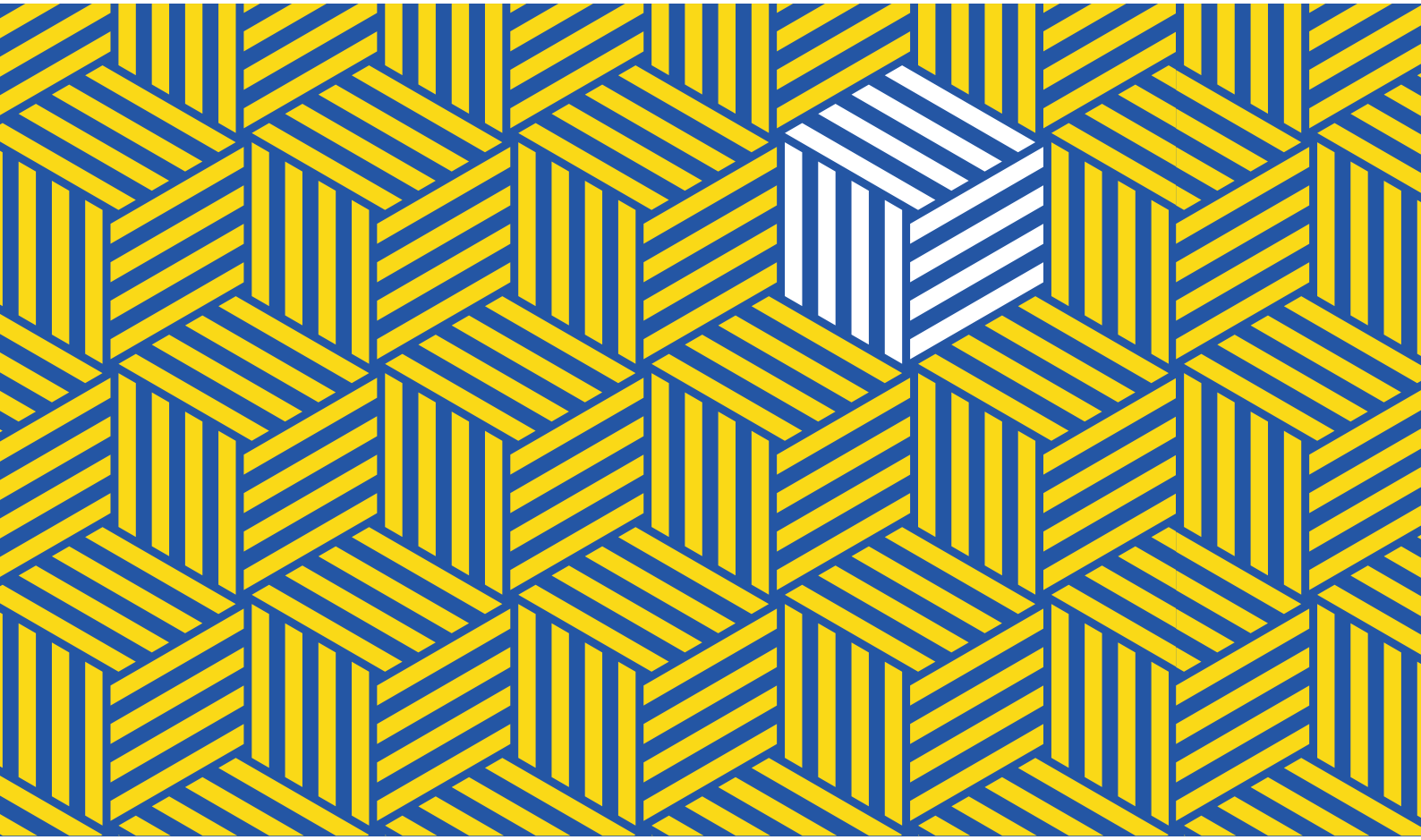
Singapore Academy of Law
Law Reform Committee

Report on the Enactment of Non-Charitable Purpose Trusts

May 2021



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Members of the Subcommittee on Trust Law

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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EXECUTIVE SUMMARY

1 Recent surveys of trust and estate practitioners have demonstrated a clear demand for additional means for families and businesses to manage and bequeath their assets. This, combined with evidence of growing demand from social enterprises for new capital, and Singapore's broader aspirations as a wealth management centre, prompted the Law Reform Committee to establish a subcommittee ('**the Subcommittee'**) to consider the merits of making provision for non-charitable purpose trusts ('**NCPTs**') in Singapore.

2 In the light of its analysis, the subcommittee recommends authorising the creation and enforcement of a statutory NCPT in Singapore law.

3 The subcommittee's review of overseas jurisdictions indicates that there is no consensus either for or against the NCPT. Equally, however, there does not appear to be the resistance to NCPTs that once prevailed, notwithstanding the development of prominent alternatives such as the trading trust, Quistclose trust and business trust. Moreover, experience in offshore jurisdictions indicates that it is now *non-tax* needs and demands rather than tax savings that drive growth in NCPTs. That is true for both family businesses and other corporate entities.

FAMILY BUSINESSES

4 For family businesses, for example: an NCPT could be used to:

(a) enable family incorporated businesses to be run and prolonged without fear of asset fragmentation among members of the family;

(b) partition assets that are to be devoted to a short-term venture which carries greater risks than the established family business; and/or

(c) facilitate the furtherance of mixed purposes of running the family business and specified social (public) purposes.

5 The subcommittee considers that existing alternatives, such as (as the case may be) establishing a discretionary trust with clauses to negate trustee duties to supervise or intervene in respect of the trust's shareholding in the family company, coupling a limited partnership to a discretionary trust, or using a Quistclose trust, are not fully successful in achieving such aims.

OTHER CORPORATE ENTITIES

6 For other corporate entities also, there are significant commercial needs for more flexible capital mobilisation – needs which the Subcommittee considers can be met by making NCPTs available as a new trust option under Singapore law.

7 Examples of commercial situations in which NCPTs may offer an effective solution include (but are not limited to): (a) the acquisition and ownership of risky assets for investment in asset securitisation, (b) the acquisition by mutual funds of investment funds including leveraged borrowing in active investment, and (c) the acquisition and ownership of shares for the purposes of exercising voting control.

8 The Subcommittee therefore recommends also providing for NCPTs for such wider commercial holding purposes.

9 It is envisaged that trustees of such NCPTs will not be obliged to monitor or intervene in the management or conduct of the corporate business (as there are no beneficiaries to whom these duties can be owed). The only duty they will owe is the irreducible core duty to retain the trust asset in good faith and for the sake of the business mission, and thus must not misappropriate the trust asset or dishonestly profit from it.

10 The Subcommittee has considered, but does not recommend, introduction of a STAR-type trust or a VISTA-type trust, akin to those used in various offshore trust jurisdictions. Such broadly conceived trusts do not appear necessary, as means already exist to, for example, avoid beneficiaries from terminating mixed purpose trusts and determining how the trust property is distributed. VISTA-type trusts also risk unduly eroding the trustee's irreducible core duty by removing the terrain over which it can operate effectively. The potential for misuse of such trusts may also pose peculiar risks or dangers to local creditors. Rather, the NCPT that the Subcommittee recommends is limited to business purposes; more specifically to an entity shielding trust which owns the shares in a family incorporated or limited partnership business without being associated with any other private or personal purposes.

SOCIAL AND PHILANTHROPIC PURPOSES

11 In contrast to jurisdictions such as India and Scotland, where their use is well established, the law in Singapore regarding trusts for non-charitable, social purposes is complex and uncertain.

12 In the Subcommittee's view, there are good reasons to recognise NCPTs as social entities which can effectively promote social development. Not least, social purposes which are not exclusively charitable may serve equally vital social needs and deliver needful social benefits – and may sometimes do so more efficiently than charities.

13 Thus for example, NCPTs provide an effective vehicle for public provision of grants or training funding to the private sector. In particular, an NCPT would ensure once the funds had arrived at their destination neither the trustee (who would be bound by a duty to fulfil the purposes of the transfer) nor the relevant public body would have beneficial ownership of the trust assets.

14 At present, the entities engaged in the delivery of social benefits are predominantly for-profit companies and sole proprietorships. The subcommittee considers this somewhat anachronistic. Using an NCPT would offer greater flexibility than using a corporation (being easier to set up, dismantle or change, etc.) and, unlike sole proprietorships, would ensure the trustee was obligated to ensure faithful furtherance of the social purpose (thus making it, among other things, more suited to attracting public funds).

15 For similar reasons, NCPTs would also provide a useful vehicle for trusts to fulfil philanthropic purposes.

16 The proposed reform also aligns with, and finds support in, Section 9 of the Government Proceedings Act, which, in defining the Attorney-General's trust enforcement powers, lists trusts for public, religious, or social purposes separately from those for charitable purposes. Furthermore, insofar as that section provides for enforcement of (non-charitable) social and religious trusts, there seem to be few grounds for arguing that philanthropic non-charitable trusts should not be similarly enforceable.

POLICY CONSIDERATIONS

17 The divergent, evolving approaches to NCPTs in major trust jurisdictions affirms, in the Subcommittee's view, that the decision whether to adopt an NCPT is ultimately one of policy, which will vary from country to country.

18 In the particular context of Singapore, key in this regard are policies regarding capital utilisation and proprietary autonomy, and the recent shift, as tax avoidance and money laundering concerns have abated, from a policy against concealment to one supporting confidentiality of disposition. The Subcommittee considers that such policy considerations militate in favour of the creation of a statutory NCPT in Singapore, in the terms set out below.

PARTICULARS OF THE RECOMMENDED STATUTORY NCPT

19 In addition to the aspects discussed above (e.g. statutory recognition, limitation to certain commercial purposes, etc.), the

Subcommittee considers that the recommended NCPT should have the following core characteristics.

20 *Implementation* – Provision for NCPTs should be made in a standalone statute. In this way, the NCPT would not purport to be either an exception to the beneficiary principle nor a new general proposition.

21 *Definition* – The statute should provide that an NCPT is one which:

(a) is sufficiently certain to allow the trust to be carried out,

(b) is not contrary to public policy, and

(c) relates to any public purpose, social purpose, religious purpose, philanthropic purpose, investment and management of assets purpose or other business purposes (or a mix of such purposes).

22 Despite being broad-based, it is submitted that the definition in (c) would not be problematic or unduly uncertain. Rather, the Subcommittee considers that it could be left to the courts, where questions arise, to clarify any uncertainty as to whether a trust has been created for a purpose within the enumerated categories.

23 That said, it may be helpful for the avoidance of doubt to provide expressly that: (a) a trust for the purpose of performing a function of government in Singapore is a public purpose trust, but a trust for political purposes is not; and (b) the fact that a trust has protection of the settlor's family as a purpose will not of itself render it a social purpose trust.

24 In addition, and to distinguish them from 'onshored' offshore NCPTs, it should be specified that to fall within the proposed legislation NCPTs must: (a) be governed (expressly or impliedly) by Singapore law; (b) have a trustee who is a licensed trust company (or a Private Trust Company qualifying as a restricted licence trustee); (c) carry on their purposes wholly or partly in Singapore; (d) have some part of their assets held in Singapore; and (e) in the case of public, social, religious and philanthropic trusts, substantially carry out the relevant public, social, religious or philanthropic purpose(s) in Singapore.

25 *Stipulation of specifically designated purposes* – Settlors should be required to specifically designate the purposes to which the trust assets are dedicated. While both the mediate and ultimate purpose should be specified, settlors should also be free to specify the ultimate purpose and confer discretion on the trustee to provide the specificity of purpose that is missing. As regards the specificity or definiteness with which a purpose is articulated, it is recommended that a purpose would be deemed valid if any given use of the fund can be said to fall either within or outside the designated purpose.

26 *Mixed purposes and beneficiaries trusts* – Provided the NCPT qualifies as a business purpose trust, it should not matter that it also qualifies as a

social trust. Additionally, if the settlor has mixed charitable and non-charitable social purposes, it may be desirable to specify in the legislation whether or not an NCPT must be exclusive in its provenance.

27 *Uneconomical, wasteful or capricious trusts* – Insofar as the proposed reform excludes private purposes trusts, there appears little need to provide for the rejection of trusts that are uneconomical, wasteful or capricious.

28 *Variation – A* greater concern than wastefulness is that insufficient funds are dedicated to further the designated purpose(s) or that, for example, a perpetual NCPT may outlive its usefulness. As such, courts should be empowered to vary NCPTs in appropriate circumstances.

29 *Enforcement* – to provide appropriate latitude, the legislation should provide that the trust may be enforced by the person nominated as enforcer in the trust instrument, or by the Attorney-General, the settlor (or her personal representative), the trustee, or such person as the court considers has sufficient interest in the matter. If an enforcer is appointed by the settlor, that person should be subject to replacement and removal by the court, just as trustees are. It would also be prudent to prescribe certain fiduciary duties (e.g. no conflict, no profit, no self-dealing) and affirmative duties (e.g. to obtain information from the trustee) by which the enforcer will be bound.

30 *Licensing* – There are opposing views as to whether it is necessary to provide that the trustee must be a licensed trust company. A compromise solution is recommended, whereby a trustee must be licensed, but registered Private Trust Companies may qualify as restricted licence trustees.

31 *Settlor control over assets* – Settlors should not be allowed to retain substantial control over assets that are permanently removed to the NCPT (e.g. the settlor should not be able to reserve the power to change the governing law, prolong the trust or amend its purposes, or remove or replace the trustee).

32 Finally, it should be acknowledged that the policy objectives that the recommended statutory provision would advance could in principle also be achieved through judicial development of the law. However, such incremental judicial development is dependent on appropriate cases coming before the court, and will likely raise new questions as it resolves others. In the Subcommittee's view, a coherent and comprehensive framework in needed as a starting point, rather than a scheme in which uncertainties are overcome reactively as they arise. That said, of course, a statutory NCPT cannot and should not be wholly isolated from the common law, and would, once introduced, continue to rely on the common law for construal and gap-filling.

CHAPTER 1

INTRODUCTION

1.1 In 2003, when the Law Reform Committee ('**the Committee**') considered whether to make provisions for the Trust Protector, it was noted that the Trust Protector was often associated with the offshore non-charitable purpose trust ('**NCPT**'). As the NCPT was not then on the law reform table, the Committee at that time considered whether it was possible to delineate the respective roles of trustee and protector in an ordinary trust and concluded that a wait and see approach should be adopted.

1.2 Also in 2003, the Government consulted a well-known practitioner on the NCPT and the Committee was invited to respond to the consultation paper. The Committee noted again its preference to wait and see how the common law and statutory law in comparable overseas jurisdictions developed before reforming Singapore's approach to NCPTs.

1.3 17 years on from the Economic Review Committee's 2003 recommendation to develop Singapore as a wealth management centre, Singapore has become a major international financial hub. It is now a leading wealth management centre and also an increasingly sought-after centre for new capital. The Subcommittee believes that the time has come to consider seriously the introduction of the NCPT as a wealth management business entity and as a source of new capital to complement the suite of financial and business services that a major financial hub and wealth management centre must have.

1.4 This report therefore discusses the case for and against NCPTs. The question of whether to introduce the NCPT as a new statutory trust option is ultimately one of policy. As a wealth management centre, Singapore must not neglect the wealth management needs of family businesses or the increasing demand by social enterprises for new capital. In this report, the Subcommittee recommends authorising the creation and enforcement of a statutory NCPT which will advance these policies.

1.5 The proposed reform does not affect and is not intended to affect the status of either charitable purpose trusts which are enforceable as trusts or private anomalous purpose trusts which are enforceable as powers of appointment.

1.6 The rest of the Report is organised as follows:

(a) **Chapter 2** reviews the case for and against NCPTs from multi-jurisdictional and multi-doctrinal perspectives, covering the case law, legal scholarship, alternative means to attain the intended purpose, and law reform initiatives. It explains why the Subcommittee thinks that the proposed reform is

ultimately a matter of policy and contains discussion of the pertinent policies or influencing considerations.

(b) **Chapter 3** contains the Subcommittee's more focused evaluation of the need for and merits of the NCPT in advancing wealth management needs of family businesses and its recommendations that a statutory NCPT be introduced to accommodate these needs.

(c) **Chapter 4** contains evaluations of the need for new sources of capital for public, social and philanthropic enterprises and the Subcommittee's recommendations that a statutory NCPT be introduced to meet these needs.

(d) **Chapter 5** discusses how a scheme for statutory NCPTs can best be set up and concludes with a number of more specific drafting recommendations to achieve the specific policy targets.

CHAPTER 2

THE CASE FOR AND AGAINST NON-CHARITABLE PURPOSE TRUSTS

2.1 We first outline the extent to which NCPTs are recognised under the common law of major trust jurisdictions. This is followed by a brief discussion of the polarised legal scholarship, followed by alternative legal and trust entities which enable the furtherance of designated purposes, and law reform initiatives in relation to NCPTs. Our overall conclusions and general recommendations are presented in paragraphs 2.42 to 2.46. Our identification of the pertinent considerations of policy may be found at paragraphs 2.47 to 2.58.

A THE CASE FOR AND AGAINST NON-CHARITABLE PURPOSE TRUSTS AT COMMON LAW

2.2 At common law, a trust for the benefit of individuals, for anomalous purposes such as the care of pets, or for charitable purposes is valid. There is considerable doubt, however, about the validity of NCPTs in the English common law.

2.3 The case of *Morice v Bishop of Durham*[1] is the settled point of departure. Sir William Grant MR there held that for a trust to be valid, there must be somebody "in whose favour the court can decree enforcement".[2] In that case, it was held that the next of kin (or residuary legatee) who would take if the NCPT failed was not such a person who could enforce the trust so as to validate it.[3]

2.4 This is dubbed the beneficiary principle.[4] Since its enunciation, there has been a notable development, namely the decision in *Re Denley's Trust Deed* ("***Re Denley***").[5] This case interpreted the principle as a principle of enforcement or standing (enforcer principle), as opposed to a requirement that a trust must confer beneficial interests on a person or persons (save in the exceptional cases of charitable and anomalous purpose trusts).

2.5 In that case, the settlor company conveyed land to trustees inter alia to maintain the land primarily for use as a sports ground by subscribing

1 (1804) 32 ER 656.
2 *Id.* at 658.
3 Lord Eldon LC affirmed in (1805) 32 ER 947, making it clear that enforcement embraces reforming maladministration and directing due administration. Declaring a void trust is not included.
4 Or somewhat inaccurately the human beneficiary principle.
5 [1969] 1 Ch 373.

employees of the company.[6] Goff J held that notwithstanding that there were no beneficiaries entitled to any beneficial interest in the land, the trust was valid and "outside the mischief of the beneficiary principle".[7] The employees were factual beneficiaries and had sufficient standing to enforce the trust within the meaning of the principle.

2.6 If *Re Denley* is right, the way is open to recognising a significant category of NCPTs (namely those for definite purposes), though not all NCPTs. In *Re Grant's Will Trusts*, however, Vinelott J was unpersuaded by the recasting of the beneficiary principle as an enforcer principle.[8] *Re Denley* was explained instead as being concerned with a discretionary trust conferring on each subscribing employee rights of use in the land as the trustees thought fit. There was thus nothing remarkable or exceptionable in Goff J's application of the beneficiary principle.[9]

2.7 While *Re Denley* seemed to be a particularly apposite development in the contexts of trusts for the benefit of unincorporated associations, here too – in *Re Horley Town Football Club*[10] – the English Court signalled a retreat. Without deciding the question, the Court observed that difficulties of termination under the rule in *Saunders v Vautier*[11] made *Re Denley* unsafe for application in such contexts.[12]

2.8 It is not necessary to dwell on alternative grounds of invalidity other than the beneficiary principle and we will only deal with two of them in Chapter 5, where we make more detailed recommendations on the form of the proposed reform. Our concern in the proposed reform therefore is predominantly with the beneficiary principle and in particular its recast in *Re Denley* as an enforcer principle.

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6 The trust was "secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use the same…." *Id*. at 375.

7 *Id*. at 384.

8 [1980] 1 W.L.R. 360.

9 *Id*, at 370-371. In *CPT Custodian Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2005) 224 CLR 98, the High Court rejected (at [25]) the ""dogma" that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership." An important assumption underlay this retreat from the enforcer principle. It is not the case that the beneficiary principle demands that there must be a beneficial owner. A discretionary trust is perfectly within the principle notwithstanding that a discretionary beneficiary is not an owner until and if he is appointed to a benefit in the trustee's discretion.

10 [2006] 3 All ER (D) 34.

11 [1841] EWHC J82, (1841) 4 Beav 115. That is, that beneficiaries of a trust (provided all are capacitated adults) may call upon the trustee to terminate the trust and distribute the trust property pursuant to the beneficiaries' direction.

12 *Re Horley Town Football Club*, above, n 10, citing at [131] Thomas and Hudson, *Law of Trusts* (2004) at paragraph 6.21. This is a reference to the problem that if the associators lacking in beneficial interest cannot terminate the trust, the *Re Denley* trust would fail for being perpetual.

1 Australia and New Zealand

2.9 In the Commonwealth, *Re Denley* has had a mixed reception.

2.10 Australian courts have paid little attention to it.[13]

2.11 The case is also largely ignored in New Zealand, where *Re Denley* has been cited, not for its enforcer principle, but for its test of certainty of a condition subsequent.[14]

2 Canada

2.12 In Canada, *Re Denley* has been recognised in two authoritative first instance pronouncements in holdings which in fact go beyond the more circumscribed inroad in the English case. In *Keewatin Tribal Council Inc v Thompson (City)*,[15] the Manitoba Court of Queen's Bench explained that the English case stood for a wider principle of enforcement or standing. In a passage left deliberately unqualified, Jewers J said: "there should be no problem with a non-charitable purpose trust where there is any number of persons with standing to enforce it."[16] In *Peace Hills Trust Co v Canada Deposit Insurance Corpn*,[17] the Alberta Court of Queen's Bench agreed.

2.13 As we have mentioned, in terms the enforcer principle in *Re Denley* is limited in application to trusts of definite purposes which have ascertainable factual beneficiaries. In Ontario, British Columbia and Alberta, sections 16, 21 and 20 of the Perpetuities Act 1966,[18] the Perpetuity Act 1979[19] and the Perpetuities Act 1980[20] respectively go further to allow trusts of definite purposes without ascertainable factual beneficiaries to take effect as powers.[21] Trustees may perform such trusts if they are willing to do so for a period of 21 years. The court may however hold such a trust

13 As is evident from a description of the doubts about its efficacy appearing in *Strathalbyn Show Jumping Club Inc v Mayes* [2001] SASC 73 at [49]. There, the court explained *Sacks v Gridiger* (1991) 22 NSWLR 502 as not an application of the *Re Denley* principle in Australia, but as a beneficiary trust, giving the children beneficial interests in the direction to use the income of a fund "to pay the school tuition fees for the children of Dr Marcus L Sacks … while both or either of them remain at school". In *McKnight v Ice Skating Queensland* [2007] QSC 273, no mention was made of *Re Denley* in the discussion of whether the trust in question was one for the purposes of an unincorporated association acquiring land and building and operating ice rinks.

