Introduction

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We are very fortunate to be able to bring together in this collection the work of leading scholars, practitioners and judges in the area of trusts and wealth management. The origins of this book lie in a conference held in Singapore in 2015, though the contributors have all worked on their chapters in the light of discussions at the conference and subsequent developments. That the conference was such a success is in no small part due to the efforts of the Singapore Academy of Law and the hospitality of the Supreme Court of Singapore, to whom we are very grateful. We also wish to thank our respective universities, Singapore Management University and the University of York, for their continuing support, as well as the research assistants who have so ably helped us in the production of this book: Jack Wells, Lim Sing Yong and Heather Chong. We hope that you, our readers, will find these contributions to scholarship as informative and thought provoking as we have.

Our conference began with a keynote speech from Henderson LJ of the Court of Appeal of England and Wales. A revised version of that address now forms the first chapter of Part I. In his chapter, Henderson LJ helpfully draws our attention to the utility and breadth of the administrative jurisdiction of the court in relation to trusts. This jurisdiction has been rather neglected in the literature, being relegated – if that is not too pejorative a word – to practitioner treatises. Happily, that is now changing. The administrative jurisdiction is as old as the law of trusts itself; indeed, it is an axiomatic foundation of the law of trusts. Henderson LJ shows just how important that jurisdiction remains to the practical utility of trust law and to structures which make use of trusts. His examples are numerous and highly relevant to modern commercial and private practice. They serve to emphasise in turn the vital importance of having judges well versed in this area of the law, who are willing to make creative, modern use of their ancient jurisdiction.

Indeed, the importance of the administrative jurisdiction is not only practical, but theoretical as well. This jurisdiction – the ability, or rather the duty, of the court to secure due performance of a trust and to facilitate its performance – is the foundation of the court's approach to remedying a breach of trust, something addressed later by others among our contributors. And the axiomatic applicability of that jurisdiction to any trust means that there must always be someone who can invoke that jurisdiction – an enforcer. Who that is, might be or should be is again a question addressed later in the book.

Five other contributors have dealt with various current issues relating to trust structures, some of which have origins in the offshore world of trusts.

While the reservation of powers on the part of settlors is not a novel phenomenon, the extent of reservations found in modern trusts significantly complicate matters. Professor Ho addresses this complex issue in a comprehensive chapter addressing both the reasons why settlors wish to make such extensive reservations as well as the dangers of over-extensive reservations. While the reasons are manifold, and the psyche of the Asian patriarch-settlor would no doubt be of interest to many in the industry, they can be boiled down to the phenomenon of the increasing use of the legal device of a trust, as a means of avoiding or evading taxes, without actually trusting, in the colloquial sense of the word, the trustee (to borrow an expression from our second contributor). As Professor Ho demonstrates, the risks of such 'trusts' are many. At their most extreme, they risk the underlying trusts, in which they can be found, being held as either shams or illusory trusts. This chapter studies both doctrines, the relationship between them as well as the underlying basis of the controversial category of illusory trusts. Even if trusts with extensive reservations survive attacks as shams or illusory trusts, Professor Ho demonstrates that over-extensive reserved powers may lead to other undesirable consequences. For example, the reservations may be used by creditors of the settlor or to access trust assets, or by a spouse upon divorce for similar purposes, an issue dealt with in greater detail by Dr Wong and Associate Professor Lee in later chapters. These then form the limits and boundaries of the trust concept and settlors who test these limits risk 'breaking bad' with the trust. The choice of title could not be more appropriate, as these settlors are in effect rejecting legal norms for their own gains.

Professor Ho's chapter overlaps somewhat with that of our third contributor, Professor Nolan, who considers the position of trustees where the trust confers powers upon a third party. As a settlor is normally regarded as dropping out of the picture upon the constitution of a trust, powers reserved by settlors are also properly regarded as third-party powers. However, whereas Professor Ho considers situations where the powers are given to settlors and therefore more properly regarded as reserved rather than conferred and are so extensive as to risk the arrangement being considered a trust altogether, Professor Nolan considers the no less important question of third-party powers embedded in entirely valid trust structures. While these are often vested in third parties other than settlors, such parties are often chosen for reasons apart from trust law. While emphasising the bespoke nature of third-party powers, themselves highlighting the 'great elasticity and generality'[1] of the trust so praised by Maitland, Professor Nolan helpfully groups such powers into four broad categories – consent, veto, direction and action. Each category, then, presents its own challenges to trustees administering such trusts, all clearly set out before considering how uncertainties stemming from both the process of construction and the equitable concepts of conscience and notice can helpfully be mitigated through careful drafting. The significance of the inherent jurisdiction of the court, as addressed in the first chapter of this book by Henderson LJ, is also usefully addressed as a means of helping trustees deal with uncertainties over third-party powers.

