影印版法学基础系列

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ESSENTIAL TRUSTS

安德鲁·伊沃比
Andrew Iwobi

（第三版）

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本书导读

信托制度起源于中世纪英国的衡平法，因为当时英国普通法院不承认受益人依赖于受托人获得的权利，而衡平法院则总是通过对受托人施加衡平法上的义务来支持这种权利的。它是英美法系一个独特的制度，在大陆法系中几乎找不到一个与之相对应的制度。又由于信托制度是建立在双重所有权观念基础之上的，即受托人享有普通法上的所有权而受益人享有衡平法上的所有权，所以坚持一物一权主义的大陆法国家在接受和移植该制度的时候难免与英美法中的原制度有所差异。对于学习信托法的人来说有必要参考一下英美法学者关于信托法的论著，本书正是这样一部简明而系统的阐释信托法的教材。

全书分为七个部分，第一部分论述了信托的性质，结合相关案例作者论述了信托制度中的双重所有权观念，并且将信托与相关的概念如寄托、代理、权利作出了比较；第二部分讲述了明示私人信托的设立，该部分又分为三小部分，首先谈到了设立明示私人信托的三大确定性要求，即意图、标的物以及对象的确定性，其次谈到了信托设立时的形式要求，最后谈到了有关遗嘱信托的有关问题；第三部分探讨了信托的构成，这部分谈到了信托构成与执行力的关系，信托设立人自己作为受托人时的法律适用以及当信托设立人将财产移转给他人而设立信托时所必需的程序等内容；第四部分介绍了回归信托和拟制信托，该部分谈到了回归信托自动成立的情形，拟制信托的性质，新型拟制信托的涨落，拟制信托可执行的要件等内容；第五部分谈到了公益信托，这部分讲述了慈善信托对于私人信托的优点，确定慈善目的的标准，慈善目的四种形态，慈善信托的公共利益要求，近似原则的性质和效力等内容；第六部分将重点放在信托的管理之上，该部分谈到了指定、解除受托人以及受托人卸职的规则，对于有报酬与无报酬受托人的不同的谨慎义务，受托人报酬的规则以及受托人主要的权利义务等内容；最后一部分则着重介绍了信托的违反，这部分谈到了违反信托的情形，利用禁令作为信托违反的一种救济，受托人的个人责任以及确定受托人责任程度的规则，个人责任的抗辩事由以及从受托人和第三人追及财产等内容。

本书作为介绍英国信托法律制度的基本读物，内容简明扼要，通俗易懂。作者理论联系实际，深入浅出地勾勒出了英国信托法的基本框架制度。

这对于我们开展比较研究，理解和掌握英国的相关法律知识，借鉴和学习英国相对成熟的法律制度是大有裨益的。

本书中文目录及索引部分由武汉大学民商法博士研究生王茂祺翻译并整理，纰漏之处在所难免，希望广大读者多提宝贵意见。

译　　者

2004 年 4 月

I re-dedicate this book to my darling wife, Uzo
and my wonderful children, Ify and Chuka

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

The Cavendish Essential Series is now in its second edition and is a well established favourite among students.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne AM
General Editor, Essential Series
Conservative Member for Mid and West Wales

Contents

目　录

1 The General Nature of the Trust

You should be familiar with the following areas:

- definitions of the trust
- the basic elements of the trust concept and their significance
- the relationship between trusts and other analogous arrangements known to English law

Some definitions

The leading textbooks contain various definitions of the trust. For example:

Underhill

A trust is an equitable obligation binding on a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may be one and any of whom may enforce the obligation.

Keeton and Sheridan

A trust is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed the beneficiaries) or for some objects permitted by law in such a way that

the real benefit of the property accrues not to the trustee, but to the beneficiaries or other objects of the trust.