14 See *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787; *General Communications Ltd v Development Finance Corpn of NZ Ltd* [1990] 3 NZLR 406; *Goodwin v Rocket Surgery Ltd* (2013) 14 NZCPR 110.

15 [1989] 5 WWR 202, (1989) 61 Man R (2d) 241 (QB).

16 *Id.* at [72].

17 [2008] 7 WWR 372 at [29].

18 SO 1966, c 113 (now RSO 1990, c P.9).

19 RSBC 1979 c 321. (now RSBC 1996, c 358).

20 RSA 1980 c P-4 (now RSA 2000, c P-5)

21 See *L.I.U.N.A Local 527 Members' Training Trust Fund v The Queen* (1992) 92 DTC 2365.

void if it finds that the settlor would rather not have the trust take effect if it must be limited to a period of 21 years.

3 USA

2.14 Under the "US state common law", a trust must have beneficiaries, save where it is a charitable purpose trust. The anomalous NCPT is unenforceable as a trust but is treated exceptionally as an "honorary trust" valid for 21 years taking effect as a power.[22] This limited rule is now largely emasculated.[23] As of 2009, in some 44 states, there were statutes which validated perpetual trusts for the care of individual burial plots.[24] Today, other honorary trusts as well as indefinite purposes trusts are enforceable as a trust[25] in 35 states which have adopted a form of the Uniform Trust Code (UTC). [26]

2.15 In those UTC states, section 408 converts an honorary trust to care for pet animals into an enforceable trust for the life of the animals while section 409 validates all other NCPTs for a period of up to 21 years.[27] Under

22 Cf *Morice v Bishop of Durham* (1804) 32 ER 656 where the trust was struck down although the Bishop was willing to carry out the specified purposes. US courts were slow to recognise the anomalous NCPT prior to adoption of the exception in § 124 of the Restatement (First) of Trusts (Am Law Inst, 1935).

23 See *Renner's Estate* 57 A 2d 836 (Pa. 1848) and the Restatement (Second) of Trusts (Am Law Inst, 1959), § 124. See also *Shenendoah Valley National Bank v Taylor* 63 SE 2d 786 (Va 1951).

24 Adam Hirsch, "Delaware Unifies the Law of Charitable and Non-Charitable Purpose Trusts" (2009) 36 Estate Planning 1 at 15.

25 For the text of the UTC, see Uniform Law Commission, *Trust Code: Final Act, No Comments* (2020) <*https://www.uniformlaws.org/viewdocument/final-act-no-comments-73*> (accessed 30 March 2021). The main failure of the Uniform Probate Code (which preceded the UTC, see further n 26 below) was to leave the honorary trust in a muddled category somewhere between trust and power. The UTC avoided the muddle by expressly providing that a non-charitable trust may be created and enforced by the designated person or, in the absence of such person, by a person appointed by the court. See Richard Ausness, "Non-charitable Purpose Trusts: Past, Present and Future" (2016) Real Property, Tr & Est Law J 321. Cf Adam Hirsch, "Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws" (2017) 26 Fla St U L Rev. 913 at 924.

26 As of March 2021 – see Uniform Law Commission, *Trust Code.* <*https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d*> (accessed 30 March 2021). See Alexander Bove, Jr. & Ruth Mattson, "The Purpose Trust: Drafting becomes a Work of Art" (2016) 43 Estate Planning 26 at 27. The amendments to the Uniform Probate Code in 1990 preceded the UTC in creating the concept of an honorary trust enforceable as a trust. S 2-907(a) provides that a trust for a specific non-charitable purpose may be performed for 21 years while s 2-907(b) stipulates that a trust for the care of a designated pet animal is valid for as long as it lives.

27 The states which have adopted the UTC are Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia,
(*cont'd on the next page*)

section 409, both trusts for general but non-charitable purposes, and trusts for a specific non-charitable purpose other than the care of an animal are enforceable as a trust. It is open to individual states to prescribe a longer period than 21 years and some have abrogated time limits entirely.[28] However, despite the apparent width of the language of section 409, extensive recourse to the NCPT beyond private purposes of providing for pets and maintenance of tombs etc appears to be uncommon.

2.16 Among non-UTC states, Delaware is noteworthy. It was among the first to authorise perpetual trusts for the care of individual burial plots[29] as well as trusts for the care of pets.[30] Since 2008, it has authorised general NCPTs other than those for the care of individual burial plots and pets.[31] These general non-charitable trusts are to be given the uniform treatment accorded to charitable trusts. NCPTs are as a result capable of being perpetual,[32] as well as being modified cy-près.[33]

2.17 The Delaware amendments are plainly intended to promote more extensive use of NCPTs for personal social and possibly business purposes. On another front, features of the self-settled asset protection trust first launched in the Cook Islands[34] have been installed in Alaska, Delaware and 15 other states (where they are known as Domestic Asset Protection Trusts).[35]

2.18 In other states, limited statutes authorise trusts for the care of pets[36] or trusts for the care of individual burial plots.[37] Where these statutes are inapplicable, courts applying the common law will look to the Restatement (Third) on Trusts for guidance.[38] This means that all such NCPTs, whether honorary or otherwise, will take effect as powers of appointment.

West Virginia, Wisconsin and Wyoming. Legislation to enact the UTC has also been introduced in Hawaii and, if passed, would take effect in January 2022. See Uniform Law Commission, *Id.*

28 Such as Wyoming, Idaho, Maine, New Hampshire, North and South Dakota.

29 12 Del Code Ann §§ 3551, 3554.

30 *Id.* § 3555.

31 *Id.* § 3556.

32 *Id.* § 503.

33 *Id.* § 3541. See Adam Hirsch, "Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts" (2009) Estate Planning 36.

34 Cook Islands International Trust Act 1988 (introduced in 1989).

35 With settlor as spendthrift beneficiary.

36 Such as California: Cal Prob Code § 15212.

37 Such as Massachusetts: Mass Gen Laws Ann c 114 § 19.

38 Two major differences between the First and Third Restatements are that the latter adds a new category of honorary trusts, defining them as indefinite or general purposes trusts, and stipulates that the trustee holds on trust to distribute to the reversionary beneficiaries. See Restatement (Third) of Trusts (Am Law Inst, 2003), § 47.

4 Scotland and India

2.19 We mention briefly that there are at least two jurisdictions, namely Scotland and India, in which the narrowly construed beneficiary principle does not apply.[39] These jurisdictions regard the trust as comprising obligations attached to ownership of property for another's benefit or for specified purposes without any division between legal and beneficial ownership.[40] Accordingly, there is general acceptance that NCPTs are valid if there are acceptable mechanisms to enforce them.[41] In Scotland, if they are public trusts, they are primarily enforceable by the Lord Advocate.[42] In India, under the Religious Endowments Act 1863 and the Charitable and Religious Trusts Act 1920 any interested person is an enforcer, while section 92 of the Civil Procedure Code 1908 names the Advocate General (or State Attorney-General) as enforcer in addition to two or more interested persons. The effect of section 92 is to impose the sanction of the Advocate General as a condition for two interested persons to institute proceedings seeking relief for breach of trust.[43]

5 Hong Kong

2.20 In Hong Kong, both the first instance court and Court of Appeal in *Hiranand v Harilela*[44] have articulated the common law of purpose trusts ambivalently without evidently and overtly indicating hostility to *Re Denley*.

6 Singapore

2.21 The position in this country is similarly ambivalent. While no decision based on *Re Denley* has been recorded, the High Court in *Goi Wang Firn v Chee Kow Ngee Sing Pte Ltd*[45] has considered submissions predicating the correctness of *Re Denley* without necessarily refuting or determining them.

2.22 It is perhaps unsurprising that the Courts have also taken a wider view of the anomalous purpose trust cases. In *Bermuda Trust (Singapore)*

39 Others include Sri Lanka and Japan. We have not included South Africa which has a well-developed law of trusts for the simple reason that trusts are there conceptualised as contractual stipulations for the benefit of another.

40 See *Inland Revenue v Clark's Trustees* 1939 SC 11 at 22 (Scotland) and Trusts Act 1882 s 3 (India) which codified a law of trusts for India consistent with Muslim law and Hindu law, as well as with principles of Buddhism.

41 See *Flockhart's Trustees v Bourlet* 1934 SN 23 where a trust for the care of pets was enforceable.

42 Less commonly by *popularis actio* (by a person with interest to sue) (see *Andrews v Ewart's Trustees* 1886 SC 69) or by heirs of the truster (see *Hill v Burns* 1824 S 275 affd 1826 2 W&S 80).

43 See *Jan Ali v Ram Nath Mundul* (1982) 8 Cal 32.

44 [2004] 4 HKC 231; [2004] HKCU 1259.

45 [2015] 1 SLR 1049.

Ltd v Wee Richard,[46] the High Court held that the settlor's trust for the performance of Sin Chew rites would have been enforceable as an anomalous purpose trust for the duration of the lifetime of the last survivor of his children and grandchildren living at the date of his death plus 21 years, if it had not failed as a consequence of impossibility of performance.[47]

2.23 Although the subject is very obscure in Singapore case law, public, social and religious (but non-charitable) trusts are also valid. Section 9 of the Government Proceedings Act provides that the Attorney General is the enforcer of public, social, religious (but non-charitable) and charitable trusts.[48] We discuss these NCPTs in more detail in Chapter 4.

B THE CASE FOR AND AGAINST NCPTS IN LEGAL SCHOLARSHIP

2.24 Reflecting the above judicial ambivalence, the legal scholarship on the NCPT is sharply polarised. We summarise the division of scholarly opinion as follows in paragraphs 2.25 to 2.28.

2.25 The weight of scholarly opinion is that the beneficiary principle is not a standing principle or principle of enforcement. These opinions see the beneficial interest as a core, defining, and indispensable characteristic of a trust.[49] Lionel Smith, for instance, argues that a trust which does not benefit beneficiaries is no trust.[50] It must have a mandatory core of benefiting beneficiaries who are entitled at minimum to an accounting of what has been done with trust property. Smith adds that an NCPT results unacceptably in unowned property and deprivation of creditors' recourse to the settlor's property.[51] Kelvin Low on the other hand acknowledges that the right to hold the trustee accountable does not necessarily require a beneficiary with beneficial interest, but adds that it must at least entail a right to forego enforcement.[52] He therefore argues that it changes nothing to add an enforcer of an NCPT. If he has no right to forego enforcement,

46 [1998] 3 SLR(R) 938.

47 The Court followed *In the matter of the estate of Khoo Cheng Teow decd* [1932] SSLR 226 which thought it clear that a royal lives clause was effectual in avoiding the rule against perpetuities.

48 Cap 121, 1985 Rev Ed

49 See Paul Matthews, "From Obligation to Property and Back Again? The Future of the Non-charitable Purpose Trust", in David J Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law Intl, 2002), 203-241.

50 Lionel Smith, "Give the People What They Want: The Onshoring of the Offshore" (2018) 103 Iowa L Rev 2155 at 2157 (citing John Langbein, "Mandatory Rules in the Law of Trusts", (2004) 98 NW UL REV 1105 at 1120-23).

51 *Id.* at 2170.

52 Kelvin Low, "Non-charitable purpose trusts", in Richard Nolan, Kelvin Low & Tang Hang Wu (eds) *Trusts and Modern Wealth Management* (Cambridge University Press Online, 2018)

who enforces his duty to enforce? Both views are alike in charging offshore NCPTs with not just pushing the limits of trust law but exceeding them.

2.26 A different and opposing view presents the 'beneficiary' principle as an enforcer principle. This is premised on an obligationist and bilateral view of the trust, in which the beneficial interest is no more than a misnomer for the beneficiary's personal right to enforce the trustee's duties.[53] In the same vein are views propounding that case law, including anomalous trust cases, affords many indications that an NCPT is valid if there is an acceptable enforcement mechanism, or there are ascertainable factual beneficiaries, or there is a felt social need.[54] An American commentator expressed a harsher view, charging *Morice v Bishop of Durham* with circularity if not flawed logic, since the same court which must declare that there is a person in whose favour it can decree performance also decides who that person is.[55]

2.27 A third view of respectable vintage was advocated by Austin Scott, who regarded the question as less doctrinal than one of public policy.[56] In this vein, he strongly supported the judicial validation of NCPTs as powers of appointment. A stronger view is held by Jo Goldby and Mark Pawlowski, who argue that insofar as the *Quistclose* trust (which is a close cousin) is clearly admitted for the sake of policy and enforceable as a trust, so too should the NCPT.[57]

2.28 A fourth view favours pragmatism over dogma. Pawlowski also espousing this view cites the increasing acceptance and legitimacy of the commercial function of holding trust assets not owned beneficially by

53 David Hayton, "Developing the Obligation Characteristic of the Trust" (2000) 117 LQR 76. Contra James Webb, "An ever-reducing core: Challenging the legal validity of offshore trusts" (2015) 21 Trusts & Trustees 476.

54 Jo Goldby & Mark Pawlowski "English and Offshore Purpose Trusts: A Comparative Study" (2005) 11 Trusts & Trustees 8 at 9, citing *Re Dean* (1889) 41 Ch D 552 as support for the arguable proposition that a purpose trust which serves a felt social need can be upheld. See also Paul Baxendale-Walker, *Purpose Trusts* (1st Ed) (Butterworths, 1999) at 364, Appendix II.

55 Adam Hirsch, "Bequests for Purposes: A Unified Theory" (1999) 56 Wash & Lee L Rev 33 at 35-44; repeated in Adam Hirsch "Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws", above n 25 at 920-921.

56 A view he championed in the First Restatement of Trusts. See also William Fratcher (ed) *Scott on Trusts* 4th Ed (Little, Brown & Co (Canada) Ltd, 1987) Vol II at 244 et seq.

57 Goldby & Pawlowski "English and Offshore Purpose Trusts: A Comparative Study", above n 54 at 13: "there is no clear policy reason why non-charitable purpose trusts should not be recognised under English law". James Goodwin, "Purpose Trusts: Doctrines and Policy" (2013) 24 KLJ 102 also identifies policy as the critical consideration. He regards policy as concerned with whether the advantages of recognition of NCPTs outweigh the disadvantages as well as whether rejection is practicable in a world where flexibility is valued. Terence Yeo and Victoria Liu, "To good purpose: non-charitable purpose trusts for the specific purpose of holding shares in perpetuity" (2020) 26 Trusts & Trustees 646 make a policy case for recognition in Singapore in terms of the preponderance of advantages which NCPTs will bring to the country.

anyone. He supports the introduction in England of a new statutory NCPT modelled on offshore trust legislation,[58] which he describes as the work of well-respected offshore service providers.[59] James Webb disagrees with what he describes as offshore trust laws that are designed to give settlors their cake and eat it by cherry-picking the advantages of trust law.[60]

C ALTERNATIVE MEANS FOR FURTHERING PURPOSES

2.29 For the purposes of setting the proposed reform in context and perspective, it is necessary to appreciate (a) that neither case law nor legal scholarship denies that there are workable alternatives to NCPTs, and (b) that such law reform as has been implemented or is being considered has been varied and non-uniform. This we now proceed to outline, beginning with a survey of alternative means for furthering purposes.

2.30 There is certainly no objection to a trust for a person such as a gift over beneficiary or the settlor, with power to the trustee to advance a non-charitable purpose if he so wishes.[61] But fulfilment of such purpose is unenforceable and the court is likely to construe the trustee as a personal trustee so that his disclaimer will put an end to the trust from the outset.[62]

2.31 Massively discretionary trusts can be employed in this manner with the purpose hidden from view in a wish letter.[63] Whether these can survive the doctrines of sham or illusory trust is increasingly debated. This is not the only drawback.

2.32 A *Quistclose* trust or a transfer subject to a mandate to apply to specified purposes may be employed.[64] In *Hiranand v Harilela*, the HKCA was open to the use of the *Quistclose* trust to provide a series of wedding gifts to members of the settlor's family.[65] Unless the purpose is of a short-lived nature, such as to stave off bankruptcy or provide greater certainty in

58 Mark Pawlowski, "Private Purpose Trusts – A Statutory Scheme for Validation" (2019) 19 Trusts & Trustees 391.

59 *Id a*t 392.

60 James Webb "An ever-reducing core? Challenging the legal validity of offshore trusts" (2015) 21 Trusts & Trustees 476.

61 See *Re Douglas* (1887) 35 Ch D 472.

62 See especially the criticisms in British Columbia Law Institute, *A Modern Trustee Act for British Columbia* (2004).

63 See *JSC Mezhdunarodniy Promyshlenniy Bank v Sergei Viktorovich Pugachev* [2017] EWHC 2426 (Ch).

64 For the *Quistclose* trust, see *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [104] – [136] rejecting the Ministry of National Development (MND)'s reliance on a *Quistclose* trust analysis. The CA held in [2016] 1 SLR 915 at [123] that the *Quistclose* trust analysis was foreclosed to the MND as the relationship between the Town Council and the MND was entirely a matter of public law. For the mandate, see *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 1 WLR 522.

65 [2004] 4 HKC 231; [2004] HKCU 1259.

bringing about a state of affairs, these are non-optimal solutions. "Power is a poor substitute for a trust"[66] where the purposes to be achieved are of a recurrent nature.

2.33 In New Zealand and Australia, the trading trust is widely employed to carry on a family business. The trading trust is an ordinary (beneficiary) trust adapted for use in family-run businesses. It is essentially a business purpose trust whereby a corporate trustee (typically asset-less) is authorised to carry on a trade and incur trading indebtedness and risks of trade loss. As a business entity, the trading trust exposes the trustee to unlimited liability. That makes it unpopular and explains why an asset-less corporate trustee is commonly used, which is a concern for creditors. Beneficiaries can terminate the trust under the rule in *Saunders v Vautier*[67] leaving the creditors to pursue an asset-less debtor-trustee. Another lingering concern is that while creditors have indirect access to the trust estate for the trustee's debts through the trustee's entitlement to an indemnity from the trust estate for his expenditure, this access is withheld if he is in breach of trust.[68] These concerns practically speaking limit the use of the trading trust to carry on low risk businesses.

2.34 Another alternative resorted to in Hong Kong and other administrative hubs for offshore trusts[69] depends on accession to the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition 1985 ("**Hague Trusts Convention 1985**").[70] The Convention accepts that trusts may be created for a specified purpose (which may be non-charitable). This paves the way to selecting an offshore trust law to govern a trust created in Hong Kong for the benefit of Hong Kong resident beneficiaries and to be administered in Hong Kong; a phenomenon that has been referred to as the "onshoring" of the offshore trust.[71] The need to settle or establish the offshore trust in an offshore trust jurisdiction with a view to administering it in Hong Kong is obviated since the choice of an unconnected law is perfectly valid under the Hague Trusts Convention 1985.[72]

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66 Donovan Waters, "Non-charitable purpose trusts in common law Canada" (2008) 28 Est Tr & Pensions J 16 at 25.

67 See above, n 11.

68 Any contractual provision between the trustee and the trading creditor for the latter to have direct access to trust property as satisfaction of trading debts is useless. It is unenforceable against the beneficiary.

69 Switzerland, like Hong Kong, is a major hub.

70 HCCH, Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition <*https://www.hcch.net/en/instruments/conventions/full-text/?cid=59*> (accessed 30 March 2021).

71 If the court is asked whether such a trust is contrary to public policy, the answer will not be plainly negative if the only asset is land. But this will not be a concern since non-residents may not own land in Singapore.

72 Certain mandatory requirements may be imposed by the applicable offshore trust law. For example, to onshore a STAR trust in Hong Kong successfully, the trustee must be or include a trust company licensed by the Cayman Islands Monetary

(*cont'd on the next page*)

2.35 In this country, the former Chief Justice in a widely reported speech considered that the same device of choice of an offshore law is available in Singapore to make up for the absence of an extended role for NCPTs.[73] There may however be lingering doubts as to this. On one view, the common law conflicts rules which are applicable in the absence of the Hague Trusts Convention 1985 will not recognise a choice of offshore trust law as applicable law in the absence of a nexus between the chosen law and the trust, trustee and beneficiaries. Whether the Singapore court will apply the pro-settlor offshore law of fraudulent trust or reject it as being contrary to public policy is uncertain. Whether an offshore trust law may be chosen in order to create a trust for the purpose of holding shares in a private trust company is debatable.[74] Again, there is no guarantee that section 90(5) of the Trustees Act[75] will insulate an offshore trust which has reserved extensive powers to the settlor against invalidation on the grounds of public policy.[76] These doubts may be hard to overcome given that trusts governed by offshore law will not be cheap to litigate offshore or in the ordinary civil courts onshore where foreign law must be proved by foreign law experts.[77]

D LAW REFORM INITIATIVES PAST AND PRESENT

2.36 We note next that law reform to introduce the NCPT is neither recent nor now a novelty. Moreover, any prospective law reform such as the proposed reform must concede the absence of a consensus on the subject.

2.37 Leaving aside the early reforms in Canada in 1966 to enforce anomalous as well as other specific NCPTs as a power,[78] the first major

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Authority, the trust documents must be kept in the Cayman Islands and the trust must not hold land in the Cayman Islands. The STAR trust is described briefly at para 3.17 below.

73 The Hon Chan Sek Keong CJ, "Trusts and the Rule of Law in Singapore" (2013) 25 SAcLJ 365 at 375-377.

74 See Raymond Davern, "Does the Virgin Islands Special Trusts Act achieve anything special?" (2010) 16 Trusts & Trustees 750 at 756. Such a trust serves the purpose of retaining shares in a BVI company with the trustee having no power to intervene in management and conduct of the company's business. If it also purports to have a beneficiary, as it may, the question is whether it is contrary to public policy for the trustee to sit back and watch the settlor destroy the company and do nothing for the protection of the beneficiary.

75 Cap 337, 2005 Rev Ed.

76 S 90(5) states that no trust shall be invalid by reason only that the settlor has reserved any or all powers of investment or asset management. Contra James Webb, "An ever-reducing core? Challenging the legal validity of offshore trusts" (2015) 21 Trusts & Trustees 476 at 482.

77 Litigation in the Singapore International Commercial Court may be less costly since foreign law may be proved in other more expedient ways. See also Terence Yeo and Victoria Liu, "To good purpose – non-charitable purpose trusts for the specific purpose of holding shares in perpetuity in Singapore" (2020) Trusts & Trustees 1.

78 In Ontario's Perpetuities Act 1966 s 16, which was followed in British Columbia's Perpetuity Act 1979 s 21 and Alberta's Perpetuities Act s 20.

steps to establish the enforcer principle were taken in the 1970s by Nauru, an offshore trust jurisdiction.[79] After some effluxion of time, the Bermuda offshore trust was launched in 1989 to great success and became a model emulated by many offshore trust jurisdictions following in its train.[80] We discuss some of these models in Chapter 3 below.