To what extent, then, might the court be excluded from the administration and execution of a trust? That is the subject of Professor Conaglen's study of trust arbitration clauses, or more specifically, their binding effect on what he describes as 'internal' trust disputes – disputes between trustees and beneficiaries, between beneficiaries or between trustees. Following the tremendous success (in terms of adoption rate) of arbitration of commercial disputes, it is no surprise that arbitrators seeking further growth would begin looking further afield. Given that one of the attractions of arbitration is its confidentiality, the arbitration of trust disputes seems to be a fertile field for growth. However, as Professor Conaglen masterfully demonstrates, the question is not one capable of being answered simply. His consideration of the arbitrability of such disputes includes a consideration of the history of arbitration in equity, from the sixteenth century and the wider changing judicial attitudes towards arbitration in the twentieth century, leading to the irresistible

1 F. W. Maitland, 'Uses and Trusts' in *Equity: A Course of Lectures* (rev'd by J. Brunyate) (Cambridge University Press, 1936), 23.

conclusion that ‘internal’ trust disputes must be inherently capable of being arbitrated. However, just because a dispute is inherently arbitrable does not mean that a settlor can dictate that ‘internal’ trust disputes be subject to arbitration by inserting an arbitration clause into a trust deed as a businessman might in a commercial agreement. This is because most modern Arbitration Acts were not drafted with trusts in mind and it is doubtful whether the problems catalogued by Professor Conaglen as to whether arbitration clauses in trusts are so enforceable are surmountable. Nevertheless, despite falling outside the scope of the Arbitration Acts, arbitration clauses in trusts can still be enforced by courts by exercising their inherent jurisdiction to stay proceedings. Owing to the court’s retention of discretion, the use of this inherent jurisdiction may well be better suited to arbitration clauses in trusts since these are not agreed upon by the parties to the trust in the way that arbitration agreements in commercial contracts are agreed upon by contracting parties.

In the first of two chapters addressing discretionary trusts (the other by Dr Turner), Professor Smith considers the phenomenon of what he describes as ‘massively discretionary trusts’, originally an offshore phenomenon. It is, like Professor Ho’s chapter, a tale of excess and its risks, and therefore tackles a number of similar themes, including that of form versus substance. Beginning with a timely reminder to distinguish a trust in the technical legal sense and the trust structure it may rest within and ending with a caution that there can be such a thing as too much of a good thing (in this case, discretion), this examination of excesses in discretion highlights the risks of adopting offshore structures in onshore jurisdictions. In the course of doing so, a number of provocative ideas are considered. Firstly, it is suggested that the rule that a charitable trust must be exclusively charitable in order to be valid cannot accommodate dispositive powers over the same trust assets. Secondly, the Privy Council’s advice in *Schmidt* v. *Rosewood Trust Ltd (Isle of Man)*,[2] to the effect that even beneficiaries to a trust may not have a right to information about the trust, is subject to strong criticism and even castigated as being contrary to both principle and prior English authorities. Thirdly, the suggestion that any object of a power of appointment is able to ‘block’ the exercise of the rule in *Saunders* v. *Vautier*[3] is seriously questioned. Fourthly, given the lack of guidance in a trust structure embedded with massive discretions, the conundrum that trustees face with settlor letters of wishes is laid bare. If they follow all the

[2] [2003] UKPC 26, [2003] 2 AC 709. [3] (1841) Cr & Ph 240, 41 ER 482 (LC).

wishes, the trust is a sham. If they don't, where are they to seek guidance? Finally, the supposed rule that trustees are not required to offer reasons for their exercise of discretion is also questioned against the backdrop of a surfeit of discretion in many modern trusts. Given the limited rights of modern beneficiaries, here used loosely, is there still trustee accountability, supposedly a core feature of the trust?