The main elements of the trust

It has been observed in Hanbury's *Modern Equity* that of the many attempts which have been made at defining a trust none has been entirely successful. In the same vein, Eveleigh J has remarked, in *Allen & Others v Distillers Co (Biochemicals)* (1974), that 'no one has yet succeeded in giving an entirely satisfactory definition of the trust'. This is scarcely surprising as the trust is such a multi-faceted device which has been employed in a diverse range of settings. Various commentators have therefore suggested that it is more instructive to describe rather than define the trust. A convenient way of describing the trust is to elaborate on the key elements which emerge from the various definitions.

Equity/equitable jurisdiction

This is an acknowledgment of the historical fact that the trust is a creature of equity rather than the common law. It owes its origin and present-day existence to the willingness of the Chancellors to compel any person who undertook to hold property on behalf of another to give effect to his undertaking in circumstances where the common law judges refused to intervene. The involvement of the Chancellors in the evolution of the trust and its forerunner, the use, has been well documented and reference may be made to Hanbury and Martin's *Modern Equity*, 15th edn, pp 3–11; Pettit's *Equity and the Law of Trusts*, 8th edn, pp 1–4, 11–16; or Pearce and Stevens, *The Law of Trusts and Equitable Obligations*, pp 78–80 for fuller accounts.

Obligation/compelled

A trust gives rise to duties which are imperative such that failure to carry them out renders a trustee liable for breach of trust.

Trustee-beneficiary (or *cestui que trust*)

The existence of a trust involves a relationship which, in most definitions, is presented as a simple bipartite one between trustees and beneficiaries. In reality, however, trusts, particularly in the commercial

sphere, often involve more complex multipartite relationships. Unit Trusts, for instance, normally entail a tripartite relationship between trustees, fund managers and investors.

It is noteworthy that Keeton and Sheridan's definition refers not only to human beneficiaries but also to objects permitted by law. This reflects the emergence of the charitable trust as a vehicle for fulfilling purposes beneficial to the community at large.

Property

Trusts do not exist in a vacuum but by reference to some species of real or personal property which constitutes the subject matter of the trust. Note in this connection:

- anything which is capable of being owned may be held on trust;
- where the person creating the trust (who is known as the *settlor* or *testator*) owns a legal estate or interest in the trust property, it is usual for his legal title to become vested in the trustee;
- where the settlor or testator owns an equitable interest, however, it is this interest and not the legal title which vests in the trustee.

Duality of ownership

The most significant feature of the trust is the manner in which it separates legal ownership of trust property from its equitable or beneficial ownership.

Historically, the common law considered the trustee as the owner of the trust property and even to this day recognises him as the legal owner of such property.

Equity for its part sought to ensure that any benefits derived from the trust property went to the beneficiary. This initially meant that the beneficiary had a right *in personam* enforceable against the trustee. In due course, however, the beneficiary came to be recognised as the equitable owner of the property. His equitable ownership subsisted alongside the legal ownership of the trustee. The effect of this was that the beneficiary acquired a proprietary interest in the trust property which he was entitled to enforce *in rem* against the whole world except a *bona fide purchaser for value without notice*. For a recent analysis of the essential distinction between the beneficiary's personal rights against the trustee and his rights *in rem*, see *Webb v Webb* (1994).

Trusts and related concepts

In seeking to understand the nature of the trust it is useful to compare it with various other concepts familiar to English law.

Trusts and bailment

Bailment entails delivery of goods for specified purposes on the condition that on the fulfilment of such purposes the bailee will return them to the bailor or deliver them according to his directions. Examples of bailment include: hire of a car; deposit of an item for repair or safekeeping; consignment of goods for delivery to a third party.

As with a trust, a bailment entails the reliance by one person on another person to whom he has entrusted his property. Thus, for instance, a direction by A to B to keep a piano for A's infant son C until C turns 21, may give rise to a trust in some circumstances and a bailment in others.

In spite of this, the trust and bailment differ materially in a number of respects:

- bailment originated from the common law; trusts from equity;
- the subject matter of any bailment consists of goods but the subject matter of a trust may be any form of property whatsoever;
- bailment passes special property (possession) while the trust ordinarily requires the settlor to divest himself of general property (ownership) in favour of the trustee;
- by virtue of such ownership the trustee can pass a good title to a purchaser in good faith and for value. Except in certain instances allowed by statute (for example, under the Factors Act 1889) the bailee is incapable of passing a good title to a third party.

