

BOOK REVIEW

TRACEY CARVER*

D S K Ong, *Trusts Law in Australia*, (2nd ed, The Federation Press 2003) 722 pp

In 1747, the English Lord Chancellor, Lord Hardwicke, described the trust as ‘... an office necessary in the concerns between man and man and ... if faithfully discharged, attended with no small degree of trouble and anxiety’.¹ However, Denis Ong’s second edition of *Trusts Law in Australia*, through an articulate and thorough exposition of the application of the law of trusts, goes some way to alleviate the ‘anxiety’ often experienced by students, academics and practitioners alike whilst coming to grips with this area.

The second edition furthers the significant contribution made to the discipline by the initial publication of the text in 1999, which has been referenced in many judgements including the High Court’s decision in *The Associated Alloys Case*.² It includes an examination of developments in the areas of: resulting, constructive, discretionary and Quistclose³ trusts; mutual wills; complete constitution and requirements of writing; trustees’ rights of indemnity and remuneration; removal of trustees; a beneficiary’s right of access to trust documents; causation and breach of trust; knowing assistance; knowing receipt; tracing; and Romalpa⁴ and exemption clauses, with the recent English and Australian court decisions in: *Foskett v McKeown*,⁵ *Twinsectra v Yardley*,⁶ *Pennington v Waine*,⁷ and *Giumelli v Giumelli*,⁸ receiving particular scrutiny.

The text adopts a well-structured and principled approach to trusts law – preceded, in Chapter 1, by a historical introduction to the development of the courts of equity and the positioning of the trust within that jurisdiction. Chapter 2 contains a comparison, usually found in trust texts, between the trust and other institutions, such as agency, bailment and debt. However, linked to the relationship between trust and debt, Ong’s chapter includes compelling argument and detailed analysis on Romalpa clauses, not normally found in such texts.

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¹ *Knight v Earl of Plymouth* (1747) Dick 120, 126.

² *Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited* [2000] HCA 25.

³ *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

⁴ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676. [2001] 1 AC 102 (House of Lords).

⁵ [2002] 2 AC 164 (House of Lords).

⁶ [2002] 1 WLR 2075 (English Court of Appeal).

⁷ (1999) 196 CLR 101 (High Court).

Indeed it is Ong's thoughtful and cogent analysis and critique of the principles under discussion, and his explanation of, or justification for, them within the wider body of trusts law and jurisprudence, which stands out in his work. This occurs throughout his text. For example, Chapter 3's exposition of the three certainties of intention, subject matter and object required for the creation of an express trust includes a detailed account of *McPhail v Doulton*⁹ and its subsequent interpretation in *Re Baden's Deed Trusts (No 2)*,¹⁰ whilst Chapters 4 and 5, on the constitution of trusts and the requirements of writing and form, contain a careful analysis of the majority (and where relevant the minority) decisions in cases such as: *Oughtred v Inland Revenue Commissioners*,¹¹ *Adamson v Hayes*,¹² and *Corin v Patton*.¹³ Chapter 6, covering the appointment and removal of trustees, together with their duties, powers, rights and liabilities, contains a particularly good account of a trustee's right of indemnity and the distinction between exoneration and reimbursement, especially as detailed in *Octavo Investments Proprietary Limited v Knight*¹⁴ and as further elaborated upon by subsequent case law.

Chapter 7 considers charitable trusts, including the categories of trust (and where relevant their statutory modification), the public benefit requirement, cy-pres schemes, lapse and the control of public collection of funds.

Chapter 8 examines resulting trusts. It covers the interplay between the presumptions of resulting trust and advancement, the interests of 'purchasers' and 'volunteers' in joint bank accounts, and illegal purpose trusts. The chapter also outlines a thought-provoking critique of *Vandervell v Inland Revenue Commissioners*¹⁵ and *In Re Vandervell's Trusts (No 2)*,¹⁶ which in part places the cases' development within their historic factual context.

Chapter 9, 'Constructive Trusts', discusses the various forms of remedial and institutional constructive trust and the circumstances in which they arise including, in the later category, a detailed analysis of the various forms of third party liability for breach of fiduciary duty (trust) – trustees *de son tort*, accessory liability and recipient liability – and the case law governing them. The requirement of 'knowledge', as traced through cases such as: *Barnes v Addy*,¹⁷ *Selangor United Rubber Estates Ltd v Cradock (No 3)*,¹⁸ and *Consul Development Pty Limited v DPC Estates Pty Ltd*¹⁹ receives particular attention, together with a discussion of the accuracy of the distinctions often made between: knowing 'assistance' and knowing 'receipt,' and 'institutional' and 'remedial' constructive trusts. Indeed Ong, contrary to the opinion

⁹ [1971] AC 424.

¹⁰ [1973] 1 Ch 9.

¹¹ [1960] AC 206.

¹² (1973) 130 CLR 276.

¹³ (1990) 169 CLR 540.

¹⁴ (1979) 144 CLR 360.

¹⁵ [1967] 2 AC 291.

¹⁶ [1974] 1 Ch 269.

¹⁷ (1874) LR 9 Ch App 244.

¹⁸ [1968] 1 WLR 1555.

¹⁹ (1975) 132 CLR 373.

held by other academics in the field,²⁰ classifies the *Baumgartner*²¹ type trust as institutional and not remedial.²² However, whilst the chapter emphasises liability associated with breach of a fiduciary duty, the hallmarks of such a ‘fiduciary’ relationship, and the placement of trustees within this categorisation,²³ receives scant attention by comparison.

Chapters 10 and 11 respectively cover the rules relating to: tracing at common law and equity, and the trustee’s duty to act impartially as between capital and income beneficiaries. In Chapter 10, *Banque Belge v Hambrouck*,²⁴ *Hallett’s Case*,²⁵ *Sinclair v Brougham*,²⁶ *In re Diplock*,²⁷ and *Foskett*²⁸ fall for particular consideration. The final chapter concerns the ‘rule against perpetuities’ and the ‘rule against accumulations’.

For students, the text is well written and researched. Carefully selected quotes from case judgements help to further clarify and annunciate the principles discussed and arguments raised, making them easily understood. The summary, provided at the end of each chapter, provides a helpful revision of the topics covered and the major principles of law. Additionally, for academics and practitioners, the text’s detailed footnotes facilitate further research whilst providing a useful comparison of the various pieces of trust, property and succession legislation in each Australian jurisdiction. However it should be noted that *Trusts Law in Australia* is a text on traditional trusts law. It is therefore of limited relevance to practitioners seeking an account of areas including: family and unit trusts; and laws impacting upon the formation of trusts such as taxation, duties and family provision legislation.

²⁰ For example, G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia* (LBC Information Services, 3rd ed, 2004) 995.

²¹ *Baumgartner v Baumgartner* (1987) 134 CLR 167.

²² D S K Ong, *Trusts Law in Australia* (The Federation Press, 2nd ed, 2003) 549.

²³ Except to the extent mentioned at *ibid* 53.

²⁴ [1921] 1 KB 321.

²⁵ *In re Hallett’s Estate* (1880) 13 Ch D 696.

²⁶ [1914] AC 398.

²⁷ [1948] Ch 465.

²⁸ *Foskett v McKeown* [2001] 1 AC 102.