In the final chapter of Part I, Mr Pollard excavates and examines the supposed rule that fiduciaries such as trustees or directors holding powers or discretions must not fetter their exercise of that discretion. In legal terms, a fetter would take the form of an undertaking, sometimes contractual, under which the fiduciary constrains his future exercise of a power or discretion. Such a rule, if absolute, could seriously constrain fiduciaries to act to the detriment of their beneficiaries. In reality, though, as this chapter demonstrates, the rule is neither absolute nor a rule properly so-called, but is no more than a description of the need to comply with the terms of a relevant power – often in this context, the need to exercise it at the correct time, combined with a fiduciary's duty to consider all the relevant factors when exercising it. Whether it applies or not will therefore be entirely dependent on the terms of the power. In many modern trusts, as a result of wider powers being afforded to trustees, the 'rule' appears to apply less stringently. Insofar as it applies, although its effects are largely 'internal' to the trust, third parties dealing with trustees subject to its application may find that they are unable to avail themselves of equitable remedies against the trustee.

Six of our contributors have chosen to focus on beneficiaries' rights. Their contributions form Part II of this book. The first two of these authors have focused on the entitlements of beneficiaries, rather than their remedial consequences.

Professor Tang makes a forceful case for the court to use its powers to create what he has called 'a *Beddoe* order for beneficiaries'. There are both practical and theoretical reasons for the courts to embrace such a development. The theoretical arguments bring us back to one of the overarching themes of the conference from which these chapters are derived: the importance of the inherent jurisdiction of the court over the administration of trusts. The significance of this jurisdiction in the law of trusts is highlighted in the first chapter of this book, from Henderson LJ. The jurisdiction explains many features of the law of trusts that differ from other areas of voluntary obligations, such as the law of contract. The jurisdiction is also of immense practical significance, oiling the wheels of trust administration.

One way in which it does this is by allowing trustees the certainty of knowing that their costs of litigation will be met out of the trust fund if they apply for, and are granted, an order to court directing this, commonly known as a *Beddoe* order after the leading case of *Re Beddoe*.[4] Interestingly, the other area in which such pre-emptive costs orders are made with any frequency is in corporate law, where an order may be made directing that costs of the shareholder bringing a derivative action shall be met out of the company's funds irrespective of the result of the litigation. Such an order, commonly known as a *Wallersteiner* order, cannot be founded in the court's inherent jurisdiction over the administration of trusts, for self-evident reasons. It is founded in the court's jurisdiction over the costs of litigation, though in England that jurisdiction now takes a statutory form as Rule 19.9E of the Civil Procedure Rules.

How strong, therefore, is the case in principle for an equivalent order to be at the disposal of beneficiaries taking proceedings for the benefit of the whole trust estate, when their situation lies at the intersection of these two jurisdictions? The court both is competent to direct how trust funds should be used in such circumstances and has jurisdiction over the costs of proceedings. In practical terms, the importance of such an order is obvious: it will often be very difficult indeed for a beneficiary to take action, or unduly risky for him to do so, without some sort of indemnity for costs. The recognition of such an indemnity would go some way towards assuaging the concerns of another of our contributors, Professor Smith, about very widely drawn discretionary trusts.

Dr Turner, the other of our contributors who looks at the entitlements of beneficiaries under the trust itself, has focused on that most difficult of creatures, the discretionary trust. He seeks to consider what is meant by a discretionary trust or settlement, an enterprise which he himself acknowledges is plagued with difficulty, simply because the terms 'discretionary trust', or 'discretionary settlement', are descriptions derived from usage and not definitions. Dr Turner convincingly suggests that most such attempts so far have tried to find the distinguishing hallmark of a discretionary trust in the features and incidents of a beneficiary's interest under such a trust. This is a project doomed to difficulty and, it seems, outright failure, because the incidents of a beneficiary's interest under a discretionary trust either are shared with the beneficiaries of all trusts, and therefore cannot constitute a distinguishing hallmark of

[4] [1893] 1 Ch 547.

peculiarly discretionary trusts, or else are not common to beneficiaries of all discretionary trusts and are therefore insufficiently comprehensive to constitute such a distinguishing hallmark. Instead, Dr Turner suggests that the only hallmark of the discretionary trust lies in an appreciation of the trustees' discretionary powers of disposition.