Trust and contract

A contract is an agreement between parties which is intended to create legal relations. There are several material differences between a contract and a trust. In particular:

- trusts are enforceable only in equity, while contracts are enforceable both at law and in equity;

- a trust imposes an obligation on the trustee to hold property on the beneficiary's behalf, whereas the obligations imposed by a contract do not always relate to property, for example, a contract may arise where A agrees to give B music lessons if B does A's laundry;
- a party who wishes to enforce a contract must show that he furnished consideration unless it is under seal. In the case of a trust, once the property becomes vested in the trustee, the trust may be enforced by the beneficiary, even if he furnished no consideration;
- the rules of privity which determine who may sue in contract do not apply to trusts. This means that a beneficiary may sue to enforce a trust without needing to show that he was party to an agreement to create it, whereas a person cannot ordinarily sue on a contract unless he was party to the agreement, for example:
  (a) S agrees with T that S will transfer his car to T on trust for B. B can enforce the trust against T once the car is transferred;
  (b) *by contrast*, X agrees to pay Y £5,000 and Y, in return, agrees to transfer Y's car to Z but fails to do so. Z could not sue Y for breach of the contract even though it was for his benefit, since he was a stranger to the agreement between X and Y. See *Tweddle v Atkinson* (1861), *Dunlop v Selfridge* (1915); *Scruttons v Midland Silicones* (1962). (But under Contracts (Rights of Third Parties) Act 1999, a person who is not a party to a contract may in his own right enforce a term of the contract if the contract expressly provides that he may, or the term purports to confer a benefit on him: s 1(1).)

Trusts and contracts are, however, not always mutually exclusive:

- On the one hand, a prospective settlor and his beneficiary may enter into a contract to create a trust. For example, S agrees with B that S will transfer property to T on trust for B. If S fails to transfer the property, B can enforce the agreement against him provided B has furnished consideration.
- On the other hand, the benefit of a contract may be the subject matter of a trust. For example, X and Y enter into a contract under which Y is to confer a benefit on Z, and X contracts expressly or impliedly as a trustee of the benefit on Z. In such an event, if Z does not receive the benefit, X is obliged as his trustee to take legal action on his behalf. If X fails to do so, it emerges from cases like *Lloyds v Harper* (1880) and *Les Affréteurs Réunis Société Anonyme v Leopold Walford* (1919) that Z, himself, may rely on the trust to enforce the benefit.

It does not, however, follow that a trust will invariably be imported into every contract between two parties for the benefit of a third. On the contrary, it is clear from cases like *Vanderpitte v Preferred Accident Insurance Corp* (1933) and *Re Schebsman* (1944) that it is only where the contracting parties intended the benefit to be held *on trust* for the third party that he can enforce the benefit himself.

Trusts and agency

An agency arises where one person (the agent) has the express or implied authority to act on behalf of another (his principal). Both the agent and the trustee are responsible for furthering the interests of others and there are marked similarities between them, most notably:

- the trustee and agent are both fiduciaries who must exercise utmost good faith in carrying out the trust or agency (but see, now, Trustee Act 2000, Chapter 6 below);
- they must both account for any unauthorised profit or benefits received by virtue of their office;
- each is enjoined by law to perform their duties personally, instead of delegating them (but see, now, Trustee Act 2000, Chapter 6 below).

There are, however, significant differences between the two concepts:

- agency is founded on agreement (except agency of necessity); whereas agreement is not a prerequisite for declaring a trust;
- the primary task of an agent is to bring his principal into contractual relations with third parties. By contrast, any dealings a trustee may have with third parties will be purely incidental to the proper administration of the trust;
- agency is in the nature of a personal relationship. There is no requirement that the principal must place property in the hands of the agent and even where property is entrusted to the agent, there is no accompanying transfer of ownership. A trust, on the other hand, is a proprietary relationship, albeit one in which the trustee's ownership is merely nominal or custodial;
- in the event of a trustee's insolvency, the fact that the beneficiary has a proprietary interest in the subject matter of the trust means that he can lay claim to the property concerned in priority to the trustee's other creditors. On the other hand, where an agent becomes insolvent, owing money to his principal, since their relationship is

personal, the common law equates the principal to an ordinary creditor. The effect of this is that he is not normally entitled to payment out of the agent's assets in priority to other creditors. See, for example, *Lister v Stubbs* (1890).