2.38 A more modest reform venture began in earnest in the USA in 1990 (see Article II of the Uniform Probate Code (UPC)) and was continued in 2000 by the comprehensive UTC with useful clarifying updates.[81] Some aspects have already been mentioned. Despite the breadth of the language of section 409, it is on record that the drafters, the Uniform Law Commissioners (or more formally National Conference of Commissioners on Uniform State Laws), chose to reject the more liberal offshore NCPT. The reasons are not documented. A possible conjecture is that any felt need for trusts for the purposes of organising mutual funds was thought to be better catered for by promulgating explicit business trust statutes. This appears to be true of the Delaware Business Trust Act of 1988 (later modified and renamed the Statutory Trust Act 2001) which provides a trust framework for organising asset securitisation and mutual funds.

2.39 Another more expansive reform in the form of a Uniform Trustee Act (UTA) is underway in Canada. The UTA can be said to represent the culmination of Canadian thinking on the NCPT that was first initiated in British Columbia in 1992.[82] The initial province-specific initiative was next incorporated in a major endeavour in 1996 to codify the British Columbia law of trusts. This massive project was seven years in the making when it concluded in 2004.[83] In 2008, the Uniform Law Conference of Canada (ULCC) in turn built upon the 2004 British Columbia codification and in 2012 released its UTA as a uniform trustee statute for enactment in all provinces except Quebec. The take-up rate remains modest. Alberta reported support in 2017[84]; British Columbia opened for consultation in 2014. Progress is slow. To our knowledge, other than New Brunswick – which in 2015 adopted various aspects of the UTA into its Trustees Act[85] – no province or territory has yet enacted the UTA into law.

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79 Nauru did so in 1972, although the first was Liechtenstein in 1926.

80 See *Report of the [Bermuda] Law Reform Committee on Trust Law Reform* (1989) and the Trusts (Special Provisions) Act, 1989, s, 13(1)(a). These reforms are outlined in Chapter 3 where we highlight their commercial slant.

81 Adam Hirsch "Trust for Purposes: Policy, Ambiguity and Anomaly in the Uniform Laws", above, n 25.

82 See British Columbia Law Reform Commission, *Report on Non-Charitable Purpose Trusts* (LR-128, Vancouver, 1992), 39–41, and Manitoba Law Reform Commission, *Non-Charitable Purpose Trusts* (r 77, Winnipeg, 1992).

83 In 2004 the British Columbia Law Institute (BCLI) issued a report entitled *A Modern Trustee Act for British Columbia* (see above, n 62).

84 See Alberta Law Reform Institute, *Final Report No. 109 – A New Trustee Act for Alberta* (January 2017).

85 Trustees Act, SNB 2015, c 21. See further, Office of the Attorney General, *New Brunswick's New Trustee's Act.* (2016). *https://www2.gnb.ca/content/dam/gnb/*

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2.40 To this list of law reform initiatives may be added the more recent Scottish Law Commission's 2014 proposals.[86] The unreformed Scottish position as it stands holds that NCPTs are valid and that the Attorney General is the enforcer. If the proposals are adopted, the general position will be taken a step further. It will make it abundantly clear that private purpose trusts, including trusts for holding a controlling interest in a company, are welcome and encouraged.

2.41 It is not possible to conclude that all major trust jurisdictions have at one point or another considered law reform of the beneficiary principle. The New Zealand Law Commission would appear for the moment to have abandoned any project for considering the beneficiary principle. Having previously announced that its Fifth Issues Paper would embrace consideration of the NCPT, the Commission would seem afterwards to have elected to drop the subject.[87] In the 2019 Trust Act therefore, no mention is made of the NCPT. We note however that in major trust jurisdictions such as England, Australia, and Hong Kong where reform is absent or not yet in contemplation, the presence of the Hague Trusts Convention 1985[88] and the use of the massively discretionary trust are conspicuous.[89]

E EVALUATION AND GENERAL CONCLUSIONS

2.42 Our survey of the 'status' of the NCPT in major trust jurisdictions and outline review of alternatives and law reform initiatives indicate that there is no consensus either for or against the NCPT. Nor is there any sign that the debate between the beneficiary principle and the enforcer principle will end any time soon.

2.43 We note that views on the offshore NCPT have shifted significantly since the 1990s when the consensus in mainstream trust jurisdictions was to reject the offshore NCPT.[90] Growing numbers of legal scholars and practitioners now support a role for the NCPT in one form or another. This

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Departments/ag-pg/PDF/en/OtherDocuments/TrusteesAct2016.pdf (accessed 30 March 2021).

86 Scottish Law Commission, *Report on Trust Law* (SLC 239, 2014).

87 See New Zealand Law Commission, *Court jurisdiction, trading trusts, and other issues: review of the law of trusts: fifth issues paper* (Law Commission issues paper 28).

88 Cf Canada where the Convention is in force in eight provinces. The original ratification in 1992 covered five provinces. It was extended to two more provinces in 1994 and another in 2006.

89 William Ahern, "The Use of Domestic and Offshore Trusts in Hong Kong" (2014) 20 Trusts & Trustees 102 at 104-105 writes that the massively discretionary trust came back into prominence in Hong Kong only in about 2009 as a long-term estate planning tool, but Hong Kong law non-charitable trusts remained unpopular in 2014.

90 The Law Reform Commission of British Columbia in 1992 (above, n 82 at 32) for instance took the view that the non-charitable purpose trust must be a statutory creature. Without statute, it could not exist.

is notwithstanding the development since then of prominent alternatives such as the trading trust, the *Quistclose* trust and the business trust.

2.44 We note however the criticism that offshore trust legislation is in a constant state of change and amendment. Distinguished trust scholars such as Smith regard this with suspicion as evidence of sacrificing essential doctrines of trust law to the whims and fancies of business clients and for promoting a race to the bottom.[91]

2.45 We also think that judicial change in Singapore along the lines laid down in *Re Denley* may be possible.[92] However, judicial revolution comes with a time lag. If there is a strong case for more wide-ranging policy-based reform, we question whether there can be a good reason to bide one's time and proceed more incrementally and interstitially in an accretive process, dependent on the dynamics and economics of private litigation and demand for judicial solutions. The second reason is that judicial development by its incremental nature will raise questions as it resolves others. If the case for recognising private NCPTs is about making the capital and financial markets more diverse and efficient, the uncertainties that come with judicial evolution are undesirable. What is needed is a coherent and comprehensive framework as a starting point rather than a scheme in which uncertainties are overcome reactively as and when they arise.

2.46 Our view is that the huge variations in problem formulation and solution in major trust jurisdictions with respect to the NCPT is affirmation that the proposed reform is one of policy. Policy varies from country to country. There will be "no one size fits all". It follows that the question is one of what proprietary autonomy and capital utilisation policies require given the circumstances and conditions of Singapore. In the rest of what follows, we first map out the relevant policies for legislative consideration. In the latter half of this report, we acknowledge that legislation is likely to be less responsive to change than the common law. Inevitably this means that while a statutory NCPT cannot or should not be wholly isolated from the common law, it will need to rely on the common law for construal and gap-filling. This will have implications for the shape of the reform instrument which we recommend.

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91 See Lionel Smith, "Give the People What They Want: The Onshoring of the Offshore", above n 50 at 2173-2174. Offshore jurisdictions say further changes to capitalise on the trust's inherent flexibility were forced upon them by hostile tax reactions from mainstream trust jurisdictions. See Hon Anthony Smellie CJ "Form and substance: Cayman Islands perspectives in the debate about offshore trusts – Presentation to the trusts and estates litigation forum in Provence, France, February 2008" (2008) 14 Trusts & Trustees 396 at 397.

92 Particularly also as in recent cases the Court of Appeal has hinted that it is open to the obligationist view in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación, SA.* [2018] 1 SLR 894 at [145].

F THE RELEVANT POLICIES

2.47 Any reform to install a statutory NCPT will impact social and economic life in the country. As a mainstream trust jurisdiction, Singapore's external policies of comity will also be impacted.

2.48 Speaking generally, these policies have shifted in focus. In the 1990s, insistent concerns were voiced about domestic tax evasion through relocation of trusts to offshore trust jurisdictions as tax havens, which do not tax capital gains and offer low corporate taxes.[93] A decade later, as concerns about domestic tax evasion were increasingly addressed by specific onshore domestic tax law developments targeting the offshore trust, the focus shifted to evasion of mandatory domestic regulatory laws such as securities fraud laws and anti-money laundering and terrorist financing laws. Following international initiatives to suppress money laundering and terrorist financing and offshore compliance, these concerns have also lessened.

2.49 Less easy to deal with are concerns of securities fraud. Warnings of the dangers of regulatory arbitrage descending into a race to the bottom have been and are still being sounded. With the disclosure of the Panama Papers in 2016 and the Paradise Papers in 2017, another problem has been spotlighted. This is the misuse of corporate secrecy by corrupt politicians and fraudsters to hide ill-gotten and corrupt gains behind complex structures involving offshore shell companies and NCPTs spread over multiple offshore jurisdictions.

2.50 We apprehend that external policies of comity must be taken into account in reforms which seek to make NCPTs available in Singapore. But they are not the first port of call. Unless the reforms are meaningful for domestic users of trusts, they cannot be sensible for international NCPTs which benefit non-resident settlors. The proposed reform must be intended to benefit domestic settlors by making available the advantages of NCPTs to fulfil existing and potential needs. Where these reforms are thus sensible, they of course should not artificially be ring-fenced and excluded from non-residents. In other words, the path to reform cannot be justified primarily by any agenda or ambition to attract offshore business to the country. This is also why accession to the Hague Trusts Convention 1985 as a means to onshoring an offshore trust cannot be based on sound policy if in the first place domestic policy is against the NCPT.

2.51 It is therefore necessary to consider whether the policies that are pertinent support creation of a statutory NCPT as an appropriate instrument of social and commercial advancement for domestic settlors.

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93 Reactions to tax haven advantages were particularly strong. See The US Senate's Permanent Subcommittee on Investigations of the Committee on Homeland Security and Government Affairs, 'Tax Haven Abuses: The Enablers, the Tools and Secrecy' (1 August 2006).

2.52 An essential and permeating policy is an owner's freedom to determine the value of his property by making a disposition of it. For this reason, and in furtherance of the exercise of an owner's autonomous choice of disposition, the law of trust provides exceptional support by establishing a set of "default power-conferring rules" and granting special access to the inherent and supervisory judicial jurisdiction. The centrality of this policy is attested to by innumerable citations of the paramountcy of a settlor's intention in construing the trust and controlling the exercise by trustees of their powers under the trust.

2.53 So preeminent is this policy that there is considerable tolerance of concealment of beneficial ownership, though not fraud. All trusts to a greater or lesser extent are permitted a concealment effect. It is only when concealment is taken advantage of to perpetrate an illegal purpose such as money-laundering, terrorist financing or fraud on investors that the trust becomes concerning and confidentiality withdrawn. Confidential communications with respect to disposition of trust property by the trustee are also protected and "when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties."[94]

2.54 A necessary corollary, we maintain, is that a disposition of property in trust equally advances the freedom to exercise autonomous choice whether the disposition is for private or public purposes. There is no policy to promote public benefit above private benefit. While an altruistic public trust may achieve more good than a private purpose trust, both alike are equally to be fostered. As well, there is no policy to favour the well-motivated and praiseworthy settlor and disfavour the ill-motivated. It follows that so far as the policy of freedom of dispositive intention is concerned, the furtherance of a social non-charitable cause or the furtherance of the settlor's family business as a business purpose is no less deserving of legislative support than the furtherance of charitable purposes.

2.55 Another corollary is that the law will withdraw support from the trust only where it would be an exercise in futility to support it or there is compelling justification to withdraw support for the protection of unborn and vulnerable persons or for the sake of regulatory integrity. There is plenty of evidence that regulatory policy alone will not be sufficient ground for the withdrawal of support. A trust is valid if the transfer of trust property is valid and complete and there is no policy intrinsic to trust law per se either for or against tax evasion or other illegalities including fraud on creditors and money laundering.[95] These regulatory policies are external

94 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [67].

95 The upshot of this is that an NCPT will be fraudulent in the same manner as any express trust that is set up with the intention to defraud creditors. It will be (*cont'd on the next page*)

to trust law though they may affect the enforceability of a trust with an illegal purpose. That is why proof of evasion or abuse of trust must be forthcoming before external regulatory policies are engaged. Whether a trust should be subject to a higher level of reporting requirements is also an external matter of policy and sensitive to the proprietary context that circumscribes the policy in question. There is thus no policy that a trust must be more transparent or registrable or subject to greater or mandatory disclosure obligations in contexts and circumstances where the commission of regulatory fraud, abuse and evasion is rife. It may or may not be expedient for tax legislation or other public interest legislation or measures to be enacted to target NCPTs in some particulars, thereby providing a stronger targeted response not dependent on proof of evasive or abusive intention but on presumption of violation of legitimate regulatory responsibilities. However, it is unnecessary and beyond the scope of this reform to make recommendations on these matters of regulatory policy which are exogenous to the intrinsic functions of a trust.

2.56 A second essential policy is implicated to the extent trust law produces the effects of organisational law on the balance between protection of creditors' rights and asset partitioning. Owners of capital enjoy the freedom to utilise capital in commerce and to limit liability for trading debts to that capital. This policy is essential to the economic life of the community. It is a policy of promoting efficient credit. As a policy which sets the limits of organisational law, it is imperative in the case of the combined freedom of many owners organising collective capital for leveraging business activity and entrepreneurial risk-taking. On it rests the principle that corporate liability is limited to corporate assets while personal assets of a corporation's shareholders are partitioned off from the corporation's creditors.

2.57 The same policy may be more muted where the trust is not primarily used to incur debt or credit for entrepreneurial gain or profit making. Thus, trust law approves of settlors creating massively discretionary trusts and does not frown upon asset protection and withholding potential property of discretionary trust beneficiaries from creditors; at least where the trust is prohibited from leveraging on trust assets. As long as the discretionary trust is not created to defraud the settlor's creditors, there is no policy against the settlor being included as one of the beneficiaries. The settlor will not be protected only if he has reserved for his own benefit powers which are tantamount to ownership or if the trust is a sham or illusory trust.[96] Again, trust law has long acknowledged in its recognition of

immaterial that the debtor was not aware of the creditor's claim at the time of creation of the NCPT if the intention to defraud was then present. In proceedings where proof of that intention has to be established, the civil standard of proof will apply and not the criminal standard.

96 See *Tasarruf Mevduati Sigorta Fornu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17.

protective trusts the policy of asset protection for beneficiaries (not including the settlor) who are within the protective ambit of the settlor. Such beneficiaries may not alienate the protected interest which furthermore is protected against involuntary alienation in the event of the beneficiary's bankruptcy. It is clear however that the settlor may not establish a protective trust for his own benefit.[97]

2.58 Given that NCPTs are widely used in conjunction with commercial activities, the question of policy is whether there is a commercial need for them in Singapore and whether any such use of NCPTs will undermine sound creditor-debtor policies. We address these important issues in the next Chapter.

97 See also the *Restatement (Second) of Trusts,* § 156 and now the *Restatement (Third) of Trusts* §§ 57, 58, and 59.

CHAPTER 3

NON-CHARITABLE PURPOSE TRUSTS AND FAMILY BUSINESS WEALTH MANAGEMENT

3.1 To determine whether there are new business needs and purposes to be advanced and if so, which of them should fall within the scope of the proposed reform, we next undertake a quick survey of three prominent offshore NCPT jurisdictions: Bermuda, the Cayman Islands and the British Virgin Islands. All three apply the same legal principles of trust law as mainstream common law trust jurisdictions, while implementing the offshore trust as a statutory NCPT by way of specialised provisions in their codifications of trust law. There are advantages and disadvantages of codification which we will not discuss. Our remit is merely to consider reform of the law as to purpose trusts and does not extend to general issues of codification.

3.2 Nor do we discuss tax considerations relating to NCPTs. This does not mean that tax treatment of NCPTs is unimportant. It is important as a matter of practice. Particularly where the NCPT competes with the corporation as a preferred business entity, the choice between them will depend on tax treatment, applicability of mandatory governance structure and other institutional preferences. But as we have explained before, such matters, especially tax treatment ought to be considered elsewhere in a different forum.

3.3 Our discussion here falls into three parts. We first discuss the previous resistance at common law to a trust form of doing business to show that there is no longer any policy that incorporation must be preeminent. We next outline the above-mentioned three NCPT models of major offshore trust legislation which are trust forms of doing business. We then identify from the offshore experience the business needs and purposes which the NCPT can facilitate in Singapore. Our overall conclusions and recommendations are presented at paragraphs 3.51 to 3.61.

A TRUST FOR BUSINESS PURPOSES AT COMMON LAW

3.4 At common law a line of authorities set its face against a trust for business purposes in the late 19th century which was to persist into the mid 20th century. In *Smith v Anderson*,[98] Sir George Jessel MR held that the purported trust was an unincorporated association for the purposes of business and making business profits and void for contravening the

98 (1880) 15 Ch D 267.

Companies Act 1862.[99] Further complication developed when the Court of Appeal overturned the decision.[100] The appellate court held that on the facts the arrangement was not an illegal association for business purposes but one to manage a trust fund settled by contributors who were not associators. The selling and buying of shares was subsidiary in nature. The purpose was not to make profits but to preserve the fund.[101]

3.5 The idea that there is a difference between associating for business purposes and managing a trust for investment in securities has proved to be elusive in subsequent case law.[102] It suggested that there was no in-between possibility of a trust for business purposes to make profits for the beneficiaries. The result in the local practice was that the hwei, kutu or chit fund, which was commonly utilised to raise business capital for small unincorporated businesses, could not be characterised as a trust for business purposes. A hwei typically involves contributors who contribute funds to a head who lends the collected funds to a borrower who could be one of the contributors. Some courts held that as a matter of fact if the number of contributors exceeded 9 or 10, this association of more than 9 or 10 contributors was a society which had to be registered to be legal.[103] This view predicated that such an association was not profit-making since registration as a society for profit-making was impossible. Other courts suggested the chit fund was a trust fund for investment in a loan.[104] This was also a difficult result since it did not explain why the trust could invest in unsecured loans. The chit fund was best regarded as a trust for business purposes but this apparently could not be countenanced. The position was eventually clarified somewhat following the passage of the Chit Funds Act in 1971.[105] Related legislation seems to predicate that the chit fund is a trust for the purposes of the 1971 Act.[106]

3.6 Since the decision in *Smith v Anderson*, the only clear example of a valid common law trust for business purposes is the trading trust as it evolved in Australia and New Zealand. The trading trust however is not a

99 S 4 of that Act made it an illegal association since the trust consisted of more than 20 persons associated for the purposes of profit-making. In Singapore, s 17(3) of the Companies Act (Cap 50, 2006 Rev Ed) still prohibits an association of more than 20 persons from carrying on business for gain without incorporation.

100 (1880) 15 Ch D 283.

101 The Court of Appeal did not consider whether the arrangement in question was a partnership since counsel on both sides conceded it was not.

102 See *Jennings v Hammond* (1882) 9 QBD 225 and cf *Re Siddall* (1885) 29 Ch D 1.

103 See *Ramasamy v Muniappan* [1940] MLJ 290; *S M Ameer Batcha v V K Kunjumon* [1959] 1 MLJ 59.

104 See *Lee Pee Eng v Ho Sin Leow* [1958] SCR 18 and *Ngu Ee Nguok v Lee Ai Choon* [1965] MLJ 32.

105 Cap 39, 2013 Rev Ed.

106 See Business Trusts Act (Cap 31A, 2005 Rev Ed), The Schedule, which lists the trust for the purposes of the Chit Fund Act as not a business trust for the purposes of the Business Trusts Act.

purpose trust but a beneficiary trust and is circumscribed as a business vehicle.

3.7 The backdrop reason for the decision in *Smith v Anderson* was the prohibition of the company law against non-incorporation. Incorporation was required for the sake of precluding unregulated conduct of business by unincorporated associations as well as trusts for business purposes which draw on pooled resources. Additionally, in the case of real estate investment trusts, there could be concerns over the unregulated alienation of property. Critical to the proposed reform is the fact that those policies for regulation exclusively through incorporation have been superseded or greatly attenuated. There is now no incorporation-only policy against the creation of a trust form of doing business but there are policies of investor protection. Any such trust form will be and should be decided on its own merits as an unincorporated business entity.

B OFFSHORE TRUST MODELS

1 Bermuda

3.8 From more than 20 jurisdictions which have implemented some form of an NCPT for doing business, we have chosen the Bermuda offshore trust as a relevant model for consideration. One reason is that it was among the earliest offshore trusts and remains a model for other offshore jurisdictions. Another is that it is constantly being "updated". This is helpful in allowing us to have a sense of what is constant and what is variable about offshore trusts. Our summary of pertinent features of Bermudian NCPT jurisprudence is based heavily on the account of Keith Robinson.[107]

3.9 In Bermuda, the two most common trusts utilised in international wealth planning are the massively discretionary trust and the Bermuda offshore trust.[108] When first launched, the latter was required to have an enforcer.[109] Experience showed that this added to the costs of establishing the trust and it was modified in 1998.[110] A simpler and more flexible system has since then permitted a range of interested persons to enforce the trust by leave of the court if no one is appointed enforcer by the trust.[111]

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107 Keith Robinson, "Bermuda", in Barbara Hauser (Consulting Editor), *Family Offices: The STEP Handbook for Advisers, Second Edition* (Globe Law and Business Ltd, 2019) at 271-280. We note that Bermuda is second only to England in terms of share of the reinsurance business.

108 Permitted by s 12A, Trusts (Special Provisions) Act 1989.

109 Part I of Trusts (Special Provisions) Act 1989.

110 Above, n 107 at 276.

111 See s 12(B)(1), Trusts (Special Provisions) Act 1989. Where there is no one qualified to apply for enforcement of the trust, the Attorney General may do so.

3.10 The Trusts (Special Provisions) Act 1989 was the seminal enactment which established the offshore trust. It has fared rather well from the litigation perspective. Litigation over its provisions is relatively modest. Cases litigated more often than not deal with the relationship between the general trust law and the availability of recourse to the inherent trust jurisdiction by the NCPT trustee. The important case of *Trustee L v Attorney-General*[112] is a recent example of cases clarifying the inherent jurisdiction of the court to grant *Beddoe* relief[113] in relation to NCPTs.[114] *In the Matter of the A Trusts* also notably featured an application for directions in the inherent supervisory jurisdiction of the court.[115] The recent case of *In the matter of the H Trust* significantly decided that the court has inherent jurisdiction to appoint a protector for an NCPT.[116]

3.11 Among the updates to the 1989 Act are those coming into force more than 10 years later. In 2004, highly controversial legislative provisions modelled on the Cayman Islands' firewall legislation were inserted to immunise Bermudian offshore trusts from challenge on the basis of foreign law invalidity.[117] These provisions also seem to have been relatively trouble-free judging from the dearth of litigation. Most of the recent reported litigation has instead concerned migrated trusts or trusts redomiciled in Bermuda from other offshore jurisdictions so as to take advantage of the perpetuities amendments in 2015.[118] A gap had been left in 2009 when the rule against perpetuities was substantially abrogated prospectively as of 1 August 2009.[119] Following the 2015 amendments, that gap has been filled. The courts have been authorised to hear applications to extend the duration of Bermudian trusts in existence prior to 1 August 2009 beyond the otherwise limit of 100 years.[120] This further change has given trustees of other offshore trusts another reason to invoke the already very wide

112 [2015] SC (Bda) 41 Com.