It is interesting to note that attempts in the case law to focus on the interests of beneficiaries have shown the practical as well as theoretical limitations of that approach. In *Pearson* v. *IRC*,[5] the House of Lords had to examine the nature of the beneficial interest, because that was what the statutory definition in question required: it imposed tax, or not, depending on whether an interest amounted to 'an interest in possession'. So the House can hardly be criticised for investigating the nature of the interest, given the statutory language. But it meant that the fixed interest subject to an overriding power of appointment did amount to an interest in possession, despite the trustees' ability to deflect benefit elsewhere in exercise of the power; whereas a trust that simply directed the trustees to distribute benefit within a class would not confer an interest in possession on the beneficiaries. The distinction is quite visible, but the practical difference amounts to very little in dispositive terms, though a great deal in taxation terms. Hardly an ideal result, at least from the perspective of the Revenue. Statutory draughtsmen could usefully learn from Dr Turner's approach.

The next two chapters, respectively by Professor Penner and Professor Davies, both focus on beneficiaries' remedial rights following a breach of trust. Both consider the ramifications of the decision of the UK Supreme Court in *AIB* v. *Redler*.[6] This decision, rather like the related decision of *Target Holdings Ltd* v. *Redferns*,[7] sought a 'common sense' resolution of the dispute at issue. But to reach that result, the Court used reasoning which has provoked much comment: its reasoning has, at the very least, potential to disrupt fundamental concepts of trust law.

AIB agreed to lend £3.3 m against the security of a property valued at £4.5 m, but the lender insisted on securing its loan by a first charge. The existing mortgages on the property had to be redeemed so that could happen. The loan funds were advanced to solicitors – Redler. As a result of Redler's negligence, £1.2 m was paid to the prior mortgagee to redeem its mortgage, but this was too little by £0.3 m. So the prior mortgage continued on foot, albeit to secure just £0.3 m. Redler negligently paid the £0.3 m to the borrower. The borrower defaulted, the property was sold,

[5] [1981] AC 753. [6] [2014] UKSC 58, [2015] AC 1503. [7] [1996] AC 421.

and the first £0.3 m of the realisation was paid to the prior mortgagee – as was proper. But that meant AIB only received approximately £0.87 m. The solicitors admitted negligence, causing loss of £0.3 m; but AIB sued for breach of trust, seeking to recover a greater sum of money. AIB argued that Redler had disbursed the entire £3.3 m in breach of trust, because no valid *first* charge had been in exchange for the money, and so that the whole £3.3 m should be replaced. AIB's claim failed. That seems intuitively correct. But the reasoning by which the UK Supreme Court reached its conclusion has sparked fierce controversy.

Professor Penner specifically uses the context of liability for breach of the trustees' duty of investment to make his case. He shows how the possible application of the reasoning in *AIB* to such cases could produce outcomes very different to those traditionally expected, and how this is inappropriate. It would amount to a major reformulation of rules of trust law without an appropriate consideration of whether or not that is beneficial. Professor Penner argues that *AIB* does not have such radical consequences as its language might be taken to suggest, and the orthodoxy in trust accounting following a breach of trust has not been displaced. This conclusion has much to commend it for the stability and coherence of the law of trusts, and the more so because, as Professor Penner points out, the potential ramifications of *AIB* are not merely practical but, if taken at their widest, involve 'a demotion or obliteration of the beneficiary's interest in the trustee's performance of his trust obligations [which] would change our understanding of what a trust is'. As he continues, '[a]t the least we should make such a change with our eyes wide open, taking into account all the relevant considerations.'

Professor Davies similarly emphasises the radical consequences of a broader understanding of *AIB*, wherein the focus of judicial attention has shifted from the trustee's primary obligation to perform the trust, or, in appropriate circumstances, to pay the monetary equivalent thereof, towards the secondary obligation of the trustee to compensate for harm done. If given full effect, as noted above, this change in focus has the potential to bring about a radical reshaping of the law of trusts, and one that may well not have been intended by the Supreme Court. The trouble is, if it was not intended by the Supreme Court, fitting *AIB* into the pattern of trust law is not easy, as Professor Davies points out. Trust law rests fundamentally on the maxim that a trust must be performed, and that if the trustee will not perform it, ultimately the court will compel or procure performance. This has clear and necessary implications for the trustee's liability: the trustee must perform, rather than merely make good harm arising from non-performance. This marks off a radical boundary between the law of trusts and law of contract: there is no such thing as an 'efficient breach of trust', whereas the law does allow a contract breaker to walk away from a contract so long as she makes good the harm done thereby. So to change the focus from performance to compensation for harm caused by non-performance is not a minor or trivial change, but one that goes to the heart of the law of trusts, as Professor Penner indicated earlier. Professor Davies also usefully examines whether such a change will commend itself to other jurisdictions, as well as considering the large range of supplementary questions which arise out of any change to, or even any move towards, a focus on compensation for harm caused by a trustee's default rather the cost of her non-performance.

