

Contents

Preface to the sixth edition	<i>page</i> xviii
Acknowledgements	xxi
Table of abbreviations	xxii
Useful websites	xxiii
Table of statutes	xxiv
Table of statutory instruments	xliv
Table of cases	xlvi
1 Trusts introduced	1
1 Introduction	1
2 The nature of a trust in English law	3
3 The trust's versatility	5
4 Manipulating facets of ownership through trusts	5
(a) The trust's 'tricks'	5
(b) Summary	12
5 Equity's rules for enforcing trusts and supplementing their terms	13
6 When is a trust not a trust?	15
7 The trust and 'competing' legal institutions	16
(a) Trust and contract	17
(b) Trusteeship and 'personal representation'	17
(c) Trust and company	19
8 Imputed trusts	21
9 Marking the boundaries	27
10 Focus on social contexts where trusts are used	32
2 The evolution of the private express trust	34
1 Introduction	34
2 Medieval 'uses' of land	35
3 The Statute of Uses	40
4 The emergence of the modern trust	44
(a) The causes of change	44
(b) The changes in trusts law and practice	46

5	Strict settlements of land and married women's property rights	50
	(a) Strict settlements	50
	(b) Strict settlements and trusts	52
	(c) Trusts for married women	54
6	The role of trusts in English law	56
7	The jurisdiction of Equity	63
	(a) Equity and the common law	63
	(b) The Judicature Acts 1873 and 1875	65
	(c) Law and Equity: fusion or harmonisation?	66
3	Taxation and the private express trust	72
1	Introduction	72
2	Trust motivation and tax avoidance	75
	(a) Trust founder's motives	75
	(b) Tax avoidance, tax evasion and creatures of a similar hue	77
3	Taxes and the policies underlying them	85
	(a) Purposes of taxation	85
	(b) Principles of taxation	86
	(c) Tax structure	89
4	Taxation and redistribution	89
	(a) Overview	89
	(b) A statistical gap: identifying the numbers and size of trusts	92
5	Tax planning and the trust	93
6	The taxation of trusts: an introduction	95
7	Income tax	97
	(a) Taxation of the individual	97
	(b) Taxation of the trust	98
	(c) Anti-avoidance measures	101
8	Capital gains tax	103
	(a) General	103
	(b) Trusts	105
9	Inheritance tax	107
	(a) Introduction: estate duty to inheritance tax – a return journey?	107
	(b) Inheritance tax in outline	110
	(c) Settled property: a continuous revolution?	113
	(d) Pre-22 March 2006 rules: interest in possession trusts	114
	(e) Pre-22 March 2006 rules: 'relevant property'	117
	(f) Pre-22 March 2006 rules: accumulation and maintenance trusts	118
	(g) Post-21 March 2006 rules	120
	(h) Inheritance tax and trusts: conclusion	123
10	Conclusion	126

4	Creating the trust - I	132
1	Introduction	132
	(a) The centrality of intention	132
	(b) Maxims of Equity and trust creation	134
2	Creating a trust: the requirements outlined	136
	(a) Capacity to create a trust	137
	(b) The 'three certainties' must be present	137
	(c) The necessary formalities must be observed	138
	(d) The trust must either be completely constituted or supported by valuable consideration	138
	(e) The trust must not infringe the rules relating to perpetuity, inalienability and accumulation	138
	(f) The trust must not be intended to defraud creditors or otherwise be contrary to public policy	139
3	Formalities	139
	(a) Foreword: creation of trusts and dealings in equitable interests	139
	(b) Creation of trusts and disposition of equitable interests: <i>inter vivos</i> formalities	141
	(c) Complete constitution of the <i>inter vivos</i> trust	153
	(d) Creation of trusts and disposition of equitable interests: testamentary formalities	163
4	Intention to create a binding trust obligation	179
	(a) Certainty of intention	179
	(b) Certainty of subject-matter	193
	(c) Incomplete constitution and the role of intention	200
	(d) Intention to create a binding trust obligation: conclusion	213
5	Trusts creation and resulting trusts	214
6	The <i>Vandervell</i> saga	219
	(a) The background	219
	(b) Stage 1: 1958–1961	220
	(c) Stage 2: 1961–1965	223
	(d) Epilogue	227
5	Creating the trust - II	228
1	Introduction	228
2	Trusts and powers	231
	(a) Trusts and powers distinguished	231
	(b) Trusts and powers compared: discretionary trusts and powers of appointment	234
	(c) Trusts, powers and 'trust powers'	236
	(d) Conclusion	237
3	Certainty of objects	238
	(a) The developing law: discretionary trusts and mere powers	238