Trusts and powers

A power, as explained in *Freme v Clement* (1881), is an authority conferred by a donor on a donee to deal with or dispose of property owned by the donor. Different types of powers may be conferred on donees for various purposes.

There are parallels between trusts and powers, since both trustees and donees of powers are entrusted with responsibility for the property of others. The resemblance between trusts and powers is especially evident where the power of appointment is concerned. Under such a power, the donee (also called the appointor) is authorised to nominate persons (who are called appointees) in whom interests in specified property will vest.

The essential distinction between trusts and powers stems from the fact that a trust is imperative and a power is discretionary. On account of the imperative nature of the trust, equity has long maintained that the beneficiaries who are the objects of the trust are in substance the owners of the trust property.

By contrast, where a power of appointment is concerned, the objects of the power own absolutely nothing unless and until the appointor chooses to appoint any part of the property to them. Until then, all they have is an *expectancy* that the power will be exercised in their favour. At this point, equitable ownership is deemed to vest in whosoever is entitled to the property in default of appointment, although the latter is liable to be divested upon the exercise of the power.

One notable consequence of this is that in the case of a trust, where all the intended beneficiaries are *sui juris*, it is open to them to bring the trust to an end and require the property to be conveyed to them under the rule in *Saunders v Vautier* (1841). The objects of the power, on the other hand, are in no position to direct the appointor to transfer to them the property which is the subject of the power.

Furthermore, where a trustee fails to carry out the terms of the trust he can be compelled to do so by the court on the insistence of the beneficiaries, and the court will as a last resort carry out the trust itself

(for example, where the trustee dies without performing the trust and there are no other trustees). In the case of a power of appointment, however, the court will neither compel the appointor to make an appointment nor will the court undertake the exercise of the power if the appointor refuses to or dies without having done so.

There are, however, certain developments in the law which have tended to blur the distinction between trusts and powers. These include:

- *The conferment of powers on trustees*: A notable feature of modern-day trusts is that they not only require the performance of duties of an imperative nature but also provide for the exercise of powers by trustees. In effect, trusts and powers are now capable of subsisting within the same arrangement.
- *The extension of the test for certainty of objects for powers to discretionary trusts*: Under a discretionary trust, the settlor typically entrusts the trustees with the responsibility for determining the manner in which property should be distributed among the members of a specified class. Similarly, under a power of appointment, the donee/appointor is authorised to exercise his discretion in distributing property among the members of a class.

  A common feature of discretionary trusts and powers of appointment is that, to be valid, the class of objects must be sufficiently certain to enable the trustee or appointor to ascertain whether a given person is or is not within the class. See *Re Gulbenkian* (1970) and *McPhail v Doulton* (1971). In this specific respect, they both differ from fixed trusts in favour of a class, which, as we shall see in Chapter 2 are valid only if it is possible to draw up a comprehensive list of all those within the class.
- *The emergence of trust powers*: The distinction between trusts and powers is further blurred by the emergence of what has been variously labelled the *trust power* or *power in the nature of a trust*. The trust power is an arrangement which on its face appears to give rise to an ordinary power of appointment, but which in substance is treated as a trust by the courts. In effect, a trust power 'is one which in default of its exercise will be exercised by the courts' *per* Hoffman LJ in *Clarkson v Clarkson* (1994).

  This super-imposition of trusts on arrangements which would otherwise be regarded as powers is exemplified by a line of cases going back to *Burrough v Philcox* (1840). T had left property to S and D specifying that the survivor of the two was to dispose of the