It is something of an irony that all these questions arise out of the search for a common sense answer to the factually simple case of a trustee's failure to apply trust funds in accordance with his duty. And while the answer given by the Supreme Court is a common sense answer, in the sense of an answer that is intuitively appealing and seems just, a further irony is that one can reach that answer by traditional reasoning which does not have such potential for sowing confusion in the law. The process of accounting would begin with falsifying the disbursement of the £3.3 m. The acquisition of a second mortgage did not cure the breach of trust, and so would not be taken into account at that stage. But what must be taken into account are the solicitors' duties. It is true that, on taking an account, the defendant trustee is not allowed to speculate that he would have used his powers in certain way and thereby mitigated the breach of trust. But what was at issue in AIB was not the trustee's powers, but its duties. Once in possession of the £3.3 m, it was the trustee's duty to acquire a first mortgage, and so what *should* show in the account is the first mortgage, not £3.3 m. Of course, what *did* show in the account was the second mortgage. On that basis, when the borrower defaulted, the trust fund *did* contain a second mortgage when it *should* contain a first mortgage, and the loss to the fund would be the difference between realisation of a first mortgage and realisation of the second mortgage, in other words, £0.3 m – the very sum awarded by the Supreme Court.

The final two contributions concerning the rights of beneficiaries focus on the vulnerability of those rights on divorce. This is an area of increasing practical concern, as well as being of theoretical interest. The assets of many high-net-worth individuals are often held in trusts, and when they divorce, the interaction between trust law and the statute law which governs divorce and financial provision on the breakdown of marriage becomes extremely important. Dr Wong and Associate Professor Lee both consider these problems, in relation to the laws of England and Wales and the laws of Hong Kong.

One of the main difficulties of anyone working in this area is that there are so many variables. The trust, or trusts, in question might have been created by the family of one of the spouses, and it might be completely fortuitous, so far as the marriage is concerned, that one of the spouses is a beneficiary of the trust. Or the trust might have been created by one of the spouses, or both of them, at a very early stage in their marriage when neither of them was particularly wealthy, and the wealth may have accrued to the trust during the course of the marriage. A good example of this is where shares in a start-up company are settled, which over the years become extremely valuable. Or the trust might be a recent creation, from the days of their wealth. Another variable is the nature and extent of the interest held by the spouse in the trust. Anyone familiar with the law of trusts knows just how varied such interests can be. And for reasons most often connected with tax planning rather than matrimonial law, it is very common for the spouse to hold only a discretionary interest, which does not amount to much in law, but given the expectations of the settlor, his wishes related to the trustees, and the trustees' inclination to respect such wishes, that interest may in practical terms be seen as a very valuable asset. What should a court making financial provision on divorce do in the face of such possibilities?

Again, it is one thing for a court hearing a divorce petition, and its consequent financial arrangements, to take a spouse's interest under a trust into account in calculating an equitable division of assets and appropriate maintenance payments. But the ability of the court to order access to those assets is quite another matter, particularly when, as is often the case, the trustees in question are not domiciled or resident in same jurisdiction as the matrimonial court. The problems in this area are not going away any time soon: indeed, they look set to increase in number and complexity. Both Dr Wong and Associate Professor Lee make timely and useful contributions to the understanding and resolution of such problems.

The final section, Part III of the book, contains six chapters which can be loosely grouped under the subject of trusts and wealth management.