(b) Mere powers, certainty of objects and <i>Re Gulbenkian's Settlement Trusts</i>	243
(c) Discretionary trusts, certainty of objects and <i>McPhail v Doulton</i>	246
(d) Certainty of objects: some unresolved problems	254
(e) Conclusion	266
4 The nature of a beneficiary's interest	270
(a) The 'great debate'	270
(b) Equitable ownership and the discretionary trust	273
(c) 'Cheese', the nature of the beneficiary's interest and discretionary trusts	274
(d) From 'equitable interest' to 'equitable right' and beyond	276
5 The beneficiary principle in modern trusts law	278
(a) Introduction	278
(b) The principle established	278
(c) The principle undermined?	282
(d) A 'protector' postscript	289
6 Trusts and public policy	291
1 Introduction	291
(a) Public policy and freedom of disposition	292
(b) Limitations in gifts, public policy and legal logic	292
2 Family trusts and creditors	295
(a) Trusts, insolvency and public policy	295
(b) Protective trusts	299
(c) Attempts to safeguard property from the creditors of the trust founder	317
3 Other purposes contrary to public policy	331
(a) General	331
(b) Racial and religious discrimination	332
(c) A statutory limitation on freedom of testation	335
(d) Statutory limitation on dispositions to defeat the claims of a spouse	336
4 Trusts, illegality and public policy: a case for reform?	337
5 Public policy and perpetuities	343
(a) Introduction	343
(b) The 'rules' outlined	344
(c) The 'dead hand' and the rule against perpetuities: a rule without a reason?	346
7 Flexibility in relation to beneficial entitlement	350
1 Introduction	350
2 Premature termination of trusts	352

(a) The 'rule' in <i>Saunders v Vautier</i>	352
(b) The explanation for and limits of the rule	354
3 Variation of trusts	356
(a) Introduction	356
(b) Pre-1958 jurisdiction	357
(c) The roads to 1958	362
(d) The Variation of Trusts Act 1958	368
(e) Conclusion	383
4 Flexibility in relation to capital entitlement and the power of advancement	384
(a) Introduction	384
(b) The statutory power of advancement	385
(c) 'Advancement or benefit'	387
5 Flexibility in relation to income entitlement and the power of maintenance	394
(a) Introduction	394
(b) The statutory power of maintenance	395
(c) Conclusion	400
8 An introduction to trustees and trusteeship	402
1 Introduction	402
2 Trusteeship: moral obligation and a profit motive	403
(a) A model of trusteeship	403
(b) The influence of the traditional model	405
(c) The decline of gratuitous trusteeship	406
(d) Present demography of trusteeship	407
(e) Trustee Act 2000: a summary	409
3 Trusteeship and trustees: an introduction	410
(a) Trustees: capacity and numbers	410
(b) Special types of trustee	410
(c) Special forms of trusteeship	412
4 Trustees' duties and powers: an outline	414
(a) Trustees' duties	414
(b) Trustees' powers	415
(c) Duties and powers: a synthesis	416
5 Conflict of interest and duty	417
6 Trustees and direct remuneration	420
(a) Introduction	420
(b) Remuneration: the rules	422
7 Trusteeship and indirect remuneration	430
(a) Directors' fees	430
(b) Commission and analogous profits	434
8 Dealings with the trust fund or beneficiaries	434

