdown, human rights law and philosophical models of social justice.

Part 6 contains three chapters which consider the variety of claims available in relation to breach of trust: whether brought against trustees in person, or against persons who have unconscionably and knowingly received trust property or dishonestly assisted in a breach of trust, or to trace proprietary rights in equity or at common law. The chapter on dishonest assistance and unconscionable receipt has been completely re-cast to account for the burgeoning case law in this area, and to consider some of the fascinating theoretical and practical questions which it raises.

Part 7 considers the way in which commercial people use trusts and other equitable principles such as the floating charge and mortgages in their transactions. There is also a discussion of themes in international trusts law which casts new light on the English case law principles. From this discussion emerges an account of the uncomfortable assimilation of general equitable doctrine into commercial activities juxtaposed with commerce's enthusiastic acceptance of some techniques found in express trusts and equitable charges.

Part 8 considers the welfare uses of trusts. The chapter on Charities has been rewritten in large part to account for the Charities Act 2011. That Act was passed just after the previous edition was submitted and therefore its treatment in the last edition was a little rough around the edges. The interaction between the old case law, which remains in force, and the new categories of 'charitable purpose' promises to be a fascinating area for the future.

Part 9 considers the established categories of equitable remedies – specific performance, injunctions, rescission, rectification and set-off for undue influence – as well as a comprehensive round-up of less conspicuous equitable remedies, including subrogation, account, equitable damages, remedies for breach of trust, and the appointment of receivers. Many of these equitable doctrines and remedies are frequently overlooked in the calls made by restitution lawyers to 'replace equity' with principles of unjust enrichment. What emerges from this discussion is a demonstration of equity at its purest: discretionary, imaginative and always in flux. For the first time there is a comprehensive discussion of the equitable doctrine of confidence and of the law relating to the award of super-injunctions.

Part 10 sets out in two short essays a compilation of the main themes of the book. First, a consideration of the theoretical underpinnings of the law of property as put to work in the context of trusts and equity; then the final chapter of the book considers the theoretical nature of equity and also examines the various meanings associated with the important term 'conscience' in this context. It has always been my aim to make this a progressive book as

well as a comprehensive textbook: it is in these final chapters that I set out to achieve that goal most obviously.

Two companion websites – containing updates on all important cases

A library of further materials can be found at <http://www.alastairhudson.com/trustslaw>, including extended essays on the nature of express trusts, of restitution of unjust enrichment, and of trusts implied by law, as well as essays on unit trusts, co-operatives and public interest trusts. That site has developed a large number of casenotes on new decisions reached by English and other courts between editions of this book. It also contains a number of short podcasts on issues of particular concern to students in examinations, videos explaining some knotty problems of trusts law, and issues which are of particular academic interest. All of my undergraduate lectures and many other podcasts besides are available free of charge on that website too. My publishers maintain a companion website (www.routledge.com/cw/hudson) for purchasers of this book which is also updated periodically to account for new developments in equity and trusts: that website will continue to grow with essays, casenotes and commentaries on this and other areas of law and legal theory. This new edition aims to update the book to account for important decisions in the Supreme Court in *Pitt v Holt*, in *Jones v Kernott* and in *Lehman Brothers v CRC*; and many other key cases besides, including *FHR European Ventures v Mankarious*, *Armstrong v Winnington* and *Independent Trustee Services v GP Noble and Morris*. Otherwise, the law is stated as it was at the various times when the various chapters were written between February 2012 and February 2014. References to nearly 250 new cases have been included since the sixth edition of this book, making it one of the most comprehensive treatments of this topic in print today. Updates on later developments will be made available on-line, as described before, in the form of documents and podcasts. Consequently, this book will remain as up-to-date as possible.

From Routledge, I would like to thank Fiona Briden for her ever-professional and always good-humoured help in the preparation of this book, and also Damian Mitchell for a thousand kindnesses. There are other people I would like to thank for help and comradeship which, while not necessarily directly connected to this book, were essential to its completion in many other ways: in no particular order but with boundless thanks Prof Geraint Thomas and Dr Helena Howe. As this book aims to show, nothing is perfect but thinking can make it seem so.

Alastair Hudson

Guide to the Companion Website

Visit the *Equity and Trusts* Companion Website at <http://www.routledge.com/cw/HUDSON>, and the author's own website <http://www.alastairHUDSON.com/>, to discover a comprehensive range of resources designed to enhance the learning experience for students of equity and trusts.



RESOURCES

Podcasts

Listen to a comprehensive series of short podcasts by the author covering an entire equity and trusts law course, discussing and clarifying key topics from the book, together with updating podcasts.

Essays

A range of essays discuss new developments and provide pathways into further research.

Video introduction

Familiarise yourself with equity and trusts through the author's introductory video presentation.

Vodcasts

Short videos in which the author explains some of the more complex issues arising in trusts law so that they make sense.

Documentaries

See key topics brought to life through a set of brief video documentaries filmed on location.

Additional material

Access Chapter 23 on ‘Mortgages, charges and taking security’ and Chapter 24 on ‘Occupational pension funds’ alongside further additional material.

Explore further

Access a link to the author’s own site which features up-to-date casenotes, further reading and research essays on various areas of law with commentary and feedback for help in developing essay-writing skills as well as guidance for taking effective lecture notes.

Updates

Keep up to date with the latest developments in equity and trusts by reading the author’s updates to the text on-line.

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Glossary

Equity and trusts law is a language. Therefore, it is important for you to understand its vocabulary. This is a glossary of some of the main terms which arise in the early days of an equity and trusts course, especially in the older cases, together with appropriate cross-references to the text that follows where particularly important terms are considered in some detail.