113 After *Re Beddoe* [1893] 1 Ch 547 at 558 where Lindley LJ said: "I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred … The words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred.'"

114 In the sequel case *Trustee L v Attorney-General* [2016] SC (Bda) 50 Com, the claimant claiming that a transfer in trust from an estate in which she was interested was void was allowed the benefit of cost coverage from the trust fund pursuant to the *Beddoe* rule.

115 [2018] SC (Bda) 42 Civ (17 May 2018).

116 [2019] SC (Bda) 27 Com (30 April 2019).

117 SS 10(1)(c) and 10(2) of the Trusts (Special Provisions) Act, as amended.

118 The Perpetuities and Accumulations Amendments Act 2015. See *In the matter of the BCD Trust* [2015] SC (Bda) 83 Civ (30 November 2015); *In the matter of the C Trust* [2016] SC (Bda) 53 Civ (16 May 2016); and *In the matter of the A Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civ (19 May 2017).

119 Perpetuities and Accumulations Act (2009) (except in relation to interests in Bermudian land).

120 See *In the Matter of the G Trusts* (2017) SC (Bda) 98 Civ (15 November 2017).

powers the courts have to restructure trusts under section 47 of the Trustee Act 1975.[121]

3.12 As might be expected, several cases were litigated in order to clarify questions of international trust jurisdiction. The decisions in them make it clear that international jurisdiction in Bermuda is straightforward if the trust in dispute is governed by Bermudian law; service out is dispensable.[122]

3.13 Bermuda has also picked up an innovation initiated in the Cayman Islands permitting Private Trust Companies (PTCs) exempted from the licensing requirements to be trustees of NCPTs. We elaborate on this innovation at paragraph 3.18 below.

2 Cayman Islands

3.14 The Cayman Islands has been described as the "quintessential" offshore trust jurisdiction. This says everything there is to say about our selecting the Cayman Islands offshore trust for consideration.

3.15 Three different Cayman Islands statutes are pertinent in anchoring its dominance in hedge funds, private equity, securitised transactions and, increasingly, private wealth management.[123] The first is the standalone Mutual Funds Law which governs mutual funds set up as unit trusts, exempt private companies or limited partnerships.[124] It supplies the foundation for the country's very substantial mutual funds industry. The Cayman Islands reputedly has a large market share of mutual funds business worldwide.[125]

3.16 The second is the offshore trust legislation passed in November 1997, namely the Special Trusts (Alternative Regime) Law 1997 in Part VIII of the Trusts Law (Revised).[126] The eponymous Special Trusts Alternative Regime (STAR) trust has provided a popular model for other offshore trust

121 *Re ABC Trusts* [2012] SC (Bda) 65 Civ (13 November 2012). S 47 would appear to be unique to Bermuda.

122 *Re the Hanover Trust* [2013] SC (Bda) 38 Civ (3 May 2013). For a failed attempt to terminate a discretionary trust and resettle the assets on a family perpetual purpose trust, see *Wong v Grand View Private Trust Co Ltd* (2019) SC (Bda) 37 Com (5 June 2019).

123 We note that many changes of a more general nature are in store affecting general propositions of trust law. These are not directly pertinent and we omit them.

124 The latest is the 2020 Revision. The Mutual Funds Law, s 2, defines a mutual fund as a company, partnership or unit trust which issues equity interests for the purpose or with the effect of pooling investor funds.

125 According to Jan Fichtner, "The anatomy of the Cayman Islands offshore financial centre: Anglo-American, Japan and the role of hedge funds" (2016) 23 Rev of International Political Economy at 1043, "[a]bout 60% of global hedge fund assets are legally domiciled in Cayman".

126 After 2009, private trusts legislation was readily found in a consolidated The Trusts Law (2009 Revision). The latest edition is the 2020 Edition.

jurisdictions and some of its notable features are mentioned in the following paragraph. It has also been a strong draw for asset securitisation sponsors.[127] We explain the significance of the offshore trust in asset securitisation below at paragraph 3.44.

3.17 The STAR trust is a perpetual mixed beneficiary and purpose trust in which beneficiaries, if they are designated, are without standing to enforce the trust.[128] Only the enforcer appointed as such by the trust instrument may do so and is duty-bound to do so.[129] This 'disempowerment' of the beneficiary is said to be distinctive of the STAR trust. Intended as a distinct alternative to ordinary trusts, the STAR trust arises as a result of a declaration within the trust instrument that Part VIII is to apply. It looks to be very versatile. It is employed to further purposes that are not charitable (such as asset securitisation), or may not be exclusively charitable (such as philanthropic purposes). It has also enjoyed wide reception as a business entity for running a profitable business which the settlor wishes to continue in his lifetime and is capable of facilitating this continuation after his lifetime in the family successor. We focus on the advantages of this business entity in the discussion below, beginning at paragraphs 3.33 to 3.42.

3.18 A related innovation is the exemption of registered PTCs from many of the regulatory and audit requirements prescribed by the Banks and Trust Companies Law (2009 Revision).[130] Registered PTCs were thought to provide additional flexibility to families to own their trustee without having to comply with stringent capital requirements for licensing as a trust company. Permitting PTCs to act as trustee of trusts settled by members of the family has had considerable appeal for wealthy settlors wishing to exert a higher level of control over their businesses, or to undertake a higher risk strategy when investing family trust funds. The PTC has also been deployed as an alternative to the NCPT where the PTC is trustee of family discretionary trusts or in conjunction with an NCPT where the PTC is both trustee of family trusts as well as of the NCPT.[131] In both instances, the PTC provides limited liability protection to family members who serve as directors of the PTC.

3.19 Despite these innovative root-and-branch reconstructions of trust law, there has not been much litigation over their nuances. For example, although the privileged relatively cheap access to the advisory and

127 See Manuela Belmontes, "Using the Cayman Islands and other Offshore Jurisdictions for Securitization Transactions" (2004) 10 J Structured Finance 36.

128 Some regard it as the gold standard. See Scottish Law Commission, *Report on Trust Law*, above n 86 at 168.

129 Enforcers may be appointed by the court in prescribed circumstances.

130 A registered PTC is a restricted licence trust company permitted by the Cayman Islands Monetary Authority to act as trustee of trusts connected to a specified individual or his family.

131 An NCPT may also be set up to own a PTC.

supervisory jurisdiction of the courts is extended to the offshore trust, the leading cases indicate only a modest pressure on the inherent jurisdiction.[132] A possible factor is that the courts have tended to take a pragmatic approach to cross-border litigation.[133] A case in point is *Merrill Lynch Bank & Trust Co (Cayman) Ltd v Yahya Murat Demirel*,[134] where the Grand Court decided that NCPT trustees did not have to seek leave of the court to serve a *Beddoe* relief application on *ex juris* defendants at least in relation to administration proceedings.[135]

3.20 In contrast, the Trusts Foreign Element Law protecting the STAR trust from invalidation by foreign law[136] has been the subject of considerable litigation.[137] The amendments providing settlors greater asset protection in the Fraudulent Dispositions Law (1996 Revision) have also been litigated.[138]

3 British Virgin Islands

3.21 In the BVI, offshore trust legislation dates back to 1993 when the Trustee Act 1961 was modernised inter alia to recognise the concept of the trust for any purpose.[139] Four important trust law amendments (leaving aside corporate law amendments) now underpin the BVI's dominance in the private wealth management industry and as the leading offshore corporate domicile.[140] This sufficiently explains our selection of the BVI

132 See *HSBC International Trustee Co Ltd v Tan Poh Lee & Ors* FSD 175 of 2019 (IKJ), noted and discussed in Rachael Reynolds & Deborah Barker Roye, "Stuck between a rock and a hard place: firewall and forum clauses – what protection is available when foreign courts seek to intervene" (2020) 26 Trusts & Trustees 208. See also *Re B Trust* (2010) 2 CILR 348. This is partly because s 90 of the Cayman Islands Trust Law (2018 Revision) provides that all issues arising in connection with a Cayman Islands trust, including administration, will be governed by Cayman Islands law.

133 See Reynolds & Barker Roye, *id*.

134 2010 (2) CILR 75.

135 See also Jane Clarkson & Mac Imrie, "*Forum Conveniens* and Beddoe Applications in the Cayman Islands" (2011) 17 Trusts & Trustees 309.

136 By refusing enforcement to foreign judgments which invalidate local trusts which are valid under local law in relation to forced heirship rights or rights out of a relevant personal relationship. Emulating the Jersey jurisprudence as seen in *Mubarak v Mubarak* [2008] JRC 136.

137 The Hon Anthony Smellie CJ, "Form *and* substance: the Cayman Islands perspective in the debate about offshore trusts. Presentation to the trusts and estates litigation forum in Provence, France, February 2008" (2008) 14 Trusts & Trustees 396 at 400 writes of the wave of litigation in the 1990s relating to foreign invalidation of Cayman Islands offshore trusts. A recent case is *In the matter of HSBC International Trustee Ltd v Tan Poh Lee* noted and discussed in Reynolds & Barker Roye, above, n 132.

138 There were many cases on a related question of the trustee's duty of confidentiality in the context of foreign criminal proceedings involving the wrongful use of trusts. See *Re H* [1996] CILR 237.

139 By the Trustee (Amendment) Act 1993, inspired by the Bermudian Trusts (Special Provisions) Act 1989.

140 See Michael Burns and James McConvill, "Navigating the highs and lows of the British Virgin Islands as an international offshore financial centre: the strengths, weaknesses,

(*cont'd on the next page*)

offshore trust for consideration; we are particularly interested in understanding why the offshore trust is often utilised to serve the needs of BVI international business companies.[141]

3.22 In 2003, section 84A replaced the former section 84 of the Trustee Act 1961 with effect from 1 March 2004.[142] Section 84 was inserted in 1993 and what section 84A did was to modernise section 84's NCPT. A chief reason for modernisation was to make it possible for purpose trusts to be created for the purposes of distribution to beneficiaries, as in the Cayman Islands.[143] Section 84A also softened the requirement of a designated enforcer, allowing for appointment of an enforcer according to mechanisms specified in the trust instrument post-creation of the section 84A NCPT.

3.23 The Virgin Islands Special Trusts Act (VISTA) was also passed in 2003. It was designed to allow trusts to be created to hold and retain shares in the settlor's BVI companies, providing a specially designated vehicle for succession planning (as originally conceived).[144] While facilitating the settlor to continue to run the trust-owned company as its director prior to handing over the succession,[145] the VISTA trust "excludes" the trustee from owing monitoring and management responsibilities in relation to the controlled company. It specifically precludes it from intervening in the controlled company save on an "intervention call" by an "interested person",[146] or supporting any action against directors of the controlled company for breach of director's duty.[147] It should be noted that the VISTA trust need not strictly be an NCPT. Where it is a beneficiary trust and has beneficiaries, any breach of trust is enforceable not only by them as

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opportunities and threats" (2011) 7 Original L Rev 105 at 106. Following leaks of the "Panama Papers" in 2016, the Cayman Islands came under the spotlight of global regulators. The more recent leak in 2017 of the "Paradise Papers" implicated a Bermuda-based law firm and a Singapore-based trust.

141 The BVI was among the first to legislate on reserved powers of a settlor.

142 S 84 continues to apply to NCPTs created before 1 March 2004.

143 Thereby replacing s 84(1)(b) which defined a purpose trust as one other than for the benefit of particular persons. Cf s 84A(2).

144 A peculiar reason for introducing the VISTA trust was to skirt around the requirement of obtaining probate on death of an owner of BVI company shares. VISTA trusts are also utilised in structured finance schemes.

145 Thus, the trust may stipulate "office of director" rules which direct the trustees how they should appoint, remove and remunerate directors.

146 An intervention call is essentially a complaint which if substantiated calls for appropriate action on the part of the trustee (s 8(3)) which may be reviewed by the court. What is appropriate action is determined by considering the settlor's wishes and efficient functioning of the company but disregarding business risks.

147 Virgin Islands Special Trust Act 2003 s 6(2) states that "voting or other powers in respect of designated shares shall not be exercised by the trustee so as to interfere in the management or conduct of any business of the company". S 3 states that the primary purpose of the Act is to "enable a trust of company shares to be established under which (a) the shares may be retained indefinitely; and (b) the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee".

interested persons but also by the directors of the controlled company or other interested persons.[148]

3.24 The third amendment which came into effect in 2007 allows unlicensed PTCs to act as trustees of family trusts[149] and enables members of a family, as it were, to control the trustee by acting as its directors. A PTC may not act as trustee of a VISTA trust but a VISTA trust may hold and retain shares in a PTC.

3.25 More recently, in 2013 a clutch of legislative amendments was passed to maintain the BVI's competitive advantage in the face of developments in other offshore jurisdictions.[150] These included extending the perpetuities period from 100 to 360 years,[151] permitting exempt BVI PTCs to be appointed as trustees of NCPTs and as the designated trustee of VISTA trusts,[152] expressly entitling VISTA trustees to access to information about underlying companies and subsidiaries of the company whose shares are held by them[153] and allowing a settlor to impose fiduciary duties of a bespoke nature in any given circumstance.[154]

3.26 The first three innovations, section 84A NCPTs, VISTA trusts and PTCs, have proven popular and appear to be reasonably free from litigation.[155] An apparent principal reason for this is the legislature's readiness to legislate updates to amend relevant provisions as soon as they appear to be problematic. As an example may be mentioned the 2013 amendments inserting a new elaborate definition of "interested person", aimed at bringing added clarity to that difficult concept.

C GENERAL EVALUATIONS AND OBSERVATIONS

3.27 It is not our intention to consider external policies of comity in this report. We will only mention in passing that we do not think that the Bermudian and Cayman Islands' firewall measures should be replicated. Nor do we think that the reduced creditor protections in their fraudulent trust laws are appropriate for Singapore. Whether these take the form of

148 Virgin Islands Special Trust Act 2003, s 10.

149 The Financial Services (Exemption) Regulations 2007. PTC features are similar to those of a BVI Business Company such as no auditing requirements, no minimum authorised capital, and no filing of documents except the memorandum and articles of association.

150 Notably the Virgin Islands Special Trust (Amendment) Act 2013 and the Trustee (Amendment) Act 2013.

151 Trustee (Amendment) Act 2013.

152 Virgin Islands Special Trust (Amendment) Act 2013 s 2(1), as amended.

153 *Id.* s 6(4), as amended.

154 *Id.* s 9, as amended.

155 The uptick in trust litigation reported in Phillip Kite & Vicky Lord, "Trusts litigation update – British Virgin Islands" (2015) 21 Trusts & Trustees 423 does not involve NCPTs.

higher standards of proof of fraud on creditors, shorter limitation periods, abrogation of badges of fraud, or restriction of recovery to creditors for the time being or to claims of which the settlor must be taken to be aware, they would not be consistent with existing creditor-debtor protection policies in Singapore.[156]

3.28 Underscoring the doctrinal importance of the enforcer principle to the NCPT,[157] the three jurisdictions continue to adhere to the enforcer principle in differing ways. In Bermuda, if no enforcer is named in the trust instrument, application to the court may be made to appoint one by a range of persons including an interested person.[158] The BVI has a different simplified system of allowing the trust instrument to provide a mechanism for subsequent appointment of an enforcer.[159] Meanwhile, retaining its original provisions on the enforcer, the Cayman Islands continues to require that a STAR trust must have an enforcer as well as a designated trustee from the outset.[160] If for some reason (such as death of the named enforcer) the trust is without an enforcer, the burden is placed on the designated trustee to appoint a replacement for him.[161]

3.29 All three jurisdictions recognise the need for exempt or restricted licence PTCs in addition to NCPTs. This is not an issue we need to address since PTCs are already permitted in Singapore to undertake all trust services except anti-money laundering services.[162] Exempt from the licensing under the Trust Company Act, they must be registered with the MAS.

3.30 While litigated cases have risen steadily, litigation on NCPT issues is still on the whole modest given the amount of funds held in NCPTs and the complexities of their use in financial corporate structures. The potential for heavy litigation is clear. This is the case in Bermuda where the purposes of an NCPT must be sufficiently certain to allow the trust to be carried out.[163] Section 84A NCPTs in the BVI are not any different since they can only be created for specific purposes, while VISTA trusts to hold and retain shares in a company raise the "thorny question" of whether they state a purpose.[164] Litigation might be expected over difficult issues as to when there is sufficient certainty of purposes or specific purposes. However,

156 See Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), s 438.

157 Unlike Mauritius, Labuan, Cook Islands and Cyprus.

158 Until the 1998 amendments, an NCPT was required to designate an enforcer. See now s 12B(1), Trusts (Special Provisions) Act 1989, as amended. The Attorney General is the default enforcer.

159 Trustee Act 1961, as amended, s 84A(3)(d).

160 Trusts Law (2011 Revision), s 100(2).

161 *Id.* s 100(5).

162 Which may be undertaken only by licensed trust companies.

163 S 12A replaces the former requirements that the purposes must be specific, reasonable and possible.

164 See Raymond Davern, "Legislating on purpose: a critical evaluation of statutory purpose trusts in the British Virgin Islands" (2011) 17 Trusts & Trustees 34.

while the Bermudian case of *Trustee 1 v Attorney General of Bermuda*[165] is an important case on the difficulties of the concept of an interested person, difficulties as to the concept of purposes have been exceptional. In more sophisticated uses where the NCPT is part of a complex structure of holding companies and non-holding companies, novel issues of relationship seem inevitable. Two reasons furnish possible explanations for the unexpectedly low volume of litigation. First, many of the complex relationships between trustees of NCPTs and shareholders of related companies are off balance sheet. Second, these relationships are intended to be confidential and there is pressure to keep them confidential.

3.31 Differences between the jurisdictions remain on many details of structure and practice. For example, the VISTA trust has remained unique to the BVI and neither Bermuda nor the Cayman Islands has attempted to incorporate it in its offshore trust legislation. We note that Samoa, not among the three jurisdictions of interest in this report, has modelled its own SISTA trust closely on the VISTA trust.

3.32 In the discussion below, we make more specific comments and observations concerning the use of an NCPT to hold shares in a company or limited partnership as an asset partitioning entity.

D ORGANISING AND MANAGING RISKY FAMILY BUSINESS

3.33 Although tax savings in low-tax offshore jurisdictions was a primary motivation to set up offshore trusts, the offshore experience over the last two decades shows that non-tax needs and demands now drive growth in NCPTs.

3.34 Among them is the need for a new business entity for running and prolonging family incorporated businesses without fear of asset fragmentation among members of the family. The reasons which explain adoption of the NCPT as a family business entity include:

(1) the NCPT will own the family company, usually an exempt private company, and the settlor can retain management of the family business company without otherwise being saddled by trustee duties if he were to remain the legal owner as trading trustee;[166]

(2) as the NCPT trustee has no beneficiaries to whom duties are owed, it will not be possible for members of the family to terminate the trust and in effect liquidate the family company;

(3) as the NCPT trustee's only duty is to retain the shares in the family company (as opposed to preserving or enhancing their

165 [2014] CA (Bda) 3 Civ. (15 August 2014).
166 See also *Highmax Overseas Ltd v Chau Kar Hon Quinton* [2014] 3 HKLRD 584.

value), the settlor and members of his family as directors of the family company are free to run its business; and to make business decisions for the sake of long-term growth or entertain higher business risks in accordance with the business judgment rule;

(4) if the NCPT is a STAR trust, it can hold the shares in the family company for the additional purposes of providing for the settlor's family out of dividends paid without members of the family owning them beneficially (thereby affording asset protection to the family);

(5) if the NCPT is a VISTA trust, the trustee will have no power to intervene (including monitoring) in the settlor's and his family's conduct of the family business notwithstanding the trust is also for the benefit of beneficiaries; and

(6) the settlor and his family will be assured that the NCPT trustee must keep trust matters in relation to the family confidential and that such information will only be accessible, if at all, by the enforcer of the NCPT.

3.35 There are two ways to try and replicate the above outcomes without utilising the NCPT, but neither succeeds perfectly. The first is to set up a discretionary trust with suitable anti-Bartlett clauses negativing trustee duties to supervise or intervene in respect of the shareholding of the trust in the family company. In *Zhang Hong Li v DBS Bank (HK) Ltd*, a couple transferred on discretionary trusts their shares in a private investment company, Wise Lords Ltd. The trust was governed by Jersey law and its terms provided that Wise Lords Ltd would be engaged by the trustees as investment advisors and managers subject to anti-Bartlett clauses which "excluded" the trustees from incurring duties to supervise or intervene in respect of investments made by the company.[167] The Court of First Instance[168] and Court of Appeal[169] held that notwithstanding the anti-Bartlett clauses, the trustees owed a high level residual duty to intervene if the circumstances warranted. They found on the facts that that high level duty was breached. The Court of Final Appeal reversed the Court of Appeal, rejecting the notion of a high level residual duty of supervision.[170]

3.36 Commentators have been quick to welcome the apex decision recognising that commercial-minded settlors should be free to agree to risk-taking investment responsibilities if they so wish free of trustee involvement and interference. We note however that the decision was highly fact sensitive and depended critically on construction of the anti-

167 The case referenced by these clauses is *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 1 Ch 515.
168 [2018] HKCFI 34.
169 [2018] HKCA 435.
170 [2019] HKCFA 45.

Bartlett clauses which were actually used.[171] There is no guarantee that all anti-Bartlett clauses can effectively remove duties of monitoring and intervening.

3.37 The second way involves coupling a limited partnership to a discretionary beneficiary trust. The trustee as limited partner can partner the settlor as general partner, with the trustee holding 99% of the partnership interest and the settlor as general partner holding 1%. But the settlor as general partner will owe the trustee as limited partner fiduciary duties; and that is exactly what the settlor who is growing the family business does not want.

E PROTECTION OF FAMILY COMPANY ASSETS IN RISKY OR INNOVATIVE BUSINESS VENTURES

3.38 Short of a complete partitioning of shares in the family company, there is evidence that an NCPT can effectively meet the need to partition assets that are to be devoted to a short-term venture which carries greater risks than the established family business. Members of the family or the family company can furnish the funds for purchase of the necessary equipment and create an NCPT to hold and retain the asset until it is sold to the family company if the project succeeds. If the project fails, the asset can also be sold without harming the balance sheet of the family company and thereby protecting the company's assets.

3.39 Comparisons between the *Quistclose* trust and an NCPT in the above context show up the inadequacies of the former.[172] Although the *Quistclose* trust has similar advantages to the NCPT in terms of easy set up and termination, it is substantially designed to operate on interim contingencies such as bankruptcy or unexpected failure of purpose. Once the *Quistclose* trustee's power to apply the restricted funds has been exercised in accordance with the transferor's mandate, the trust expires. Thereafter the asset which is the substitute of the *Quistclose* funds will be beneficially owned by the transferee, free of any restrictions. The *Quistclose* trust obviously will be unable to take the asset off the balance sheet of the transferee. The second difficulty is that in any case there is still little evidence that the *Quistclose* trust can be created over assets which are not money or money in a fund. If this is right, any argument that the objectives in paragraph 3.34 can be achieved by deploying a *Quistclose* trust will fall away.