(a)	Introduction: 'self-dealing' and 'fair-dealing' rules	434
(b)	'Self-dealing' rule and the purchase of trust property	435
(c)	'Fair-dealing' rule: dealings with a beneficiary including purchase of the beneficial interest	439
9	Conflicts of interest and duty: the wider picture	441
9	Aspects of the management of trusts	443
1	Introduction	443
2	Duty of care	444
(a)	From the 'prudent man' to a statutory duty of care	444
(b)	A statutory duty of care: Trustee Act 2000, s 1	446
3	Investment	450
(a)	Introduction	450
(b)	The investment marketplace	452
(c)	Commerce, the courts and the development of trustee investment law	458
(d)	Powers of investment and the Trustee Act 2000	474
(e)	Investment management, risk and liability for loss	480
(f)	Investment and the Trustee Act 2000: a panacea for all ills?	486
4	Impartiality and investment	491
(a)	Introduction	491
(b)	The 'annual harvest' and some problems of capital and income	493
(c)	The scope of the duty to act impartially	495
5	Delegation	503
(a)	Introduction: from prohibition to the Trustee Act 2000	503
(b)	Trustees' powers of delegation and the Trustee Act 2000	505
10	Trusteeship, control and breach of trust	517
1	Introduction	517
2	Appointment and removal of trustees	520
(a)	The role of the settlor	520
(b)	Appointment of new or additional trustees	521
(c)	Retirement and removal of trustees	526
3	Controlling trustees' discretion	529
(a)	Trusts, powers and discretions	529
(b)	Exercising the discretion	531
(c)	The rule in <i>Re Hastings-Bass (dec'd)</i>	536
(d)	Beneficiaries' access to information	543
(e)	Conclusion	553
4	Pursuing a remedy	558
(a)	Introduction to trustee liability	558
(b)	Breach of trust and compensation claims: a classification	559

(c) The measure of liability	563
(d) Liability of trustees: personal or collective?	581
(e) Relief of trustees	583
(f) Protection of time	596
5 Proprietary remedies	601
(a) Tracing: an introduction	601
11 Implied trusts and the family home	603
1 Introduction	603
2 Legal starting points	605
(a) Express and implied trusts	605
(b) Resulting and constructive trusts	607
3 Implied trusts and family property law	608
(a) The common law	608
(b) Statutory reform: the Married Women's Property Act 1882	608
(c) Section 17: signs of community?	609
(d) The House of Lords' rules: <i>Pettitt</i> and <i>Gissing</i>	610
(e) Family law reformed	611
(f) Matrimonial property law and the ongoing marriage	612
(g) Unmarried couples	613
(h) Other family relationships	614
4 The family home in joint legal ownership	614
(a) Express declarations	615
(b) No express declarations	618
5 The family home in sole legal ownership	625
(a) Constructive trusts	626
(b) Resulting trusts	639
(c) Proprietary estoppel	640
6 The rules in context	642
7 New directions?	647
(a) Unjust enrichment: Canada	648
(b) Unconscionability: Australia	651
(c) Reasonable expectations: New Zealand	654
(d) Contributions: <i>Sharing Homes</i>	656
(e) A reallocative scheme	657
8 Conclusion	660
12 Trusts in commerce - I: commerce and equitable remedies	661
1 Introduction	661
2 Tracing	665
(a) Tracing: an introduction	665
(b) Tracing and claiming at common law	669
(c) Tracing and claiming in equity	673

(d)	The limits to equitable tracing and equitable proprietary claims	680
(e)	The personal claim in equity	688
3	Subrogation	690
4	'Strangers', equitable personal liability, 'constructive trusteeship' and commercial considerations	692
(a)	Introduction: the two categories of 'constructive trusteeship' or 'equitable personal liability'	692
(b)	Recipient liability and 'knowing receipt'	696
(c)	Accessory liability and 'dishonest assistance'	709
5	Injunctions	723
(a)	Introduction	723
(b)	Types of injunction	723
(c)	'Holding the ring': interim injunctions	724
(d)	Securing the assets: freezing orders and search orders	730
6	Specific performance	740
7	Equitable damages	743
(a)	Introduction	743
(b)	The jurisdictional question	743
(c)	Exercising the discretion	744
(d)	The measure of damages	746
(e)	Losses, gains and a blurring of boundaries	747
13	Trusts in commerce – II: commerce, credit and the trust	750
1	Introduction	750
2	Consumer prepayments and the trust	752
(a)	The prepayment problem	752
(b)	Remedies	752
(c)	Conclusion	758
3	Loans, security and the trust	759
(a)	Protecting the lender's interest	759
(b)	The <i>Quistclose</i> trust	760
(c)	The enforceability puzzle: a 'new model' commercial trust?	763
(d)	Alternative explanations	766
(e)	<i>Quistclose</i> and remedial constructive trusts	773
4	Reservation of title and the equitable tracing doctrine	775
(a)	Unsecured creditors, freedom of contract and reservation of title clauses	775
(b)	The commercial framework	777
(c)	<i>Romalpa</i> , unmixed goods and the requirements for an equitable tracing claim	778
(d)	Reservation of title, mixing of goods and the limits of equitable tracing	783
(e)	Conclusion	788

