Trusts law in Australia (2nd ed)
By Denis SK Ong
The Federation Press, 2004

As the author, an associate professor of Law at Bond University, notes in the introduction to his work, the most important institution in equity was, and is, the trust. And it is the trust and trust law in Australia which is the focus of this book.

The opening chapter provides a useful summary of the nature of the trust and compares it to other concepts, such as debt. The author recognises what he refers to as a dichotomy between trust and debt in certain circumstances, the most notable of which being the Quistclose trust. There can co-exist in the one transaction both legal and equitable rights and remedies, that is, remedies at law arising from the relationship of debtor/creditor but also remedies in equity arising from the mutual intention of the parties as to how the moneys the subject of a loan are to be utilised. The author provides a useful and easy to digest analysis of the judgment of Lord Wilberforce in Quistclose. The nature of a Quistclose trust is considered in the context of cases which have applied it both in Australia and England. The prevailing view in the authorities that a Quistclose trust is in the nature of an express trust was challenged by the House of Lords in Twinsectra in 2002 where Lord Millett held that such a trust was an entirely orthodox example of a default or resulting trust. The author incisively considers the conceptual incongruities which emerge from Lord Millett’s view of the nature of the Quistclose trust which is at odds with the prevailing view.

In considering trusts in the context of other concepts, the author also examines the use of the Romalpa clause which, if effective, affords to an aggrieved supplier a right to trace either the property the subject of the clause or to trace the proceeds of sale. The book considers the development of the law in relation to retention of title and the position of Romalpa clauses after the High Court’s consideration of them in Associated Alloys and, in particular, the danger that a retention clause could be construed as either a trust or, of greater concern for suppliers, that it could be construed as a charge and fail for want of registration.

So whilst the focus of the book is on trusts, the comparison with other concepts such as the Quistclose trust and Romalpa clauses provides the reader with a multi-faceted manner of examining particular factual circumstances which could arise either as part of one’s study of the law or its practice.

After the interesting and informative opening chapter, the author then deals in a comprehensive fashion with the ‘compulsory’ considerations in any work on trusts, namely, the ‘Three certainties required for the creation of express trust’, the ‘Writing requirements for certain types of transactions’, the ‘Complete constitution of voluntary trust’, the duties, liabilities, powers, rights, appointment, retirement and removal of trustees, an examination of charitable, resulting and constructive trusts, tracing and the rules against perpetuities and accumulations.

The chapter on tracing provides a useful summary of the general principles of tracing at common law and in equity including an examination of the topical issue as to whether the rule in Clayton’s Case is of any application in determining the manner in which a mixed fund is to be distributed. In considering this issue, the author has considered the development of the law both in England and Australia since Re Diplock to come to the conclusion that there is no scope for the operation of Clayton’s Case except in limited banking contexts. To the authorities considered in the book on this topic may be added in Re: Global Finance Group Pty Ltd (2002) 26 WAR 385 and in Re French Caledonia Travel [2003] NSWSC 1008 which expressed views consistent with those of the author.

The book is an informative and easy to read update on the law of trusts in Australia. Its content and style render it useful to both students of law and practitioners alike. It is a welcome addition to the corpus of works on trust law.

Reviewed by Anthony Lo Surdo