171 See also *Appleby Corporate Services (BVI) v Citco Trustees (BVI) Ltd* [2016] 17 ITELR 413.

172 A *Quistclose* trust is frequently deployed to prevent the funds under it from becoming the transferee's and thus available to the transferee's creditors on insolvency. An NCPT can achieve the same outcome. See *Kingate Global Fund Ltd v Knightsbridge (USD) Ltd* [2009] CA (Bda) 17; (2009) 76 WIR 204.

F NCPTS AS INTEGRAL STRUCTURAL ELEMENTS OF A FAMILY OFFICE

3.40 The NCPT has also been deployed in the growing family office business. A Family Office is desirable for a family business that is sufficiently large to afford in-house management of all the financial and non-financial needs of members of the family. The NCPT can be used as the central management core in a Family Office which is established to preserve and enhance family wealth, secure the family's commitment to philanthropy, as well as provide other service needs of the family such as tax and succession planning, educational and personal and relational services.[173]

3.41 The family holding companies or limited liability partnerships whose directors are PTCs conduct the various family businesses or provide the various family services. These can be sandwiched between NCPTs which own the PTCs and the Family Office at the apex which controls those NCPTs. The Family Office in turn can also be set up as a PTC whose ownership is held by an NCPT. This structure allows the Family Office as general manager to provide stable and long term centralised management to a suite of family holding companies or limited liability partnerships.

3.42 In substance, the NCPT in a multi-entity Family Office performs the function of securing asset partitioning at each level of a hierarchy of trading and service entities, minimising risks of fragmentation as well as segregating the differentiated risks of distinguishable components of the family businesses.

G NCPTS AS ASSET PARTITIONING ENTITIES IN COMMERCIAL TRANSACTIONS

3.43 In recommending recognition of the private purpose NCPT, the Scottish Law Commission observed at paragraph 12.34 of their Discussion Paper that "Many of the uses of [NCPTs] are commercial."[174] This is borne out in the offshore experience. It is enough to cite three of these purely commercial uses; namely the acquisition and ownership of risky assets for investment in asset securitisation, the acquisition by mutual funds of investment funds including leveraged borrowing in active investment, and the acquisition and ownership of shares for the purposes of exercising voting control.

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173 There is no standard definition of a family office. It is often used to refer to a PTC of an NCPT which is the central management core of all the businesses of the family. Direct management by the settlor in his family trusts will be problematic and lead to a finding of sham trusts. A family office involves the settlor managing the PTC, thus avoiding the risks of a sham trust finding.

174 Scottish Law Commission *Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law* (DP 148, April 2011).

3.44 In asset securitisation, loan liabilities are packaged in a bundle and ultimately offered as investments to investors in a complex arrangement involving the loan originators, sponsors, depositors, purchasers, servicers, credit rating agencies, issuers, and investors. Reducing the arrangement to the simplest minimum, the stream of income or monetary liabilities from loan originators is sold to a corporate special purpose vehicle (SPV) whose shares are held on charitable trusts or an NCPT.[175] This ensures that the shares of the "orphaned" SPV will not be available to creditors of the SPV as well as the originator in the event of the bankruptcy of the originator of the package of income or monetary liabilities. This further ensures that the shares held by the NCPT are shielded from creditors of investors while the SPV is a going concern.

3.45 In a similar vein, the Scottish Law Commission noted that NCPTs could be useful as 'business' trusts for the purposes of holding land as security for present and unascertainable future participants in a re-development project.[176] The initial developer looks to sell the developed land to an as yet unascertainable manager. Until such time as that happens, financiers will require collateral to which they can have recourse if the project stalls or stultifies or is completed negligently, as against interests that will be changing hands. The collateral must not be beneficially owned and yet should not be capable of being dealt with by the title-holder. This is achieved by vesting legal ownership in the NCPT which will hold the land to be developed and the stream of income that will be produced after the land is developed and let out by the manager.

3.46 We note that the NCPT may not always have a long shelf-life in some of its applications as an asset partitioning business entity participating in related transactions or as part of a commercial multi-entity arrangement. As an example, the offshore trust when first conceived was also used to pool funds for active investment.[177] A PTC carried on the investment business with authority to borrow and agreed with investors to pay them returns on their contributions or return their contributions on demand. Ownership of the PTC was held by an NCPT against which investors could have no beneficial interests except upon liquidation of the PTC.

3.47 Today, the NCPT is unlikely to be used as a collective investment scheme if market investors are to be solicited. A dedicated collective investment scheme or specific investment business trust will more likely be employed. As mentioned earlier, instead of admitting the more liberal

175 Which is prohibited from engaging in any activity other than holding the liabilities or debt obligations as security for bonds or loan notes issued by the SPV to capital market investors.

176 Scottish Law Commission *Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law* (DP 148, April 2011) at [12.6] – [12.8].

177 The corporation, with its rigid and wide-ranging creditor protection rules adapted to manufacturing and trading, was not a suitable entity to carry on the investment business.

offshore trust, American states led by Delaware chose to enact the statutory business trust to accommodate the demand for mutual funds.[178] This is a business trust to conduct business for profit which is heavily modified by contract to satisfy business requirements. The generic business trust can be used to pool capital collectively from unit-holders to be actively invested by the trustee-manager. These resources are transformed not into beneficial interests (neither in the underlying assets to be purchased nor in the composite fund) but into personal rights to periodic payment or to repurchase by the business trust at a guaranteed price.[179] In this way, the business trust can borrow up to an authorised limit of its equity. It will also be unaffected by the rule in *Saunders v Vautier*[180] and can instead provide exit avenues which are capable of market pricing. In practical impact, the statutory business trust differs little from the NCPT as a going concern. The difference is that unit-holders as settlors have residual property rights in the surplus assets of the business trust on termination of trust, whereas unit-holders receive the residual value of the shares of the PTC from the NCPT. The business trust is also more heavily regulated and has the requisite mandatory essential features which are typically prescribed for the sake of consumer and investor protection.[181]

3.48 A relevant backdrop point is that in Singapore there is no generic business trust (GBT) such as that authorised under the Delaware Statutory Trust Act to render the NCPT superfluous. In 1971, a trust for raising capital for small businesses was created under the Chit Funds Act.[182] The Business Trusts Act[183] which came into force in 2005 likewise envisages a business trust which is far from being a GBT, but is a specialised specific investment purpose entity managed by a corporate trustee-manager. The business trust (BT) is to be limited to conducting the investment business for which it is registered. Another species of the GBT, the Collective Investment Scheme (CIS) is envisaged very broadly as a pooling of investor funds by an operator for spreading the risks of investment[184] and encompasses both the unit trust (where investors are trust beneficiaries in relation to, but without direct beneficial interest in, the underlying investments) and the

178 See 12 Del Code Ann § 3809.

179 Not to be characterised as an unincorporated association. Cf *Hecht v Malley* 265 US 144 (1924).

180 See above, n 11.

181 At the same time, amendments introducing the limited partnership and the limited liability company which is taxed on a flow-through basis as if it were a partnership have made the corporate form available to mutual funds. More recently, the introduction in Delaware of the series LLC or protected cell companies will remove more corporate limitations and make it attractive for mutual funds which desire to partition their own asset risks.

182 Cap 39, 2013 Rev Ed. While there is nothing explicit about the chit fund being held on trust for business purposes, that is assumed to be true or taken for granted in references to the chit fund in allied or cognate legislation (such as the Business Trusts Act (Cap 31A, 2005 Rev Ed)).

183 Cap 31A, 2005 Rev Ed.

184 Securities and Futures Act (Cap 289, 2006 Rev Ed), Div 2.

investment company (where investors are shareholders, and not trust beneficiaries, in the investment company). In the former, investors are entitled to redeem their units of beneficial interest at any time for a value proportionate to the value of the underlying investments, while in the latter they may of course sell their shares at any time. As hinted in its designation, the CIS is not an NCPT. The real estate investment trust (REIT) is also not a GBT but either a specialised CIS (managed by an operator who is not the trustee) or a specific asset BT (managed by a trustee-manager) and limited to making profits out of investments in income-producing real estate.[185]

3.49 The Variable Capital Company (VCC), the latest business entity to be admitted, makes asset segregation within a single entity possible for insurers and mutual funds, among others, by way of statutory innovation to the corporate form.[186] VCCs are spared from holding annual general meetings if certain conditions are met. Further flexibility is afforded by allowing easy redemption of shares in VCCs without the need for shareholders' approval. These innovative features build on an essential trust characteristic that segregated asset portfolios are to be kept separate. But there is no trust in the make-up of the VCC. Its segregated assets are statutorily deemed to be separate legal entities for the purposes of set-off and netting. All the above-mentioned new business entities have a specifically designated and demarcated scope of application. It is not hard to see that in these circumstances the NCPT can play a niche role whenever there is need in a structured finance or other commercial arrangement to achieve targeted asset partitioning and risk segregation in order to attract capital investments.

3.50 As a third example of niche utilisation, NCPTs can be used to achieve the effect of voting trust legislation which is absent in Singapore. Voting trusts have been enabled by the legislature in several US states since the early 1900s. They have proven to be expedient to concentrate and entrench management in a few hands and useful in a diverse range of contexts where strong centralised direction is critical to corporate success. This can be a boon inter alia, (a) where diffuse ownership increases the prospects of unpopular but competent management being voted out from year to year, (b) in the initial years of corporate growth where immediate success has to be foregone, or (c) over a period of consolidation where management stability is essential.[187] The need for legislative enabling can be seen to arise from well-known constraints of contract law. Voting agreements resting only in contract were easily disrupted. A proprietary basis which was necessary to provide permanence to the agreement was missing; hence the

185 Both statutory trusts are permitted to borrow up to specified limits of their equity.

186 Variable Capital Companies Act 2018 (No 44 of 2018).

187 A voting trust can also be used in a Dual-Listed Company to replicate the voting in one company in the other. This has the advantage of ensuring concerted pursuit of identified economic interests by both companies.

legislation. In the absence of voting trust legislation, the NCPT can overcome the law's resistance to the splitting of legal ownership rights. A shareholder's rights to dividend and vote are indivisible (unless otherwise provided in the issuer's constitutional documents). It is legally impossible to split the voting rights from the rights to dividend and impress a trust over the former but not the latter. However, by the simple expedient of utilising an NCPT, shareholders can transfer their ownership to NCPTs for the purposes of collecting and distributing dividends and for the purposes of trustees exercising voting rights to maintain existing management in control. These shareholders as settlors will have personal rights as interested persons to enforce performance of the purposes but will not have beneficial interests so as to entitle them to terminate the trust and destabilise management control.

H CONCLUSIONS

3.51 We conclude from our survey of the offshore experience that there are significant commercial needs for more flexible capital mobilisation which can be met by making NCPTs available as a new trust option in Singapore law.

3.52 The need for a more appropriate alternative to the trading trust to run family businesses is best met by the NCPT as owner of the corporate entity which will be conducting the family business. The fact that there are no relevant investor protection policies to contend with when the NCPT is so utilised is one advantage that the NCPT has over the other alternative of a generalised business trust. A more general business trust with a PTC as trustee is also not a suitable alternative if – as is the case – the desired objective can be achieved by a simpler and less costly trust holding entity which owns the family company. By its very nature there is no standardised family business and that further explains why a standardised business trust model is less suitable. The ease with which the holding trust can be set up and wound up upon fulfilment or obsolescence of business purpose is another strong advantage.

3.53 This flexibility in particular means that the NCPT can be deployed both for the small as well as the large family business where avoidance of asset fragmentation among family members becomes essential. An NCPT holding shares in a family trust company in which family members as directors manage the family wealth can continue the family business on a long term basis without the pressure of having to satisfy shareholders concerned about short term returns and fragmenting the capital mobilised for the business by disposing of their shareholding.

3.54 Importantly, the NCPT's permanent asset partitioning of shares in the family's incorporated business is capable of satisfying creditor-debtor policies, provided the NCPT is not also used to provide benefits to the settlor or open to control by him. Such a holding trust will not leave the settlor in control of the trust or the shares in the incorporated business. If

the NCPT trustee cannot incur any debt and the family company remains liable for its debts to its creditors who have first recourse, the NCPT will only be a residual claimant if the company becomes insolvent, consistent with sound creditor-debtor policies.

3.55 Finally, the NCPT can facilitate the furtherance of mixed purposes of running the family business and specified social (public) purposes. It does this by imposing a duty on the trustee to do so without conferring any beneficial interest on any person.

3.56 We also conclude that NCPTs have niche roles to play in commercial arrangements which are intended to secure new capital from market investors for entrepreneurial gain or to protect against inimical fragmentation of corporate control. In such deployments, NCPTs are utilised to separate ownership completely from management of the issuer, its investors and its creditors alike consistent with sound creditor-debtor policies, while ensuring non-fragmentation among investors. In asset securitisation, for example, the retained assets are owned by the purpose trust and removed from both investors in and creditors of the issuer for the purposes of serving as security for payments by the issuer of income from those assets to investors. The issuer's creditors negotiate the terms of their credit to the issuer bearing in mind that the segregated assets are not available and are not prejudiced in any manner inconsistent with current creditor-debtor policies. Investors on the other hand look only to the returns from those assets so long as the returns remain forthcoming. In the event of the issuer's insolvency, the purpose trustee will be obliged to satisfy relevant investor claims against the issuer.

3.57 Experience shows that where NCPTs can meaningfully add diversity to the range of existing business entities and offer different risk profiles to capital investors at lower transaction costs, there will be a net increase in capital market efficiency. But it also appears that they may not always be long lasting and may be superseded as standardised business entities evolve to become more flexible but also more resilient.

3.58 We would add that although we support – for the foregoing reasons – making private NCPTs available for business purposes, we do not think the case for a STAR-type trust is made out. Such a trust combines business and personal purposes. Settlors might understandably wish to secure a dynastic trust by such a combination in order to install a formal governance structure whereby beneficiaries are benefited according to compliance with a common code of conduct binding on all beneficiaries. However, such a mixture blurs the differences between beneficiary trusts and purpose trusts to a vanishing point. In their discussion paper and report, the Scottish Law Commission did not find the idea of a mixed

purpose and beneficiary trust confusing.[188] They took the view that the beneficiaries of a STAR-type trust would undoubtedly have beneficial interests (if the trust for them is a fixed trust) even if the right to enforce resides exclusively in the enforcer. Others disagree, seeing the beneficiary as denuded thereby of the right to hold the trustee accountable for trust property in effect.[189] Our view is that such a broadly conceived private purpose trust is not needed. Trust for purposes which benefit beneficiaries (such as support and maintenance trusts) are already readily enforceable as beneficiary trusts. If the objective of admitting such a mixed purposes trust is to preclude its termination under the rule in *Saunders v Vautier*,[190] this can already be achieved more simply by the settlor setting up a discretionary trust, or by a fixed trust reserving discretionary power to divest a beneficiary's interest or to add a new beneficiary. We think that a settlor can include purposes of a private nature which are ancillary to the holding and retention of a controlling interest in a company or limited partnership. But if he wishes to confer personal benefits derived from the controlling interest on family members, the settlor should require the trustee to covenant with him to benefit them. This benefit should be enforceable under the Contract (Third Parties) Act[191] and not under trust law. Otherwise, when the family company is failing, directors will be tempted to prefer benefiting the trust to the company's creditors. That will be a breach of duty to the company which the trustee will feel pressured to ratify.

3.59 For similar and other reasons, while we support the holding NCPT, we do not think that the VISTA-type trust is appropriate for Singapore. The VISTA trust is more than a holding NCPT to the extent that it is set up as a fixed or discretionary beneficiary trust or as a mix of beneficiary and purpose trust. These incur the same criticisms mentioned above. To the extent that there is no preclusion to the settlor being or becoming a beneficiary of the VISTA trust, there will additionally be asset protection objections. VISTA-type trusts originally aimed to reduce fiduciary duties of the purpose trustee to nothing except to the extent necessary to deal with an "intervention call" or complaint by an interested person.[192] We are concerned that these trusts could produce the effect of whittling down the irreducible core duty by removing the terrain over which it can operate effectively. It could be said that the irreducible core duty not to be

188 Scottish Law Commission, *Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law* (DP 148, April 2011) at [12.37].

189 James Webb, "An ever-reducing core? Challenging the legal validity of offshore trusts" (2015) 21 Trusts & Trustees 476 at 485. See also Donovan Waters, 'Reaching for the Sky: Taking Trust Laws to the Limit' in David Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002) 243 at 289, who calls it "a strike into the dark".

190 (1841) 4 Beav 115.

191 Cap 53B, 2002 Rev Ed.

192 We note that there is greater flexibility after 2013 to stipulate specific fiduciary duties in any given circumstance.

dishonest in relation to trust responsibilities will only be engaged if information is unintentionally made available to an interested person who is then minded to complain that the trustee must take appropriate action to deal with the complaint. We are also concerned about the peculiar risks or dangers of misuse of VISTA-type trusts to local creditors. While the Panama Papers exposed secret links to bribery concealed by anonymous shell companies, the same links can be established utilising NCPTs which benefit beneficiaries and purposes. Mixed NCPTs are likely to be misused for the very reasons that are their advantages. They are easy to set up and dismantle (so may be hard to detect), harder to detect because they are secreted as part of a business, confidential (so it will not be easy to know who set it up and for whose benefit they are created), and can be utilised by a bribe taker to own and control bribe moneys.

3.60 As such, the only holding NCPTs which we would recommend be made available are those for purely business purposes, and not those which also have private purposes benefiting persons as beneficiaries. We envisage that trustees of such NCPTs will owe no duties to monitor or intervene in the management or conduct of the corporate business since there are no beneficiaries to whom these duties can be owed. The only duty the trustee will owe is the irreducible core duty to retain the trust asset in good faith and for the sake of the business mission. The trustee must therefore not misappropriate the trust asset or dishonestly profit from it.

3.61 Although we did not draw attention to the question of settlor reservation of powers in our earlier outline of the STAR trust and the VISTA trust, we recognise that this is a strong feature of both. It is commonly thought that such powers are not fiduciary powers. The protector is another such feature but the converse is true. His powers to protect the trust from breach by the trustee are fiduciary in nature. Nevertheless, there is widespread scepticism about whether settlor reservation of powers and the role of the protector are effective in practice in ensuring creditors will not be prejudiced by ownership of the debtor being in the control of the directing mind of the debtor. Given that we do not recommend mixed NCPTs, we need not weigh in on the debate. The NCPT we recommend is limited to business purposes; more specifically to an entity shielding trust which owns the shares in a family incorporated or limited partnership business without being associated with any other private or personal purposes.

CHAPTER 4

NON-CHARITABLE PURPOSE TRUSTS AND SOURCES OF CAPITAL FOR SOCIAL ENTERPRISES

4.1 Our original remit was the narrower one of considering whether NCPTs for business purposes should be introduced in Singapore, including in particular the specific consideration to have a non-charitable purpose trust to hold the shares of a PTC.

4.2 However, we must acknowledge that so far as NCPTs as family business entities are concerned, the purposes they seek to advance will likely be mixed social and business purposes in many instances. This is also true of corporations seeking integrated or embedded asset partitioning as part of a commercial arrangement. Given the rise of corporate social responsibility in general and impact philanthropy in particular, such NCPTs are increasingly mixed purposes NCPTs, combining business and philanthropy.

4.3 These developments make it incongruous to leave NCPTs for social and philanthropic purposes out of the proposed reform; and we have included the broader question of mixed purpose NCPTs and deal with it in this Chapter.

4.4 There is another significant reason that we should deal with it. Section 9 of the Government Proceedings Act[193] contemplates that the Attorney-General is the enforcer of public, social, and religious trusts; making it evident that these are distinguished from charitable trusts. The broader remit allows us to reconcile the proposed reform and section 9, bringing clarity to a very obscure piece of Singapore law. It also brings the question of modernising trust funding for social enterprises within the reform.

4.5 This Chapter considers the experience of the US states, Scotland and India with social NCPTs and examines the extent to which that experience is relevant for the proposed reform in Singapore. Our conclusions are presented at paragraphs 4.57 to 4.65.

193 Cap 121, 1985 Rev Ed.

A EXPERIENCE IN OTHER JURISDICTIONS

1 Scotland

4.6 Public NCPTs play an important role in Scottish social life. Until the decision in *Pemsel's case* in 1891,[194] there was no real legal distinction between charitable trusts and public trusts. Charitable trusts were simply a species of public trust. The effect of the decision is that, for the purposes of tax law, "the English law of charity is to be regarded as part of the law of Scotland."[195]

4.7 As we have briefly mentioned in paragraph 2.19 above, all public trusts are enforceable by the Lord Advocate. The result is that a wider range of public trusts of a social nature is enforceable than in England. For instance, a trust to provide sporting facilities to members of a community is an enforceable public trust[196] although it was not a charitable trust in English law until passage of the Recreational Charities Act 1958.[197] A trust to maintain a public park is likewise an enforceable public trust.[198] It is not essential that the park should benefit persons in need of exercise. It appears that public trusts play a significant role in organising sporting and cultural events, music or youth clubs, and promoting community interaction.

4.8 Public trusts also encompass a wider spectrum of religious life.[199] They can be religious without being charitable. A trust to set up a school for children of Roman Catholic parents at a named locality may not be charitable but is a public trust.[200] A trust to provide religious and cultural support for Hindus would be another example. Other public but not always charitable trusts provide funds to help repair and renovate old places of religious worship.[201] Public trusts also have political impact. Trusts for political purposes are non-charitable[202] but unlike in England are enforceable as public trusts. Examples are public trusts to influence climate change legislation or secure change in the law.[203]

4.9 Despite the prevalence of public trusts, there is no authoritative definition of what a public trust is. Courts require only that the trust must

194 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531
195 *Guild v Inland Revenue Commissioners* [1992] 2 AC 310 at 318
196 *Russell's Executor v Balden* 1989 SLT 177 at 179.
197 *Guild v Inland Revenue Commissioners* [1992] 2 AC 310 at 318.
198 *Russell's Executor v Balden* 1989 SLT 177 at 179.
199 See *Anderson's Trustees v Scott* 1914 SC 942 at 953.
200 *Winning and Others, Petrs* 1999 SC 51.
201 Or to convert them into community centres in which case the trust will be a social trust.
202 *McGovern v Attorney-General* [1982] 1 Ch 321. See also *Bowman v Secular Society* [1917] AC 406.
203 Cf *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

benefit the public or a section of it.[204] Accordingly a trust to relieve poverty among relatives is a private trust and not public;[205] unlike the law in England, where such trust is a (public) charitable trust. But it will not be enough simply to intend to create a trust for public purposes without specifying the particular purpose.[206] This indulgence is only allowed to charitable trusts.

2 USA

4.10 We are indebted to an article by Richard Ausness for much of the material on the American experience with NCPTs of a private character.[207] This is interesting because it says a great deal about the irrelevance of public purpose trusts in the US, notwithstanding that the framework for creating such trusts under the UTC exists. The case law experience falls into three periods.