- Absolute title** ownership of all of the property rights, legal and equitable, in property.
- Administrator** the person who administers the estate of someone who died without making a will.
- Beneficial interest** a synonym for ‘equitable interest’.
- Beneficiary** as discussed in para 2.3.4, the person (or people) for whose benefit property is held on trust, such that they have the equitable interest in that property. The nature of the rights of beneficiaries is discussed in Chapter 4 in detail.
- Bequest** a gift made under a will.
- Certainty of intention** the requirement, considered in Chapter 3, that the settlor intended to create a trust, as opposed to something else. The court may infer the existence of an express trust from the circumstances: there is no obligation for the settlor to use any specific form of words nor to use writing to create a trust in all circumstances.
- Certainty of objects** the requirement, considered in Chapter 3, that the beneficiaries of a trust or power must be sufficiently certain.
- Certainty of subject matter** the requirement, considered in Chapter 3, that the property comprising the trust fund is sufficiently certain, i.e. that it must be separately identifiable from other property.
- Cestui que trust** a Latin synonym for ‘beneficiary’.
- Chose in action** a form of intangible property, such as a debt, which constitutes an item of property in itself formed of the rights and obligations created between two (or more) parties.
- Constructive trust** a trust created by operation of law (rather than by the conscious intention of the parties) when a person has knowledge of some factor affecting their conscience in relation to property, considered in Chapter 12.
- Declaration of trust** the action performed by a settlor in creating a trust. In relation to some kinds of property, there are formalities for a proper declaration of trust; see Chapter 5. In relation to most property the settlor needs only to manifest an intention to create a trust.
- Deed** a formal document signed and delivered as a deed (s 1 of the Law of Property (Miscellaneous Provisions) Act 1989) required, for example, to create a valid will (s 9

of the Wills Act 1837) and to effect a valid conveyance of land (s 53 of the Law of Property Act 1925).

Devise a bequest, usually concerning land.

Equitable interest a right in property classically recognised by the courts of equity.

Equity as discussed in section 1.1 and thereafter, a system of rules developed to counter-balance the rigours of statute and common law by the Courts of Chancery so as to allow for fairness in individual cases. It is a legal technique based on ensuring the good conscience of the individual defendant.

Executor a fiduciary under a will trust. (The feminine form is 'executrix'.)

Express trust a trust created voluntarily by a settlor such that a trustee holds property on trust for a beneficiary or beneficiaries.

Injunction an equitable remedy either requiring or precluding some action, considered in Chapter 27.

Intellectual property copyright, patent and trade marks, being forms of chose in action constituting intangible property.

Inter vivos some relation, such as a trust, taking effect while the settlor is alive. Literally, it is Latin for 'between living people'.

Legal title the property rights acquired by a trustee which enable that trustee to manage and administer the trust fund for the benefit of the beneficiaries.

Legatee a beneficiary under a will.

Next of kin a person specified under the intestacy rules as being a deceased's nearest relative for the purposes of distributing the estate of a person who has died intestate.

Personal property property other than land and intellectual property, such as chattels. Sometimes referred to as 'personalty'.

Personal representative one who is appointed to administer a deceased's estate.

Real property land; referred to as 'real property' because historically to acquire rights in land one had to bring a 'real action'; technically 'real property' does not include leases.

Rectification an equitable remedy affecting an alteration to a contractual document to give effect to the parties' true intentions, considered in Chapter 28.

Rescission an equitable remedy rendering void a contract, considered in Chapter 28.

Restitution either the common law process of restoring specific property to its original owner, or more generally the contested principle of effecting restitution of unjust enrichment by way, *inter alia*, of subtracting that enrichment from the defendant.

Resulting trust a trust arising to return an equitable interest in property automatically to its original owner where no trust has been created, or a trust arising in favour of a person who has contributed to the purchase price of property, as considered in Chapter 11.

Settlement a synonym for trust in most circumstances, with a technical meaning in relation to the law of taxation and under the now-repealed Settled Land Act 1925. Family settlements were the way in which wealthy families organised the ownership and use of property down the generations, and were often created on the marriage of family members.

Settlor one who creates an express trust.

Specific performance an equitable remedy enforcing the intention of the parties to a contract, considered in Chapter 26.

Subrogation an equitable remedy permitting a person to sue on obligations originally owed to another person where the court considers it just to do so, considered in Chapter 30.

- Testamentary** taking effect after death, such as a trust, for example, coming into effect by means of a will after a person's death.
- Testator** one who creates a will, a settlor of will trusts. (The feminine form is 'testatrix'.)
- Tracing** the process of identifying and recovering either specific or substitute property transferred in breach of trust, prior to the imposition of an equitable remedy to recover that property or its substitute, considered in Chapter 19.
- Trust** defined in full in para 2.2.1, an equitable institution arising so as to require a trustee to hold property for the benefit of a beneficiary, or beneficiaries, arising either expressly at the instigation of a settlor or being implied by a court as a resulting trust or as a constructive trust.
- Trustee** a fiduciary who holds property on trust for the benefit of a beneficiary or beneficiaries.
- Unjust enrichment** an alternative explanation of some equitable claims and remedies; a doctrine which achieves restitution by means of the subtraction of an unjust enrichment which the defendant has acquired at the claimant's expense.
- Vesting property** transferring property rights to a person.
- Volunteer** one who receives property or a benefit without giving consideration for it.
- Will** an attested document which provides for the manner in which the testator's property is to be divided on death, created in accordance with statute.

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