14	Trusts in commerce – III: fiduciary relationships, commerce and the trust	791
1	Introduction	791
2	Fiduciary relationships and breach of fiduciary duty	793
	(a) Identifying the ‘fiduciary relationship’	794
	(b) Remedial constructive trusts	805
	(c) Fiduciaries, breach of confidence and undue influence	811
	(d) Defining the content of fiduciary duties: conflicts of interest and the ‘secret profits’ rule	815
	(e) Fiduciary duties: some policy considerations	836
3	Remedies	843
	(a) The problem of bribes	844
	(b) Equitable compensation	849
4	A postscript	850
15	Trust, contract and unincorporated associations	852
1	Trusts within the rules of an association	852
2	Bequests to an association	854
	(a) The problems outlined	854
	(b) The relevant authorities	856
	(c) Conclusion	866
3	Destination of assets on the dissolution of an unincorporated association	867
16	An introduction to the law of charity	880
1	Introduction	880
2	Charity, the state and charity law: a background	887
	(a) The late Middle Ages to the late eighteenth century	887
	(b) From the Industrial Revolution to the emerging welfare state	890
3	Charity in a welfare state	897
	(a) New roles for philanthropic organisations	897
	(b) The demography of charity	903
4	‘Privileges’ of charitable status	908
	(a) Privileges of charitable trusts under trusts law	908
	(b) The fiscal privileges of charities	921
	(c) Charities and discrimination	929
5	Conclusion	930
17	A legal definition of ‘charity’	934
1	Introduction	934
	(a) An agenda for change	934
	(b) The Charities Acts 2006 and 2011	936
	(c) Summary	938

2	Procedure governing registration as a charity	943
3	The categories of charity	945
	(a) Prevention and relief of poverty	945
	(b) Advancement of education	949
	(c) Advancement of religion	953
	(d) Advancement of health or the saving of lives	961
	(e) Advancement of citizenship or community development	962
	(f) Advancement of the arts, culture, heritage or science	964
	(g) Advancement of amateur sport	965
	(h) Advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony, or equality and diversity	966
	(i) Advancement of environmental protection or improvement	966
	(j) Relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage	967
	(k) Advancement of animal welfare	968
	(l) The promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services	969
4	Recognising new charitable purposes under CA 2011, s 3(1)(m)	970
5	State–charity relations: a comment	974
6	Recreational purposes	975
7	Charities: an international postscript	978
8	Public benefit	979
	(a) Introduction	979
	(b) A ‘personal nexus test’ and the advancement of education	979
	(c) A relief of poverty anomaly: ‘poor relatives’ and ‘poor employees’	981
	(d) A flexible approach and a ‘question of degree test’	983
	(e) A ‘class within a class’ test	988
	(f) Access for the poor, charging fees and distributing profits	989
	(g) Conclusion: public benefit, ‘section of the public’ and altruism	993
9	Charities and political activity	994
	(a) The scope of the principle	994
	(b) The principle in practice	997
	(c) The principle assessed	1000
10	Reform and the definition of ‘charity’	1004
18	The regulation of charities	1008
	1 Introduction	1008
	2 The Charity Commission	1010
	(a) Structure and functions: an outline	1010

3	<i>Cy-près</i> and matching charitable purposes to social needs	1016
	(a) Introduction	1016
	(b) Coordination of activities	1018
	(c) Modernisation under the <i>cy-près</i> doctrine	1018
	(d) 'Small' charities	1024
	(e) Conclusion	1025
4	Honesty and efficiency in charity management	1026
	(a) Introduction	1026
	(b) Detecting and preventing maladministration	1029
	(c) The limits of the supervisory framework	1045
19	Trusts – an international dimension	1052
1	Introduction	1052
2	Offshore financial centres	1055
	(a) Introduction	1055
	(b) International finance and offshore tax havens	1055
3	Offshore trusts	1057
	(a) Tax planning, trusts and the Vestey saga	1057
	(b) Offshore trusts and UK taxation: legislative responses	1060
	(c) Offshore trusts: the big picture	1062
4	Conflict of laws and the Hague Trusts Convention	1063
	(a) Introduction	1063
	(b) The Hague Trusts Convention: key legal issues	1064
5	A civil law response	1067
	(a) Introduction	1067
	(b) Italy: <i>trusts interni</i>	1067
	(c) France: <i>la fiducie</i>	1069
6	EU initiatives	1070
	(a) Introduction	1070
	(b) A uniform trust code	1071
	(c) A Directive on protected funds	1072
7	Conclusion	1072
	Index	1077