4.11 The first is mentioned only for historical interest. Prior to the *Restatement (First) of Trusts* in 1935, US state courts were slow to admit enforceability to anomalous purpose testamentary trusts.[208]

4.12 In between the publication of Scott's highly influential *Restatement (First) of Trusts* and promulgation of the Uniform Probate Code (UPC), it became clear that such trusts, dubbed honorary trusts, were to be treated as powers to apply the entrusted property to the designated purpose. There is evidence from case law that the most common category of honorary trusts was the trust for the care of designated pets, followed by the trust to erect and maintain monuments in memory of the settlor or his wife or to care for a burial ground or cemetery plot.

4.13 The former was not only the most sought after, it was also the least problematic. Even when the rule against indefinite duration limiting the trust to 21 years was applicable, courts had little difficulty in validating a trust for care of pets by taking account of the amount required to upkeep the domestic animals on a daily basis, applying a suitable multiplicand, and satisfying themselves that the funds provided would be exhausted within 21 years. The latter, namely the trust to erect and maintain tombs, became perpetual following early statutory reform.

4.14 Notably, despite the encouragement under the *Restatement (First) of Trusts* given to trusts for a specific non-charitable purpose, the take-up rate was extremely small. There was only modest use of the trust for other

204 *University of Edinburgh v Torrie Trustees* 1997 SLT 1009 at 1014

205 *Salvesen's Trustees v Wye* 1954 SC 440 at 447.

206 See *Grimond v Grimond's Trustees* 1905 SC 90; (1905) 7 F (HL) 90.

207 Richard C. Ausness, "Non-Charitable Purpose Trusts: Past, Present, and Future" (2016) 51 Real Prop. Tr. & Est. L.J. 321

208 The case of an inter vivos purpose trust was less urgent since it was always open to a settlor to tacitly consent to the trustee carrying out his designated purpose.

specific purposes. In one of the handful of examples of NCPTs which came before the courts, the court rejected as void a trust to publish and disseminate the writings of the settlor as being of little intrinsic worth and contrary to public policy.[209] To similar effect, a trust to exhibit worthless works of art was rejected in another instance.[210]

4.15 The modern period beginning from the UPC through to the emergence of the UTC was when definite as well as indefinite purpose trusts became enforceable as a trust. The case law is a showcase of concerns and debates over the limits of NCPTs. Thus, in the case of a trust for care of pets, courts had to intervene to either modify the amount dedicated to the care of the settlor's pet animals or cut it down. Where the fund provided is insufficient, the UTC decrees failure of purpose but some courts were prepared to modify the plan and accept a modest revision downwards. Where the funds were in excess, especially in care of pet cases, courts were known to order the surplus to be given to the reversionary beneficiaries from the onset, instead of anticipating failure.

4.16 The US state experience in the modern period sheds valuable light on the nature of judicial intervention in relation to NCPTs. It can be inferred that in hardly any reported case was the court asked to resolve complaints of breach of trust in maladministration. The vast majority of cases was concerned with uneconomical, wasteful or capricious trusts.

4.17 Social NCPTs were conspicuously missing despite the UTC providing enforceability of NCPTs as a trust. There is no evidence that settlors were incentivised to create social NCPTs. Nor did it make a visible impact that the UTC unequivocally accepted that trustees could be given discretion to select among the purposes or to appoint income, principal or both to one or more purposes. Although this might have opened the way to social NCPTs, the development of social enterprise in the last two decades would appear to have by-passed the trust. It may be that while the NCPT can serve as a dedicated fund for social purposes, the fact that a trust is not a legal entity subject to regulatory control was perceived as inhibiting its capacity to attract funds from the public.

4.18 Whatever the reason may be, the corporate entity has been the spearhead in gathering new funds for social enterprise. A variety of corporate entities with more flexible governance codes and flow-through tax treatment now offer different classes of market investors more discriminating choice of investing in social enterprises. These range from low profit limited liability companies (L3C), benefit corporations (corporations for profit but with a purpose of creating general public

209 *Fidelity Title & Trust Co v Clyde* 121 A 2d 625 (Conn, 1956).

210 *Medical Society of South Carolina v South Carolina National Bank* 14 SE 2d 577 (SC, 1941).

benefit), and multi-entity organisations (where for example a charity sets up an L3C which it controls).

3 India

4.19 In India, the NCPT has been recognised since promulgation of the Indian Trust Act in 1882. As the 1882 Act defines the beneficial interest as being no more than a right against the trustee as owner of the trust property, a trust for the benefit of beneficiaries, like a trust for purposes, is valid if it is enforceable by an enforcer (the obligationist conception). In the former instance, the beneficiaries are the enforcers. In the case of charitable purpose trusts, any interested person (such as a member of the fluctuating public benefiting from the furtherance of the purpose) is the enforcer. In the case of non-charitable purposes such as religious endowments dedicated to a deity or idol, the courts personify the deity or idol as a juristic person and various statutes and the Civil Procedure Code designate any interested person and the Advocate-General as enforcer.

4.20 This conceptualisation of the trust made considerable sense in view of the important roles non-charitable purpose or religious trusts have played and continue to play in supporting and advancing social, cultural, and religious life in India. It recognises particularly the omnibus and multi-purposed character of Indian religious trusts. As endowments, they were and still are designed to provide a livelihood to those who maintain religious monuments and emblems of the faith and provide religious teaching, instruction and education. They also serve as significant communal focal points for strengthening religious solidarity and building civic bonds between members of the community. Large endowments typically take on more complicated multilateral roles by advancing a variety of philanthropic purposes. They are also likely to be running businesses and resemble somewhat the modern family office which has evolved in the US and elsewhere (including Singapore) for the purposes of managing family businesses and undertaking and supporting non-financial familial purposes and relations.

4.21 The facile resemblance to a family office is also true of the large family waqf which Islamic law or Muslim law recognises. There was from the beginning of English legal history in India essentially no obstacle to upholding the waqf as a private purpose trust, in view of the obligationist conception of the trust under Indian trust law. But if what was at stake was whether the trust was or could be perpetual, there was a serious problem. The family waqf could only be a perpetual trust if it was a public and charitable trust for religious purposes. In the well-documented colonial case of *Abdul Fata Mahomed Ishak v Russomoy Dhur Chowdhry*, the Privy Council refused to validate the family waqf as a perpetual public and charitable religious trust.[211] The court's refusal was grounded in English

211 (1894) LR 22 Ind App 76 (PC)

dichotomous concepts of what is private and public. The family waqf was both private and public and therefore invalid. The intense debate that ensued led eventually to passage of the Mussalman Waqf Validating Act 1913, validating the family waqf under Muslim law.

4.22 We note that the continued vitality of the waqf in India and the peculiar capacity of Muslim law to accommodate the advancement of mixed private and public purposes attests to a flexibility that is still lacking in orthodox trust law.

B THE POSITION IN SINGAPORE

4.23 The corresponding law in Singapore is complex and uncertain by reason of the differentiated reception of English law (generally) and the law of trusts (in particular). It is necessary to distinguish the pre-independence period and the post-independence period as well as the period before 1905 and after 1905 in relation to Muslim and Hindu endowments.

4.24 In the pre-independence period, by which is meant the period when personal law was recognised, the critical proposition was laid down by Sir Benson Maxwell CJ in *Choa Choon Neoh v Spottiswoode*,[212] the leading case on reception of English trust law. The Chief Justice had in an earlier case articulated the principle of how English law (doing justice and right) was to be applied more generally, without adverting to the particular direction in the Second Charter of Justice that the court must in exercising the ecclesiastical jurisdiction do so in so far only as local religions, usages and customs would permit.[213] In his view, the general principles of English law would afford recognition to native religions and customs. Striking the same note, he said in *Choa Choon Neoh v Spottiswoode* that he "[did] not doubt that the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or setting up and adorning an idol, as in an Indian case mentioned by Mr. Woods, would be determined in this Court on the same principle, and with the widest regard to the religious opinions and feelings of the various eastern races established here."[214] In a later passage in the same judgment, he added that: "In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them."[215]

212 (1869) 1 Ky 216.

213 *R v Willans* (1858) 3 Kyshe 16.

214 *Choa Choon Neoh v Spottiswoode* (1869) 1 Ky 216 at 219.

215 *Id* at 221. The decision that the rule against perpetuities was applicable without modification in accordance with custom, usage or religion was affirmed by the Privy Council in *Yeap Cheah Neo v Ong Cheng Neo* (1875) 1 Kyshe 337 at 346.

4.25 Subsequently in a non-trust case *Mong bte Haji Abdullah v Daing Mokkah bin Daing Palemai*,[216] it was held that it did not make any essential difference whether the principles of modification are derived from the general principles of English law, or from the Second Charter's admonition to apply English law "so far the circumstances permit", or from the exercise of ecclesiastical jurisdiction "so far as the several religions, manners and customs of the inhabitants of the said Settlements or places will admit".[217] The principles are essentially the same and have the same objective of preventing injustice and oppression resulting from application of English law without regard to local religions, customs and usages.

4.26 The entirety of the reported case law on Chinese and Muslim trusts originates from this pre-independence period. These are cases where the settlor chose English law, expressly or impliedly, as governing law of his trust or where given the nature of the trust property as land situate in the country, the applicable law was bound to be English law.[218] The vast majority of these cases were testamentary trust cases and the endowments created by will were endowments of land in perpetuity.[219] In one or two of them, the settlor made two wills; one under English law and another separate and distinct will under Muslim law.[220]

4.27 The predominant question in these cases was how English law as applicable law should be modified to accommodate local religion, custom and usage. Three propositions emerged.

4.28 First, if the endowment is for a public purpose, which relates to a creed or religion, the English law of charitable trusts will be applied, adapting the English definition of charity to the extent necessary to validate the endowment as a charitable trust. Thus, whereas trusts to dedicate land to burial of the owner and his family were held to be invalid, trusts to dedicate land as burial grounds for persons of the same "Seh" were held to be valid and charitable.[221] In like manner, the endowment of a temple for Sin Chew worship for persons of the same "Seh" was held to be a valid public

216 [1935] SSLR 123.

217 *Id* at 126.

218 *Syed Ali Bin Mohamed Alsagoff v Syed Omar Bin Mohamed Alsagoff* [1918] SSLR 103 is an example of an English law will made by a local Arab which contained an alternative bequest complying with the rule against perpetuities.

219 In some Sin Chew and burial ground cases as well as *Re Syed Shaik Alkaff decd* [1958] 2 MC 38 the applicable law was English law as the lex situs. In others, by the settlor's choice of English law, it was English law which had to be applied and not Chinese personal or Muslim law. In any case, even if Muslim law had been the applicable law in *Re Syed Shaik Alkaff decd* (assuming the will to be an Arabic will), the waqf in dispute was a land endowment and would have violated the rule against perpetuities.

220 See *Attorney-General v Shaikh Ali bin Awath* [1928] SSLR 101.

221 *Cheang Tew Muey v Cheang Cheow Lian Neo* [1930] SSLR 58. See also *Re the will of Yap Kwan Seng, decd* [1924] 4 FMSLR 313. Although the principle of modification was not cited, it was arguably applied by analogy to the trust for locality cases. On the latter, see *Attorney General of the Cayman Islands v Even Wahr-Hansen* [2001] 1 AC 75.

religious and charitable trust.[222] This result was consistent with the decision of the Straits Settlement Court of Appeal in the Penang case of *Yeoh Him v Yeoh Cheng Kang*. There it was decided that land held by the trustees of a society for the Seh Yeoh for such objects as providing a safe refuge for members, decent interment for poorer members, and religious observance and the worship of the idol Sye Tow Kong, was held on a charitable trust.[223] But an endowment for descendants to perform Sin Chew rites for the settlor and his family was refused modification and validity. It was private and non-charitable notwithstanding it may have a pious character in encouraging the settlor's descendants to "please God" and "avoid the dangers of being haunted".[224]

4.29 In older as well as relatively recent cases, the proposition of adapting the definition of charity to local religion, custom and usage was more assumed than propositionalised. We see this as clear proof of acceptance of the principle of modification of English trust law in regard to local circumstances. In *Re Chionh Ke Hu*,[225] for example, the High Court was called upon to decide the validity of a trust for distribution in the trustees' discretion to persons practising the Buddhist religion. The High Court held the trust could not be construed as a purpose trust. However, the Court made it clear that the result would have been different if the trust in question had been a religious trust. For then, the trust would have been a charitable trust for the advancement of religion. Although the Court did not state this, at this time Buddhism would not have met the definition of religion under the English law of charities. The trust for promotion of the Buddhist religion could only have been an advancement of religion under English law if the English test of what counts as religion was adapted to the non-theistic religion of Buddhism.[226] Most recently, in *Koh Lau Keow v Attorney-General*,[227] there was apparently a private religious trust created under an English law trust deed for the benefit of the settlor and her circle of friends as practising Buddhists. Premising a modified test of religion, the Court of Appeal held that the trust failed as a charitable trust for advancement of the religion of Buddhism as it lacked the element of benefit to the public.

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222 *Tan Chin Ngoh v Tan Chin Teat* [1946] 1 MLJ 159 and obiter in *Lim Chooi Chuan v Lim Chew Chee* [1948] MLJ 66. A more recent case is *Attorney-General v Lim Poh Neo* [1974] SLR(R) 782.

223 *Yeoh Him v Yeoh Cheng Kang* (1889) 4 Ky 500. This case was distinguished by the HKCA in *Ip Cheung- Kwok v Sin Hua Bank Trustee Ltd* [1990] HKCU 403. The HKCA held that an ancestral worshipping trust for a clan was nevertheless a private and not charitable trust for want of public benefit since the so-called beneficiaries were bound by a common relationship.

224 *Choa Choon Neoh v Spottiswoode* (1869) 1 Kyshe 216 at 219. See also *In the matter of the estate of Khoo Cheng Teow decd* [1932] SSLR 226 and *In the matter of 2 indentures of settlement both dated 2nd day of August 1888, and made respectively between Tan Swee Hong etc and Khoo Cheng Teong etc* [1934] SSLR 44.

225 [1964] 1 MLJ 270.

226 *Re Low Kim Pong's Trust Settlement* [1938] SSLR 144 is another example.

227 [2014] 2 SLR 1165.

4.30 Second, and in contrast, if the endowment is for a private purpose, no modification is possible and in accordance with *Morice v Bishop of Durham* the trust will be void. In *Re Syed Shaik Alkaff decd* the court thus refused to uphold a waqf (or wakaf) of land for amur-al-khaira ("good works") in certain places in Arabia to secure the approval of the Almighty.[228] Although created under a trust deed attached to an Arabic law will, the trust was a trust of land in Singapore and therefore governed by the lex situs, or English law. Applying that law, the court held that it was an invalid perpetual private religious trust. "To be "religious" in the true sense, a purpose must tend to the promotion of the religion not merely secure the "approval of the Almighty"."[229] The Court's decision in substance marked out the legal impossibility of modifying a private purpose trust within the mischief of the beneficiary principle and thereby converting it into a public and charitable trust. Before this decision, it had also been held that while a charitable gift could be made for the benefit of a Hindu temple and was charitable, it could not be made to a Hindu temple (or an idol).[230] The reasoning is clearer in the Indian cases which validate a gift to an idol.[231] A gift to a Hindu temple is a gift to the idol which it consecrates and unlike the same in Singapore is valid as a principle of Hindu law.

4.31 There was only one exceptional avenue for validating private purpose trusts, otherwise invalid for lack of beneficiaries with beneficial interests.[232] If the private purpose trust could be characterised as a non-perpetual anomalous purpose trust, it could be upheld. Earlier in this Report, the case of *Bermuda Trust (Singapore) Ltd v Wee Richard* [233] was singled out as a prominent example of the anomalous purpose trust. In that case, the High Court accepted that the Sin Chew purpose trust dedicating a house to performance of Sin Chew rites by the settlor's children was an anomalous purpose trust and valid,[234] if it was not perpetual.[235]

228 [1958] 2 MC 38 (alternatively cited as (1923) 2 MC 38).

229 *Ibid* at 46.

230 *A-G v Thirpooree Soonderee* (1874) 1 Ky 377. Although *Choa Choon Neoh v Spottiswoode*'s principle of modification was not cited in the court's two line judgment, there can be no doubt that the court was acting upon it. The court refused to accede to the submission on behalf of the A-G that the gift of $200 to the temple (or idol) should be upheld by way of giving due allowance for the ignorance of natives unable to express themselves clearly.

231 William Agnew *The Law of Trusts in British India* (Thacker, Spink & Co, 1882) at 369–370.

232 In *Choa Choon Neoh v Spottiswoode* (1869) 1 Ky 216.

233 [1988] 3 SLR(R) 938. See also this Report at para 2.21.

234 *Ibid* at [5]-[6].

235 See also *Choa Choon Neoh v Spottiswoode* (1869) 1 Kyshe 216 at 221. Sir Benson Maxwell CJ held obiter that its purpose was to benefit the deceased in the after-life, not to promote religion. At the highest, its purpose was a pious one of the settlor's descendants "pleasing God and escaping the dangers of being haunted"; and that was still not the promotion of religion.

4.32 Third, in contrast to the wealth of cases on the modified English law of trust, the question of the status of non-perpetual private and public endowments created under personal law would not appear to have directly been litigated in the courts.[236] As previously mentioned, the opinion of Sir Benson Maxwell CJ is that the "widest regard" will be given to the "religious opinions and feelings" of local races on decisions as to the validity of a bequest for the propagation of an Oriental creed or building a temple or mosque or setting up and adorning an idol.[237] This opinion appears to have been the ratio decidendi in the Privy Council case of *Khoo Hooi Leong v Khoo Chong Yeok*.[238] On this implicit basis also stands the decision in *Lee Poh Lian Neo v Chinese Bankers Trust Co Ltd*, where the settlors of certain trusts were successors of one Wee Siang Tat, who had died intestate and had used his land as burial grounds for his family. They desired by these trusts to perpetuate the use of the land as burial grounds for the deceased's family in accordance with Chinese custom.[239] Terrell JA took their validity for granted while dealing with a point as to whether the deed had been executed by all settlors. He obviously did not think it was necessary to consider whether the trusts could be regarded as public non-charitable trusts.

4.33 There was little doubt that the same result would be true of endowments created under Hindu customs or religions or the Muslim religion. So if the waqf in *Re Syed Shaik Alkaff decd* had been a non-perpetual personal law waqf *of personal property* created under an Arabic will, it would, in accordance with the opinion of Sir Benson Maxwell CJ, have been a valid religious waqf under Muslim law.[240] Be that as it may, in 1905 the Mohammedan and Hindu Endowment Ordinance was passed, which "applied to 'any endowment in land or money … given for the support of any Mohammedan Mosque or Hindu Temple or Mohammedan or Hindu Shrine or School or other Mohammedan or Hindu pious, religious,

236 The only reported case, *Ng Eng Kiat v Goh Lai Mui* [1940] SSLR 78 was concerned with a testamentary trust to purchase land in China for the performance of Sin Chew rites. It was held that the rule against perpetuities did not apply to such a trust.

237 *Choa Choon Neoh v Spottiswoode* (1869) 1 Ky 216 at 219. See further paragraph 4.24 above.

238 [1930] AC 346. See *Mong bte Haji Abdullah v Daing Mokkah bin Daing Palemai* [1935] SSR 123 at 126.

239 [1941] SSLR 28. See also *Tan Chin Ngoh v Tan Chin Teat* [1946] 1 MLJ 159.

240 In no subsequent local Singapore case was the colonial Court asked to consider the validity of the family waqf in an English will. This was described as "a glaring omission" in Nurfadzillah Yahaya, "British colonial law and the establishment of family waqfs by Arabs in the Straits Settlements, 1860-1941" in Lionel Smith (ed) *The Worlds of the Trust* (CUP, 2013) Ch 8 at 167 at 179. But the answer was obvious. It would have been invalid whether as a private trust for the family's benefit or as a mixed family and public religious trust. Where English law was the governing law, it made sense to adapt the personal law endowment to an English equivalent. If there was no English equivalent to a private purpose trust, any possibility of adaptation would have been extremely doubtful.

charitable or beneficial purpose.'"[241] The juxtaposed reference to pious, religious or beneficial purpose was clear affirmation of the validity of perpetual waqfs and Hindu religious endowments under personal laws.[242] It is likely that the perpetual family waqf was also acknowledged as valid in this enactment.[243]

4.34 In actual fact, the expressly declared purpose of the 1905 Ordinance was to make for the better administration of Muslim and Hindu religious and charitable endowments. The Governor was empowered to order that such endowments be administered by the Mohammedan and Hindu Endowments Board if the endowment had been mismanaged, or the endowment had no appointed trustees or it would be to the advantage to so administer the endowment.[244] An order thus made had the effect of vesting all the property of the endowment in the Board. In 1966 the Administration of Muslim Law Act[245] was passed to vest legal ownership of property held as waqf in the Majlis Ugama Islam Singapura (MUIS). Thereafter, in 1968, the Hindu Endowments Act[246] was passed, which vested ownership and management of certain major temples (four out of over 30 temples) in the re-named Hindu Endowments Board (HEB). Both statutes notably omitted to provide expressly that the MUIS and the HEB, as the case may be, were to hold endowment property on express trusts for defined segments of the public. The result was that they were regarded as holding such property on constructive trusts for the purposes of religion. It is fair to say that as a further result waqfs and Hindu endowments are now to be regarded as statutory (constructive) trusts.

4.35 Another statutory development should be noted since it has brought greater certainty as to how waqfs and Hindu religious endowments and other public trusts are to be enforced.[247] Prior to passage of the Government Proceedings Act in 1956,[248] section 59 of the Crown Suits Ordinance relevantly provided that "All suits and proceedings in the Court

241 S 2, An Ordinance for the Better Administration of Mohammedan and Hindu Religious and Charitable Endowments, 8 September 1905 (Ord No XVII of 1905).

242 As in the Federated Malay States (FMS) where "by virtue of the religion of the parties Mohammedan law would be the applicable law": *Mong bte Haji Abdullah v Daing Mokkah bin Daing Palemai* [1935] SSR 123 at 124.

243 Any doubts were removed by s 40(3) of the Muslims Ordinance 1957 (Ord No 25 of 1957). This was little noticed. A likely reason was that the nation-wide compulsory acquisition of land policy inevitably led to the down-sizing of landholdings dedicated to waqf. See Tang Hang Wu, "From Waqf, Ancestor Worship to the Rise of the Global Trust etc" (2018) 103 Iowa L Rev 2263 at 2282.

244 S 4 of Ord No XVII of 1905.

245 S 59 of the Administration of Muslim Law Act 1966 (Act No 27 of 1966).

246 S 36(1) of the Hindu Endowments Act 1968 (Act No 30 of 1968). The 1968 Act repealed the 1905 Ordinance.

247 Under s 13 of the Mohammedan and Hindu Endowments Ordinance 1905, the Board's sanction was required for any action against an endowment administered by the Board.