There is a sense of disquiet with regard to the jurisprudence in relation to modern wealth management, in that banks seem to always have the upper hand vis-à-vis their customers. Associate Professor Christopher Hare tackles the issue of mapping out the concept of client sophistication and its impact on litigation by investors against banks. As a preliminary point, it is observed that, with a few notable exceptions, suits against banks have often resulted in the banks prevailing against the investor. An increasingly important feature in these battles against the banks is for the judges to examine the investors' level of sophistication – the more sophisticated the client, the less likely he or she would be successful. This chapter's central thesis is that the idea of investors' sophistication has been used in an inconsistent and indeterminate manner, resulting in a very pro-bank approach at the expense of investor protection. This thesis is developed by tracing the origins of the idea of client sophistication before taking a close look at the modern cases. As Associate Professor Hare demonstrates, the modern cases do not explicate the idea of client sophistication in a consistent and meaningful way, save for a reference to a mixed bag of tangential factors. It is difficult to disagree with this chapter's forceful observation that the current approach 'raises the spectre of inconsistent decisions turning on minor factual differences and untrammelled judicial discretion'. Ironically, even if the investor is regarded as unsophisticated, this does not mean that the investor would necessarily succeed. This is because the investor would still have to contend with a raft of adverse clauses like the non-reliance clause which might preclude a claim. To add insult to injury, Associate Professor Hare points out that some contractual documents contain a 'sophistication clause', i.e. the investor acknowledges that he or she is a 'sophisticated client'. It remains to be seen whether the courts will uphold such a clause. The need for the courts to unpack the idea of the sophisticated client with greater precision in future cases in order to reduce the uncertainty cannot be missed.

On a similar theme of banking contracts, Associate Professor Kelry Loi tackles the no-rescission and no-cancellation clauses found in these contracts. As Associate Professor Hare's and Associate Professor Loi's chapters demonstrate, it is a modern phenomenon in most financial centres in the world for banks to exclude or limit their liability with various forms of contractual clauses. In most cases, these contractual clauses are upheld on the basis of freedom of contract. Some critics have charged that this approach is a form of 'documentary fundamentalism' which unfairly favours the bank. To this end, Associate Professor Loi explores the validity of the no-rescission and no-cancellation clauses commonly found in banking-customer contracts. The context in which such clauses are relevant is as follows: typically, a customer might make a claim against the bank for pre-contractual misrepresentation and ask for damages or rescission of contract. In response, the bank would invoke a variety of clauses such as the no-rescission and no-cancellation clause to prevent the customer from rescinding the contract. If the bank is found liable for misrepresentation, the bank might also attempt to limit any claim for damages by relying on an exemption or limitation of liability clause in the contract. Thus far, modern case law and academic commentators suggest that such no-rescission and no-cancellation clauses remain effective even if the claimant purports to rescind the contract in which this clause is contained. In a carefully written chapter, this assumption is challenged both as a matter of authority and of principle. As a matter of authority, it is pointed out that the important decisions in this area have equated the no-rescission and no-cancellation clauses to arbitration, jurisdiction, confidentiality and choice of law clauses which survive any purported rescission of the contract. However, Associate Professor Loi makes a persuasive case that the equivalence to such clauses is a false one. While there are utilitarian reasons for the law to treat arbitration, jurisdiction, confidentiality and choice of law clauses as autonomous clauses, these utilitarian concerns are not pertinent in relation to the no-rescission and no-cancellation clauses. Also, the learned author perceptively observes that arbitration, jurisdiction and choice of law clauses only determine the forum in which liability is to be adjudicated, whereas the no-rescission and no-cancellation clauses are dispositive in relation to the liability of the parties. Thus, the case for treating them in a similar fashion is very much weakened. Furthermore, if we push the contractarian reasoning to its fullest extent, then this would mean that parties may also be able to contract out of rescission in situations such as duress and undue influence. Returning to first principles, Associate Professor Loi's central thesis is that the law ought not to uphold such clauses if misrepresentation is alleged, because the quality of the initial consent of the innocent party is impaired at the time of the formation of the contract. While not explicitly articulated, this analysis seems to be premised on the recognition of the huge power imbalance between the bank and its customers, especially with the use of standard form contracts.