248 The 1956 Act was modelled on the codification in the Crown Proceedings Act 1947 which however was without an equivalent to section 9.

relating to charities or otherwise in which the Crown is interested, or in which the interests of the public are affected … shall be brought and had in the name of the A-G of the Colony as plaintiff or defendant … ."[249] Express mention of public, religious, or social trusts was conspicuously absent in those provisions. It was highly probable that the phrase "charities or otherwise" was intended to embrace public, religious, or social trusts. If so, section 9 of the Government Proceedings Act[250] has clearly clarified that omission by providing that the Attorney-General shall be the enforcer of public, social, religious, and charitable trusts.

4.36 Despite the enactment of section 9, considerable practical uncertainties remain, undermining the prospects of ascertaining what other pre-independence personal law public trusts and religious trusts exist. No clear documentation of these trusts exists, and compulsory acquisition of their lands has caused many of them to fail; but their existence cannot be ruled out. Whatever they are, subsisting non-perpetual non-Muslim and non-Hindu religious trusts created under personal law (notably Chinese temples of a private nature) would of course be caught by the provisions of section 9 of the Government Proceedings Act.

4.37 The practical issues to which we have adverted are by no means insignificant notwithstanding that, post-independence, the concept of personal law has been abrogated (whether expressly or impliedly). While it will no longer be possible to create public trusts under personal law as such, resident settlors are free to create such trusts governed by foreign law (save in relation to Singapore real property). Even if there were no longer personal law trusts in existence, the question remains pertinent whether section 9 is recognition that foreign law public, social, and religious trusts can exist in Singapore subject to the supervisory jurisdiction of the Attorney-General.

4.38 There is also a vast difference between the pre- and post-2003 public (social) trust landscape. Pre-2003, both the dedication of an ancestral hall to Sin Chew and the provision of burial grounds for a Clan under English law were validated as charitable trusts. Both also became obsolete in the course of time. It is possible that the only pre-2003 examples of public trusts are the *inter vivos* Clan Associations philanthropic non-perpetual endowments governed by Chinese personal law and temples for public benefit, and that the only examples of private religious trusts are temples for private worship.

4.39 However, since 2003 when the Ministry of Social and Family Development set up the ComCare Enterprise Fund to provide seed funding

249 Ord 22 originally Ordinance XV of 1876 s 57. In India, provisions equivalent to section 9 of the Government Proceedings Act were contained in section 92 of the Civil Procedure Code. In 1947 India became an independent State but there has since then not been any attempt to replicate the English Crown Proceedings Act 1947.

250 Cap 121, 1985 Rev Ed.

for social enterprises,[251] the country has seen notable progression and then escalation in both incidence and range of social enterprise activities. A recent publication charts the development in social activities benefiting the public from 2003 to 2016 and finds impressive involvement by private sector companies as well as foundations.[252] These activities cover not only direct assistance in training and providing job opportunities to the disadvantaged. They also significantly embrace research as a means to finding new solutions, creating public awareness, and other forms of knowledge and capacity building. An interesting discovery is that the vast majority of social enterprises are incorporated as for-profit companies. This is followed by sole proprietorships and then limited partnerships. The social trust is missing, seemingly reflecting unawareness that the social trust is a public entity recognised in the law.

C PUBLIC TRUSTS FOR PERFORMING GOVERNMENT FUNCTIONS IN SINGAPORE

4.40 This is another obscure area in which public trusts have featured. The English jurisprudence reveals a persistent but patchy notion of the public trust.

4.41 The idea of a public trust for performing governmental functions is traceable to the English Municipal Corporations Act 1835.[253] In a leading case, it was held that section 92 of the Act created a charitable trust over the property of the municipal corporation or local council. Consequently, the Attorney-General was entitled to intervene as enforcer whenever there was an ultra vires disposal of property by the corporation.[254] This case and other nineteenth century cases like it were later regarded as purely instrumentalist in nature, deploying the trust as a means to enforce the ultra vires doctrine. The public trust characterisation supposedly fell into desuetude after common law prerogative remedies were fashioned to enforce the ultra vires doctrine.[255]

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251 Leaving out co-operative societies set up under the Co-operative Societies Act (Cap 62, 2009 Rev Ed) and mutual benefit organisations associated with clans set up under the Mutual Benefit Organisations Act (Cap 191, 1985 Rev Ed).

252 Singapore Centre for Social Enterprise (raiSE) *The State of Social Enterprise in Singapore* (2017) <*https://www.raise.sg/images/resources/pdf-files/raiSE–State-of-Social-Enterprise-in-Singapore-2017-Report.pdf*> (accessed 30 March 2021).

253 John Barratt "Public Trusts" (2006) 69 MLR 514 traces it to an earlier decision of the House of Lords in *A-G v Dublin* (1827) 1 Bligh NS 312.

254 See *Attorney-General v Aspinall* (1837) 2 My & Cr 613. See also *Attorney-General v Compton* (1842) 1 Y & CCC 427.

255 It gave rise to derivative notions of a public duty which borough officers were said to owe to rate payers who paid their rates to the borough. John Barratt, "Public Trusts" (2006) 69 MLR 514 argued that there was no basis for the derivation but he may have omitted certain cases which establish the duty as a trustee duty, namely *Bowes v City of Toronto* [1858] 11 Moo PC 463 and *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.

4.42 After a long hiatus, the idea of the public trust re-surfaced briefly in *Construction Industry Training Board v Attorney-General* ("*CITB v Attorney-General*").[256] The CITB (the Board) was a Government-created specialised board endued with advisory functions but also educational resources for the purpose of training workers. The finances necessary for conducting work-based training were raised by imposing levies on employers. On the basis of these matters, the Board applied to be registered as a charity and the Court of Appeal by a majority upheld its registration. The majority held that it was unthinkable that if the Board misappropriated the levies, there should be no recourse to the courts to recover the funds from the Board. That was enough to bring the Board within the trust jurisdiction of the High Court, without which the Board could not meet the definition of charity as being one amenable to that jurisdiction. Russell LJ dissenting took the view that the Board was a public trust (but not a charity within the meaning of the Charities Act). If he is right, the Board would be an example of a modern statutory public (but non-charitable) trust in England.

4.43 After a shorter hiatus, the public trust finally became visible again in 1983.[257] This became incontrovertible in 2001 when *Porter v Magill*[258] was decided and Lord Bridge regarded it as a general principle that members of the governing body of a municipal corporation must be taken to be trustees of the corporate estate and answerable to the corporation for breach of fiduciary duty.[259]

4.44 There are good reasons to think that the doctrine of public trust is also part of the law of Singapore. The case of *Attorney-General v Aljunied-Hougang-Punggol East Town Council (AHPETC)*[260] did not decide to the contrary. There, the Court of Appeal did not have the benefit of citation of the authorities on the public trust but that made no difference to the disposition of the appeal. The Court was asked to reverse the lower court's rejection of the submission that certain grants-in-aid made to the Town Council (TC) were held on *Quistclose* trusts for the benefit of the Ministry of National Development (MND). It refused to do so on the ground that the question of the relationship between the MND and the TC could not admit of any invocation of the law of private trusts, since the TC was a creature of statute and the manner in which it held the grants in aid of its statutory duties was governed exclusively by public law.[261] We think it should not be

256 [1973] Ch 173.

257 When the decision in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 was reported.

258 [2002] 2 AC 357.

259 *Id* at 464.

260 [2016] 1 SLR 915.

261 In his submissions to the Court, the Attorney-General made no mention of the nineteenth century cases employing the public trust reasoning. Even had he done so, however, the result would likely not have been any different. Cf Benjamin Ong, "Government Funding for Town Councils: The Role of Private Law" (2018) 30 SAcLJ 944.

overlooked that *AHPETC* was a case where the use of grant moneys implicated the complex relationship between central and local government in what was a new feature of the Singapore polity. What was critical to the shaping and definition of that feature was the principle of autonomy of town councils commensurate with greater political accountability and the rejection of central government responsibility for town council mismanagement.

4.45 Accordingly, in *Aljunied-Hougang Town Council v Lim Swee Lian Sylvia (AHTC v Sylvia Lim)*,[262] the High Court pointed out that it was these critical features of the grants-in-aid scheme which were determinative of the exclusive governance of public law in relation to the relationship between the MND and the TC. It was however stressed that the Court of Appeal did not and should not be taken to have ruled out application of the private law of fiduciary duties consistent with the underlying political accountability of the TC in fund management. Nothing in the judgment of the Court of Appeal precluded the High Court finding that the defendant town councillors were in a fiduciary relationship akin to directors of a company to the plaintiff TC. In the result, neither in the Court of Appeal case of *AHPETC* nor in *AHTC v Sylvia Lim* was the question asked whether the TC held its assets on a public and charitable trust. We think that by the same token, there is nothing in the Court of Appeal's judgment to preclude a public trust from arising in relation to government funding if that is consistent with the statutory funding scheme in question.

4.46 These clarifications are helpful in identifying a role for public trusts in apolitical funding relationships between the Government and private sector. They indicate, for example, that the provision by the Government of grants and subsidies to research institutions for the purposes of research or other resource and capacity building for the training of workers as in *CITB v Attorney-General* lends itself to public trust analysis. No question of balance between central and local government public accountability is at stake so as to render irrelevant any recourse to the law of public trusts.

4.47 A pertinent observation is that nowadays the provision of comprehensive training through institutions directly financed and regulated by government which *CITB v Attorney-General* reflects is no longer considered efficient. A more efficient model predicates government subsidised re-training outside the formal sector and skills enhancement for upgraders through private sector participation. A grant and subsidies model enables the Government to adopt more differential sector-specific approaches with specific focus on life-long learning and digitalisation. Industry participation on the other hand ensures more relevant responses to identified skills deficits and targeted realisation of objectives, guarantees that training will be needs based, and allows more realistic assessment results and certification and qualification outcomes.

262 [2019] SGHC 241.

4.48 In this connection, we looked at a Canadian case, *Ontario v Two Feathers Forest Product LP*,[263] where an attempt was made to rely on the *Quistclose* trust to resolve the funding problem which arises where grants are made up-front and in advance of delivery of targeted skills training. Two Feathers was provided government funds to deliver on-the-job skills training intended to benefit Aboriginal and non-Aboriginal residents, but applied to dissolve before all the money grants were expended. The funding agreement satisfied nearly all the requirements of the *Quistclose* trust and if the grants were *Quistclose* funds, they would of course have to be returned to the Government on dissolution of the grantee. The lower court (application judge)[264] held that the funds were held on a *Quistclose* trust. The appellate court held to the contrary that they were a debt. This was because – notwithstanding that the agreement restricted the use of the funds to Two Feathers' proposal for skills training, stipulated for return of remaining funds or repayment of unused funds on breach of agreement and so forth – it also provided that any remaining or unused funds owing to the Government should be deemed to be a debt. Additionally, the court found from scrutinising the actual allocation of the funds that only a small amount was to be expended for skills training. The vast amount or the balance was for running the business of Two Feathers, buying equipment and acquiring a lease of premises. The appellate court concluded that, essentially, the grants were not restricted to the exclusive purpose but were business funds for a general, long-term purpose.

4.49 We agree with the upshot and thrust of the Canadian judgment to the effect that the *Quistclose* trust is not well suited to the task of regulating the use of grants to provide training and work-based skills on an on-going basis under a commercial agreement between a governmental body and the grantee. A *Quistclose* trust serves to ensure that targeted funds reach their target and is not designed to perpetuate beyond their destination. Once the funds have arrived at their target, the mutual intention is that the transferee will become beneficial owner. A public NCPT will do the job better if the transferee must not become beneficial owner even after arrival of the funds at their destination but must owe a fiduciary duty to fulfil the purposes of the transfer. This is particularly the case if at the same time the Government should also not retain any beneficial ownership in the funds once they have been transferred. No matter whether the transferee becomes bankrupt before or after the transfer to him, the funds being held on an NCPT can never be claimed by the transferee's creditors.

D PHILANTHROPIC TRUSTS

4.50 We mention finally that corporate philanthropy is no longer just a major talking point and an idealised commitment. Setting an example, local

263 2013 ONCA 598.
264 2012 ONSC 5077.

companies such as the DBS and Singtel and many others have swiftly embraced principles of corporate social responsibility in their governance codes and regularly set aside a portion of their profits for philanthropic or "practically benevolent" purposes. There is in particular documented evidence of the legal structures employed by Temasek Holdings to further its philanthropic giving. These include the Temasek Trust set up in 2007, Temasek Cares set up in 2011,[265] and multiple foundations pursuing general as well as targeted impact philanthropy. Temasek Education Foundation is a registered charity. The remaining foundations operated by Temasek Holdings are very likely set up as trusts (although not denominated as such), companies limited by guarantee, or exempt private companies. This is because under Singapore law there is no similar legal entity as a civil law foundation.

4.51 Detailed information about philanthropic trusts is hard to obtain from the public domain. This is partly because confidentiality is one of the advantages sought when the trust is chosen as philanthropic entity.

4.52 Also worth remarking is that the rise in philanthropic giving has been identified in five phases. These are described as the post-war reconstruction phase (September 1945 to May 1959), the transition to self-rule and independence phase (May 1959 to August 1975), the tripartite whole of society phase (August 1975 to November 1990), the shared values phase (November 1990 to August 2004), and the coming of age phase (August 2004 to date). The Government took the initiative and the driver's seat in the first three phases, usually by providing the concepts, master plan, and seed money. In a marked transformation, local foundations began innovating in the shared values phase and companies and other community sectors and societies as well as charities now take the lead in philanthropic giving.

4.53 While there is yet to be a more systematic rationalisation of the entire non-charitable public benefit sector, a serious local study on the question of legal structures for social and philanthropic enterprises may not be too distant. Such efforts will raise questions whether entities resembling civil law foundations, and others like low profit liability companies or community interest limited liability companies or public benefit companies or societies should be available to attract new sources of capital for social and beneficial or benevolent development (as the first-mentioned has been in offshore trust jurisdictions and as the second-mentioned have been in US states and the UK).

4.54 In the meantime, we think that a more preliminary issue pertaining to laying a proper foundation for enforcement of philanthropic trusts should be dealt with. Section 9 does not appear to recognise philanthropic non-

265 It is not clear from its designation whether Temasek Cares is also a philanthropic trust.

charitable trusts by its omission to refer to them. This is an unfortunate omission in light of what we have stated above.

4.55 The problem may be illustrated by reference to *Re Holborn Aero Component Ltd's Air Raid Distress Fund*.[266] In that case, employees of a company contributed to a fund for the relief of those among them who were suffering distress from air raids. The trust thus created failed to be charitable because it did not benefit the public. It was a private trust for the benefit of a section of subscribers to the fund, rather than a charitable trust for the benefit of the public or a section of the public. In the result, the trust failed and the contributors obtained a return of a due proportion of their contributions less benefits received, if any, under a resulting trust. The result was correct under the law but there was no doubt that the trust was meritorious and the contributors would have preferred to have had their common benevolent purpose fulfilled than their money back.

4.56 We think that there is a very strong case for upholding philanthropic non-charitable trusts instead of nullifying them and imposing resulting trusts. The technical reason for refusing philanthropic trusts is that they do not benefit the public, though they benefit others. In the words of Lord Cross of Chelsea in *Dingle v Turner*, "To establish a trust for the education of the children of employees in a company in which you are interested is no doubt a meritorious act; but however numerous the employees may be the purpose which you are seeking to achieve is not a public purpose. It is a company purpose and there is no reason why your fellow taxpayers should contribute to a scheme which by providing "fringe benefits" for your employees will benefit the company by making their conditions of employment more attractive."[267] We agree that this must be so for purposes of the law of charity. However, rejection of philanthropic non-charitable trusts as a charity should not entail rejection of the trust as a valid NCPT enforceable as a trust. The fact that they may be private purpose trusts is not a valid objection. Section 9 of the Government Proceedings Act validates social and religious trusts and from what we said at paragraphs 4.28 and following some social and some religious trusts are of a private nature. If social and religious trusts are enforceable under section 9, there does not seem to be any good reason to exclude philanthropic non-charitable trusts as unworthy of enforcement by the Attorney-General or interested persons suing with his sanction.

E EVALUATIONS, CONCLUSIONS AND RECOMMENDATIONS

4.57 To sum up, there are in Singapore three broad categories of valid common law purpose trusts; namely anomalous private purpose trusts, charitable purpose trusts, and public, social, or religious purpose trusts.

266 [1946] Ch 194.
267 [1972] AC 601 at 625.

We have characterised anomalous purpose trusts as private purpose trusts. Others may disagree with this characterisation and regard them as social purpose trusts. There may be some substance to the disagreement. The Sin Chew trust for instance may be characterisable as a social purpose trust if its primary object is seen in functional terms of provision of a social need among the Chinese people in pre-independence Singapore. Indeed, some see the anomalous purpose trust case of *Re Dean*[268] as explicable only in these terms.[269] But we hold that the correct characterisation of what is a social purpose must turn on whether the purpose benefits the community or a section of it as a whole, as opposed to benefits based on personal nexus. Thus, where, as in the *Bermuda Trust (Singapore) Ltd v Wee Richard*,[270] the Sin Chew rites in contemplation were entirely personal to the settlor, the benefits would properly be said to be personal and not of a public character. If however the trust is a dedication of an ancestral temple for performance of Sin Chew rites of all members of a clan, proof of public benefit ought to qualify the trust as a social trust under the proposed reform.

4.58 The demand for anomalous purpose trusts appears to be extremely modest. There does not appear to have been any case in recent times of demand for Sin Chew trusts or trusts of burial grounds. Although there are many unanswered issues raised by anomalous purpose trusts, we do not consider that there is a compelling case for inclusion of such purpose trusts in the proposed reform.

4.59 In relation to section 9's reference to religious trusts, we think that for the avoidance of doubt, clarification is advisable. Religious trusts should be stated as comprising waqfs and Hindu religious endowments and all others which are of a public benefit.

4.60 In our view, there are good reasons to recognise NCPTs as social entities which can effectively promote social development. Social purposes which are not exclusively charitable may serve equally vital social needs and deliver needful social benefits, in some circumstances perhaps more efficiently than charities. It is somewhat anachronistic though that the vast majority of entities engaged in the delivery of social benefits are for-profit companies and sole proprietorships. The for-profit company seems to be too rigid to serve as a social entity with its blended focus on shareholder value maximisation and social benefit. Presently, the flexibility to incorporate a community interest company limited by guarantee or shares, or to form a community benefit society which exists in the UK is absent. The sole proprietorship on the other hand is ill-suited to attract public funds and comes with no guarantee of faithful dedication to the purpose.

268 (1889) 41 Ch D 552.

269 Jo Goldby & Mark Pawlowski "English and Offshore Purpose Trusts: A Comparative Study" (2005) 11 Trusts & Trustees 8 at 9.

270 [1988] 3 SLR(R) 938.

The NCPT in contrast is flexible, easy to set up and to dismantle or change if another organisational entity is now more suited to the social mission. Unlike the sole proprietor, the purpose trustee is a fiduciary who must ensure faithful furtherance of the social purpose.

4.61 Another reason is that such reform will provide alignment with section 9 of the Government Proceedings Act. It would be unsatisfactory to leave section 9 in its present state of obscurity if not desuetude. The reform will furnish a timely occasion and opportunity to clarify many issues of public trusts not dealt with by section 9.

4.62 Thirdly, such clarification will usefully confirm that public trusts include NCPTs which perform government functions by way of initiating or supporting social development. The setting up of the ComCare Enterprise Fund to provide seed funding for social enterprises was in our view a public and social NCPT. For reasons mentioned earlier, the closest alternative entity which might be suited to such delivery of government grants, subsidies, or other benefits, namely the *Quistclose* trust, comes far behind the NCPT in merits and suitability.

4.63 Indeed, the advantages of the NCPT over the *Quistclose* trust in performing governmental functions of subsidising skills training and research may well attest to a potentially wide and significant scope for deployment of the NCPT.

4.64 Fourthly, while philanthropic giving can be organised in many ways, the philanthropic trust is clearly an important though presently under-valued entity. It can be more widely employed as an entity for general as well as impact philanthropy. One significant advantage is that the NCPT can facilitate mixed purposes and is suitable in particular to advance charitable and philanthropic purposes. The latter may be charitable. The former is always philanthropic under the charity law. But when the two are put together, the trust will fail as a charitable trust for not being exclusively charitable.

4.65 Philanthropic non-charitable trusts are not presently within section 9. We consider that this omission should be rectified.

CHAPTER 5

INTRODUCING A STATUTORY SCHEME – RECOMMENDATIONS

5.1 In light of our conclusions in Chapters 2, 3, and 4, we now proceed to address and make more specific recommendations regarding essential particulars which the proposed statutory NCPT should have.

5.2 The essential particulars reflect in part our recommendation that enabling legislation should be a standalone statute. In this way, we neither say that the statutory entity is an exception to the beneficiary principle nor in any way suggest that it is a new general proposition. The latter, especially if it smacks of root-and-branch reconstruction, could undermine the coherence and stability of the common law. The former could stultify development of the common law. The additional merits of a separate statutory NCPT include: (1) the need to provide for autonomous construction of the pertinent provisions as far as possible; (2) the need to ensure that the statutory NCPT will be developed autonomously without prejudice to the parallel development of the common law; and (3) the need to ensure that the legislative response to change is unaffected by the common law response as far as possible.

5.3 In making this recommendation we also seek to avoid the difficulties which have plagued the judicial development of certain offshore trust legislation such as the Trusts (Jersey) Law 1984, which purports to provide a unified and ambitious cross-cutting statutory and common law matrix for the NCPT. We explain this more fully in the following paragraph.

A DEFINITION OF PURPOSE TRUST

5.4 A definition is essential if a standalone statute is to be adopted. As a preliminary observation, we note that the provisions of Articles 11 to 14 of the Trusts (Jersey) Law 1984 may be ruled out as model legislation for our purposes. The provisions in question represent a codification of the law of trust. This is essential for a civil law jurisdiction which needs to import in general terms the notion of the trust from the onset. We are not such a jurisdiction.

5.5 The same is true of the approach adopted in the Belize Trusts Act. Section 2 of the Act is an affirmative definition that "A trust exists where a [Trustee] holds […] property which does not form […] part of his own estate (a) for the benefit of [a beneficiary] […]; (b) for any valid charitable or non-charitable purpose which is not for the benefit only of the Trustee; (c) for such benefit as […] in […] (a) and also for any such purpose as […] in […] (b)." For our purposes, it would be advisable to avoid affirmative definitions of the trust, particularly as we continue to have divided opinions over whether the proprietary view of trusts prevails or the

obligationist view. This means that when we cite offshore trust legislation as possible model legislation, we shall only be looking at specific provisions on NCPTs.

5.6 There are four options open to us. The first is to stipulate a negative definition to effect that a trust shall not be invalid by reason only that there is no human or legal beneficiary to enforce it if the terms of the trust provide for the appointment of an enforcer in relation to its non-charitable purposes. This option presumes that the common law is applicable in the first instance. Difficult questions can arise whether the trust in question is a *Re Denley* trust and therefore valid before the provision even becomes applicable. For that reason, the first option is not suitable and does not fit our recommendation for a standalone statutory NCPT, the validity of which will not turn on whether it would otherwise be invalid at common law.

5.7 The second is the approach adopted in Guernsey. Section 12(1) of the Trusts (Guernsey) Law 2007 stipulates that "A trust for or including non-charitable purposes created by an instrument in writing and the terms of which provide for - (a) the appointment of an enforcer in relation to the trust's non-charitable purposes, and (b) the appointment of a new enforcer at any time when there is none, is valid and enforceable in relation to its non-charitable purposes." This option can serve to introduce a standalone NCPT, but it relies on the notion of validity. It may be more appropriate to avoid references to this notion, emphasising instead that the statutory NCPT may be created for stipulated purposes (the details of which are discussed at paragraphs 5.20 to 5.28 below).

5.8 The third is the approach adopted in the Cayman Islands Trust Law (2017 Revision) Part VIII Special Trusts - Alternative Regime (for "STAR trusts"). Section 99 states:

> (1) The objects of a special trust or power may be persons or purposes or both.
>
> (2) The persons may be of any number.
>
> (3) The purposes may be of any number or kind, charitable or non-charitable, provided that they are lawful and not contrary to public policy.

For reasons which we state at paragraph 5.29 below, we think this option is not appropriate. It accepts NCPTs which are couched generally as non-charitable purposes whereas we would support NCPTs with specifically designated purposes. These are purposes for which the creation of statutory NCPTs can be justified in policy. The enforcer principle in sharp contrast will justify the creation of NCPTs for any purpose as the settlor desires that is not contrary to public policy.

5.9 A variation of this third approach is adopted in Mauritius. There is provided a general definition of an inclusive nature which lists the purposes of trading, dealing with life insurance, managing cash deposits, and managing pension funds.[271]

5.10 The fourth option is to model the definition after section 74 of the Canadian UTA (2012).

5.11 Section 74(2) enables a person to create a trust that does not create an equitable interest in any person, and is for a non-charitable purpose described in subsection (3).

5.12 Section 74(3) states that a non-charitable purpose is one "that is recognised by law as capable of being a valid object of a trust or is: (a) sufficiently certain to allow the trust to be carried out, (b) not contrary to public policy, and (c) in relation to (i) purposes for which a society may be formed, (ii) the performance of a function of government in Canada, and/or (iii) a matter specified under subsection (12)."

5.13 Section 74(12) states that "the *[regulation-making authority for the jurisdiction]* may make regulations specifying matters in respect of which a non-charitable purpose trust may be created under subsection (2)".

5.14 The Mauritius and the Canadian definitions approach specificity of purpose differently. We prefer the enumerated and exhaustive list definition in the former. But for reasons which we explain at paragraphs 5.20 and following below, we would recommend a two-pronged definition, bearing in mind that the need for and use of NCPTs will alter in response to changes in the underlying economic and social circumstances (not to mention changes in alternative legal entities which are close substitutes of the NCPT).

5.15 The combination of negative and positive elements in the Canadian definition is attractive and can be adopted to the extent adoption is not incompatible with our proposal for a standalone statute. This substantially means omitting the first phrase in section 74(3) of the UTA, which is designed to incorporate the common law.

5.16 However, instead of expressing the affirmative elements in the manner employed in section 74(3)(c), we think the proposed Singapore statute should stipulate more generally that a statutory trust may be created in relation to any public purpose, social purpose, religious purpose, philanthropic purpose, investment and management of assets purpose or other business purposes or mixed social, philanthropic, investment and management of assets or other business purposes.

271 See s 2 of the Mauritius Offshore Trusts Act 1992 repeated in the Trusts Act 2001 (replacing offshore trust with trust).

5.17 This option has the advantage of leaving the common law, including the law of private (anomalous) purpose trusts, as a separate branch of the law which can be developed judicially in its own autonomous terms. A further advantage is that it will allow a sufficiently broad-based legislative response. The problem with section 74(3)(c)(iii) is that the apparent advantage of flexibility to add to the list of acceptable non-charitable purposes on an ad hoc basis is not mirrored by an ability to subtract. The list can only expand, not contract. Moreover, once a purpose has been added, it will become a permanent fixture or, at minimum, create expectations for future application. Difficulties of predicting what purpose may be specified given pre-existing specifications are another drawback which will be avoided.

5.18 We do not think a more broad-based categorical list definition is problematic or could be inhibitory by reason of uncertainty. We envisage that the inherent jurisdiction may be made available to clarify any uncertainty as to whether a trust has been created for a purpose within the enumerated categories. It should not matter whether a contemplated purpose falls within two or more overlapping heads. The drafting will make it clear that a trust which meets one element of the definition will be an NCPT whether it additionally meets another element or does not.

5.19 We would therefore recommend this definitional option as one of the two components or elements to be met. The second component or element is discussed immediately below.

B STIPULATION OF SPECIFICALLY DESIGNATED PURPOSES

5.20 We envisage that while a settlor may set up an NCPT by settling specifically designated assets on trust, he must also specifically designate the purposes to which the assets are dedicated. The broad categorisation of acceptable purposes represents objective descriptions within which his specifically designated purposes must fall. If there is a failure to stipulate a specific purpose, the court will not need to be called upon to decide objectively whether the broadly designated purpose fund for business or social development is valid. A stipulation which merely repeats the broad categories will be rejected.

5.21 One way of putting our recommendation is that the settlor must stipulate the mediate purpose and not merely the ultimate purpose. In some cases, his mediate purpose is a modality of his ultimate purpose. In this respect, our recommendation follows the Scottish approach to public trusts by denying validity to public trusts which lack a definite purpose that can be shown to be beneficial to the public or a section of it. It will not be disputed that the question of specificity must be one of construction. If for instance the settlor states that he creates the trust for the purposes of holding and retaining the shares in company X, the court will ascertain with the aid of construal techniques whether he means to create a bare trust for him as beneficiary or whether the holding and retention is a purpose of

asset partitioning.[272] It may be possible for the court to reach the latter conclusion if there is evidence of the role that the NCPT is envisaged to play in related transactions.

5.22 There is a further question whether the settlor can be permitted to specify the ultimate purpose but confer a discretion to his trustee to provide the specificity of purpose that is missing. The Scottish approach is affirmative on this and we agree.

5.23 There is a still further question as to the degree of specificity or definiteness of purpose. At common law, there are at least two alternative grounds on which an NCPT might fail, of which indefiniteness of purpose is one. This requirement was in fact decisive in *Morice v Bishop of Durham*. Sir William Grant MR there rejected the trust of the residuary estate for objects of benevolence and liberality in the discretion of the trustee as being indefinite and uncertain.[273] However, the test of ascertainability of beneficiaries has been relaxed in the case of indefinite beneficiaries in the more recent House of Lords case of *McPhail v Doulton*.[274] There is no reason not to apply this modern test for discretionary beneficiary trusts to NCPTs, substituting purposes for beneficiaries. The effect is that a purpose will be certain if any given use of the fund either comes or does not come within the specifically designated purpose. A similar test has been applied in *Quistclose* cases.[275] We think that this common law test can serve adequately the task at hand.

5.24 A significant implication of our recommendation is that it must be possible to make sense of the broad categories ex ante. Otherwise, any attempt to provide a specific purpose may be a shot in the dark in the face of uncertainty as to whether it will fall within the intended enumerated broad category. So far as investment and business purposes are concerned, there is case law to guide the legal adviser who is instructed to draw up the pertinent trust instrument. In addition, we recommend that the concept of investment purposes be defined negatively, so that a specific purpose will not be outwith the category of investment purposes by reason only that the trust is to hold the shares in a company or the asset(s) of a company. Similarly, there should be a negative aspect in relation to business purposes so that the mere holding of shares or other asset or participating

272 Cf Anthony Duckworth, "Trust Law in the New Millennium: Prospective – Part 2" (2001) 7 Trusts & Trustees 11 at 18 who says that the trust instrument must specify the purpose for which shares in a company are held in trust and that it is insufficient to say merely that the trust's purpose is to hold those shares.

273 The court would have reached the same conclusion if the objects were restricted to those of benevolence. In *Chichester Diocesan Fund & Board of Finance (Inc) v Simpson* [1944] AC 341, the House of Lords held that a trust for benevolent purposes was invalid for indefiniteness.

274 [1971] AC 424.

275 See *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [104] – [136].

interest or right will not fail as a business purpose if, for instance, it appears that the holding of interest or right is part of a corporate arrangement for asset securitisation. This minimalist definitional approach should suffice, given the very factual nature of carrying on business.

5.25 This means that we have also answered the question whether there should be a more specific provision along the lines of the Virgin Islands Special Trusts Act 2003 (for "VISTA trusts") to facilitate the holding of shares and other assets by NCPTs.

5.26 There should not be any need to define what are public, religious, or philanthropic purposes. But it may be helpful to clarify that a trust for the purpose of performing a function of government in Singapore is a public purpose trust but a trust for political purposes is not.

5.27 There is no consensus on how social purposes should be defined. Nor would we attempt one. It may be attractive for some to adopt a definition linked to the registration of societies so that a social purpose is one for which a society with that purpose as its constitutional object may be registered. One advantage of this is that it builds upon the established distinction between companies and societies. Secondly, it ensures the implicit rejection of NCPTs for political engagement. But we think the suggestion is fundamentally flawed in assuming that societies are necessarily formed for social purposes. A club may be formed for private purposes of individual benefit and enjoyment notwithstanding there is an element of social consciousness and an enforceable contractual tie in the use, sharing, and deployment of common resources of the society.

5.28 We think that a social purpose will have certain features such as the provision of support to people in need (support which need not be pecuniary but encompassing empathetic support and counselling), and the inculcation and promotion of orientations towards the common good. However, instead of an affirmative definition, we would propose a negative inclusion stating by way of avoidance of doubt that the fact that a trust has protection of the settlor's family as a purpose will not of itself render it a social purpose trust. An NCPT which protects not the settlor's family but the settlor from his creditors will not be regarded as established for social purposes in any case, apart from being contrary to policy.

C WHETHER MIXED PURPOSES AND BENEFICIARIES TRUSTS SHOULD BE ALLOWED

5.29 We have previously noted that in a STAR-type regime a settlor can create a mixed purposes and beneficiaries trust. Additional flexibility is supposedly achieved because a settlor can create a beneficiary trust with an enforcer and specify that only the enforcer shall be entitled to rights of information but not the beneficiaries. This is said to be a salutary result in certain circumstances. We prefer however not to recommend this and therefore any statutory provision to handle the problem is unnecessary. It

would be preferable to attain to this flexibility, if it is valuable, by the usual, more conservative process of common law incremental and contextualised development.

5.30 We have also previously observed that NCPTs are likely to have mixed business and social purposes. This is something that must be anticipated. Our solution has already been mentioned. As long as the NCPT qualifies as a business purpose trust, it should not matter that it also qualifies as a social trust. There is another complication we must anticipate. If the settlor has mixed charitable and non-charitable social purposes in view, we consider that it may be desirable to take a position on whether an NCPT must be exclusive in its provenance.

D WHETHER TO REJECT THE UNECONOMICAL, WASTEFUL, CAPRICIOUS NCPT

5.31 Our view is that such limitations on NCPTs are unnecessary for three reasons. First, the American experience shows that such constraints do more harm than good in the cases where the supposed problems are encountered. The more common occurrence is that settlors settle more funds than are needed to accomplish their private purposes; in such situations the law of resulting trust already provides an adequate solution with respect to the unexhausted surplus. Second, the particular experience of Delaware is firm proof that specific limitations targeting uneconomical, or wasteful or capricious trusts are unnecessary once the doctrine of cy-près is made equally available to reform NCPTs. Delaware's statute has dropped these limitations and requires only that the NCPT shall be attainable (that its declared purpose be "not impossible of attainment").[276] The settlor is apparently free to decide how much the trustee should spend on the declared purpose and is not limited to amounts objectively determined by the court to be sufficient to carry it out.[277] Third, and most importantly, the limitations in question make sense primarily in relation to private purposes trusts. They are not relevant, let alone needed, because the proposed reform excludes private purposes trusts.

5.32 In the case of social and philanthropic NCPTs there is little meaningful sense in which it can be said that the NCPT is uneconomical, wasteful or capricious. More meaningful problems include insufficient dedication of funds to further the specifically designated social activities. We therefore recommend empowering the courts to vary NCPTs in proper circumstances (we have previously made recommendations in a separate report for a Variation of Trusts Act to be enacted).[278]

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276 12 Del Code Ann § 3556(a).

277 Adam Hirsch, "Delaware Unifies the Law of Charitable and Non-Charitable Purpose Trusts" (2009) 36 Estate Planning 1 at 17-18.

278 Law Reform Committee, Singapore Academy of Law, *Report on Introducing a Statutory Variation of Trusts Jurisdiction* (2019) (Chair: Tan Yock Lin).

E ENFORCER

5.33 There are many enforcement mechanisms to choose from. After consideration, we think that the model embodied in section 74(11) of the Canadian UTA provides the degree of latitude most suitable for our purposes. Under this model, a list of alternative enforcers is prescribed and any listed enforcer may intervene to compel performance of the NCPT. The list consists of: (a) the Attorney-General, (b) a person appointed specifically in the trust instrument to enforce the trust, (c) the settlor or his personal representative, (d) a trustee or co-trustee, and (e) a person appearing to the court to have a sufficient interest in the matter.

5.34 There is sound policy for treating enforcers who are appointed by the settlor in the same way as trustees who are subject to replacement and removal by the court for misconduct. We so recommend.

5.35 It is a common feature of offshore trusts to explicitly prescribe certain duties of a fiduciary as attaching to the enforcer, namely the no conflict duty, no profit duty, and no self-dealing duty. Certain affirmative duties are also prescribed, notably the duty to require information from the trustee from time to time. We agree that these are useful provisions to insert in the proposed legislation.

F TRUSTEE

5.36 There are opposing views as to whether it is necessary to provide that the trustee must be a licensed trust company. When provisions requiring licensed trust companies were spelt out in offshore trust jurisdictions, they were intended to provide a source of comfort and confidence to settlors who were being asked to deposit or transfer large funds in unknown offshore jurisdictions. Singapore is already a well-established wealth management centre. Perhaps more to the point, the basis for reform is to offer Singapore centred funds a new trust option; not so much to attract offshore funds to Singapore. A second and more cogent reason for insisting on licensed trustees is that professional trustees are more likely to ensure compliance with anti-money laundering regulations. The opposite contention is that since our recommendations are directed also at supporting small domestic family businesses, it would not be expedient to add to the costs of using an NCPT by requiring that trustees of the NCPT must be licensed trustees. There is also the argument that any rigid requirement that the NCPT trustee must be a licensed trustee could be "unduly restrictive" in purely commercial utilisations of the NCPT. When evaluating the merits and demerits of such a requirement, the Scottish Law Commission was concerned that there might be cases where a commercial concern would find it more expedient to "declare itself trustee of its own

property".[279] In light of the above considerations, we recommend a compromise solution: that is, to require trustees to be licensed but allow registered PTCs to qualify as restricted licence trustees.

5.37 We do not think it necessary to stipulate explicitly that an NCPT trustee owes an irreducible core duty to act in good faith in the best interests of the trust (purposes).

G RETENTION OF CONTROL BY THE SETTLOR

5.38 We have already mentioned that we do not recommend the mixed purpose and beneficiary trust where the NCPT is in addition created for the purposes of making distributions to beneficiaries (say) for support or education. In purely commercial uses, settlors are less likely to be interested in enjoyment than in control.

5.39 Should settlors be allowed to retain substantial control over assets that are permanently removed to the NCPT? Examples of retention of control would include reservation of power to change the governing law, to amend the purposes of the trust, prolong it or to remove the trustee or change the trustee.

5.40 It could be argued that the settlor must have the flexibility to change the terms of the NCPT if the circumstances so warrant. However, in such cases the settlor already has power or control of the income or earning capacity without ownership of the principal, as it were. If he is additionally to have power over the ownership even in a more limited manner, the NCPT would be no different from a beneficiary trust and prejudicial to creditors who have dealt with the company on the basis that the trust would be residual claimant. Our answer is for that reason in the negative – settlors should not be allowed to retain substantial control over assets that are permanently removed to the NCPT.

H PERPETUITIES

5.41 At common law, anomalous purpose trusts are subject to the rule against perpetuities. The pertinent rule of perpetuities is the rule against inalienation of capital or indefinite duration, and not the rule against remoteness of vesting. The rule of indefinite duration is strictly applied; the possibility of the trust fund outlasting the period of perpetuities is enough to render the trust void.

5.42 In Singapore, this barrier to the NCPT has largely or practically been marginalised following the introduction of the principle of 'wait and see' in the perpetuities reform which was introduced in 2004. Although there are

279 Scottish Law Commission *Report on Trust Law* (SLC 239, 2014) at [14.15].

some doubts, the amended Civil Law Act embodying the reform most probably has the effect of extending the period of wait and see to 100 years, in the absence of any express provision. In practical terms, there is little likelihood that the narrow classes of exceptional NCPTs valid at common law will be objectionable for contravening the rule of indefinite duration if the period for wait and see is as long as 100 years.

5.43 Whatever it may be for private anomalous purpose trusts, we think that there is no need to subject the statutory NCPT to the rule of indefinite duration. Essentially, the proposed statutory NCPT is either a business or social or philanthropic entity (though not a legal entity). The law has never regarded the vesting of capital in a company for business purposes or the creation of social capital in a charity as raising concerns about perpetuities. The dedication of capital in both instances is only theoretically perpetual. In reality, capital dedicated to both must be utilised, sold, re-acquired and applied as the social need or business occasion for profit arises. Similarly, we do not recommend subjecting the NCPT to the rule against indefinite duration. The business NCPT will not be holding assets forever if the fortunes of the company to which those assets are linked melt away. The social NCPT will sooner rather than later be depleted of its assets because these must be applied for social development. If they are replenished from the investing or supporting public because the NCPT has been effectual in furthering social development, why would it be a concern that the NCPT has been in the 'business' of social development for a very long time?

5.44 What is of concern is that a perpetual NCPT may outlive its usefulness. We therefore consider it important that such a trust should be amenable to statutory variation under the Variation of Trust legislation that we have previously recommended. Where an NCPT is a holding device and owns a family incorporated business which fails, it will be a residual claimant to such assets as are left over after payment to creditors and in the stead of the settlor.

I PRIVATE TRUST COMPANIES

5.45 Private trust companies are exempted from the licensing requirements of the Trust Company Act.[280] We do not see any reason to change this.

J DEFINING WHAT IS ONSHORE

5.46 As a matter of policy, the NCPT is intended to benefit the development of the financial services industry (in particular the wealth management sector) in Singapore by providing a new trust option. It is also

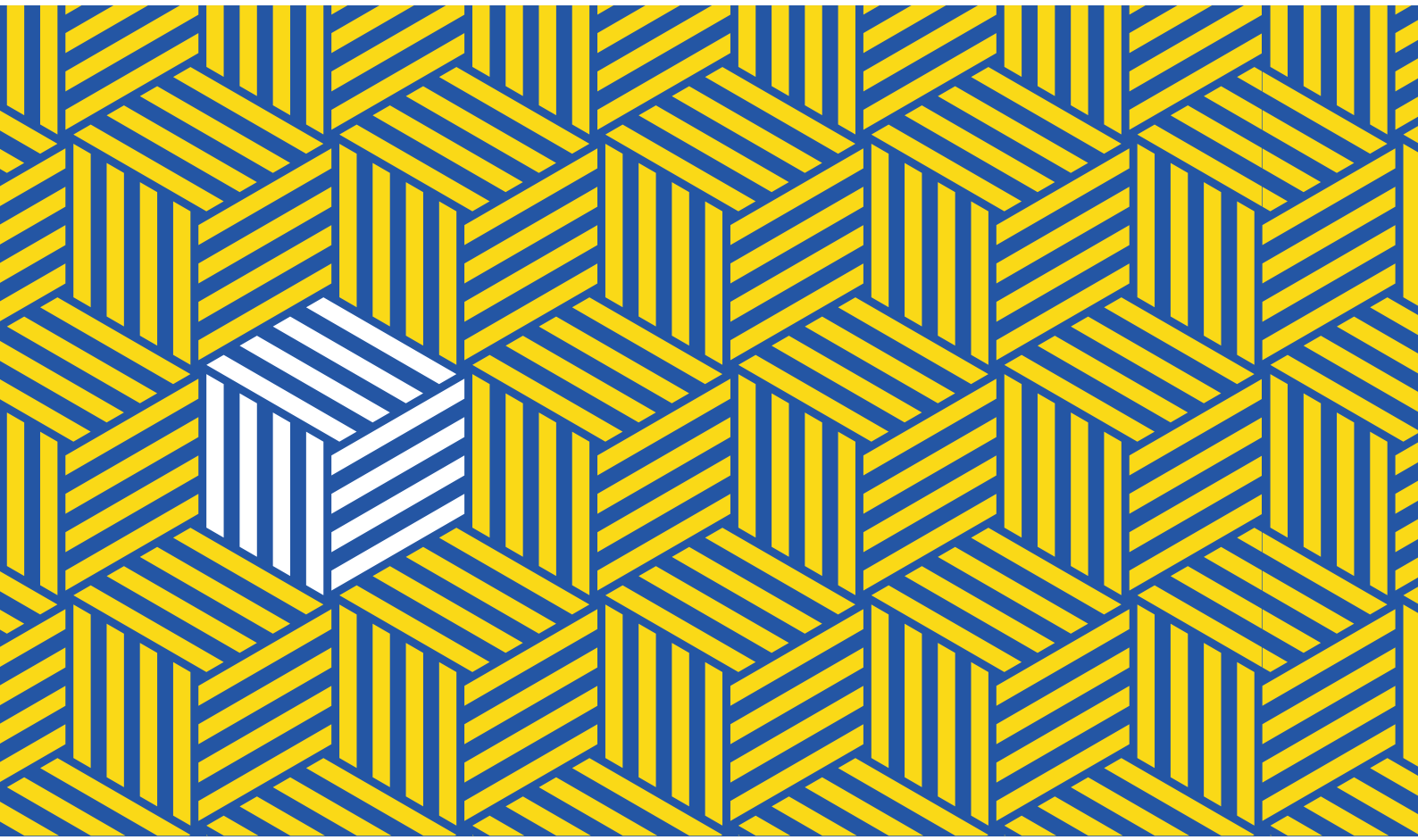
280 Cap 336, 2006 Rev Ed.

helpful in addressing and fulfilling the requirements of commercial substance triggered by international regulatory changes.

5.47 It is necessary to consider how to define the onshore NCPT so as to distinguish it from the "onshored" offshore NCPT. The distinction must reflect the present categories of offshore trust as well as foreign trusts which are administered in Singapore. For the purposes of tax exemptions or incentives, obviously, the onshore NCPT should be governed by Singapore law.

5.48 We therefore recommend that the availability of this option should depend on satisfying the following criteria: (a) the NCPT is expressly or impliedly governed by Singapore law; (b) the trustee of the NCPT is licensed trust company; (c) the NCPT carries on its purposes in part or entirely in Singapore; and (d) some part of its assets are held in Singapore.

5.49 In the case of public, social, religious and philanthropic trusts, we recommend that the pertinent public, social, religious and philanthropic purposes must be substantially carried out in Singapore.



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