The idea of whether a non-charitable purpose trust may be validated by a stroke of a draftsperson's pen is explored by Professor Kelvin Low. In a comprehensive study, the viability of the non-charitable purpose trusts is considered based on orthodox trust principles. This chapter is essentially a challenge of Justice Hayton's well-known thesis (before his elevation to the Caribbean Court of Justice) that the usual objections to a non-charitable purpose under English law may simply be overcome by prescribing a person or entity as an enforcer. In other words, Hayton characterizes the beneficiary principle as an enforcer principle – as long as a trust has an enforcer, it ought to be allowed. Hayton's argument has apparently found favour in some offshore jurisdictions which have legislated to provide for the non-charitable purpose trust. Several problems with validating the non-charitable purpose trust simply by prescribing an enforcer of the trust are identified. Professor Low perceptively points out that the primary objection to a non-charitable purpose trust is one of governance, i.e. there is no one to enforce the trust. This problem is not solved by appointing an enforcer. All this does is introduce the vexed and unresolved question: Whom does the enforcer owe duties to? If the enforcer owes a duty to the trustee, then we would be in a situation of 'a hopelessly circular loop of rights and duties'. However, if the enforcer is held not to owe obligations to anyone, then we are in the unenviable situation of having nobody to watch the watcher, which was the objection to non-charitable purpose trusts in the first place. Thus, the objection based on an ungoverned trust in relation to a non-charitable purpose trust is not resolved by appointing an enforcer. Professor Low also argues that any argument in favour of the validity of the non-charitable purpose trusts by analogy to the charitable trust is misconceived. The charitable trust is enforced by a public official, typically – the Attorney-General in most jurisdictions – who is under a public law duty to perform his or her duty. In contrast, it is not clear whether there is a workable legal mechanism to ensure that the enforcer of a non-charitable purpose trust performs his duties. Finally, Professor Low challenges the seemingly conventional wisdom that offshore non-charitable purpose trusts would inevitably be recognized as a matter of private international law by onshore common law jurisdictions.

The chapters by Mr David Chaikin and Ms Eve Brown, and by Professor Francesco Schurr deal with trust law in their respective jurisdictions – Australia and Liechtenstein. Mr Chaikin and Ms Brown make a case for the modernisation of trust law in Australia. Their proposal is motivated by purely pragmatic grounds, i.e. that Australia should compete with Singapore, Hong Kong and New Zealand for a share for the burgeoning Asian wealth management industry. They point out that the wealth management market dealing with Asian high-net-worth individuals is very large and Australia is missing out on a share of this market. Mr Chaikin and Ms Brown's suggestion is that in order for Australia to capture a larger share of the wealth management industry, its trust law needs to be modernised to accommodate for the main drivers of setting up a trust, namely asset protection, succession planning, settlor control and tax consideration. They imagine a federal Alternative Australian Trusts Act and flesh out a design, scope, licensing and registration scheme of the proposed statute. While Mr Chaikin and Ms Brown have sketched out a bold, viable and comprehensive plan, it seems to the reader that whether this proposal will ultimately be taken up by the Australian Government will depend on the political will of the day.

Professor Schurr's chapter provides a fascinating case study of the trust transplanted into a civilian system, i.e. in Liechtenstein. Liechtenstein is a unique example because it has imported the English concept of trust by way of statute in 1926. The rationale for the transplant in Liechtenstein was wholly pragmatic – to attract investors from other jurisdictions and to build up a fiduciary service industry. Professor Schurr expertly brings us through a 'clash of legal cultures' between the common law and civilian legal tradition in relation to this legal transplant and how this is resolved in the context of Liechtenstein. What is particularly striking about this chapter is that it demonstrates that most of the effects of a common law trust are achieved by way of a statutory solution without resort to equitable jurisdiction or reference to the idea of splitting of title into legal and beneficial title. Ultimately, what Professor Schurr's chapter demonstrates is that it is possible to transplant the trust into a civilian legal system by statute if there is a commitment by the national courts to apply and interpret the law of trusts in accordance with the English legal tradition.

Finally, on a more philosophical level, Mr Tony Molloy QC, in a provocative chapter, challenges us to think whether status quo in relation to the contemporary use of the trust is still tenable. The trust is now used by ultra-high-net-worth individuals to minimize taxes or even evade the payment of taxes. This, Mr Molloy argues, may alienate the general population and make them feel that ultra-high-net-worth individuals are not 'all in together' with the rest of society. Such a sentiment coupled with vast income inequality may engender intense hostility and discontent, which may lead to explosive social unrest. Relying on Professor Piketty's thesis that the rich are accumulating wealth at a more rapid pace and that wealth is now concentrated in fewer and fewer hands, Mr Molloy warns that inevitably the trust will be seen as toxic because it is the prime driver and protector of wealth accumulation. Mr Molloy suggests that trust advisors should counsel their clients that they must contribute to supplying goods of public necessity and that there needs to be a redistributive taxation scheme of high wealth. While not all may agree with Mr Molloy's controversial views, few of us will disagree with him that in light of the Common Reporting Standard in relation to Automatic Exchange of Information between participating tax authorities promulgated by OECD, the 'game will be changing for the trust'.

For those of us who practise, teach and write about trusts, we certainly live in interesting times. And we hope that this volume will contribute to that interest.