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Introduction

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This book results from a conference, held in Singapore in August 2019, which we organised to discuss the implications for trust law and wealth management of a topic much discussed in other contexts, but less so in the present context: the enormous and continuing rise of Asian wealth. The world economy has changed and continues to change in focus to a degree not seen since the rise of European maritime powers, beginning in the late fifteenth century. This change is compounded by the accelerating pace of technological change. The law – including trust law and the law of wealth management – must acknowledge and accommodate these developments and their consequences. We hope this volume is a contribution to that process.

Our book begins with an overview on 'Family Trusts Today' by Lady Arden (Chapter 2). This chapter provides an insightful *tour d'horizon* of the problems that are encountered in modern trust law practice. The chapter focuses on four problems that affect modern family trust practice: privacy in family trust litigation, over-dominant settlors and the doctrine of sham trusts, trustees' liability to trust creditors in the event of insolvency, and climate change and the handling of disputes between beneficiaries and trustees. Lady Arden's incisive treatment of the problems highlights the complexity of modern trust practice and provokes us to consider more deeply the fundamental tenets of the trust institution in order to work towards solutions.

On privacy in court proceedings, litigation concerning family trusts is not, by default, heard in private. The court needs to balance between the private interest of protecting beneficiaries' identities (especially the identity of any vulnerable beneficiaries) and the public interests of open justice and transparency. It is interesting to note that some jurisdictions are now offering court-based resolution of disputes in private, but only in the context of 'non-local' disputes, where the public interest in transparency may be less than in a fully domestic context. The Singapore International Commercial Court (which, notwithstanding its name, has jurisdiction to hear trust disputes with an 'international' and 'commercial' character) is one such example. Beyond the litigation context, developments such as trust registration and data protection also enable greater transparency in private trusts but possibly at the cost of a loss of privacy.

As to an over-dominant settlor and the sham trust doctrine, Lady Arden's analysis of the landmark decision of *JSC Mezhdunarodniy Promyshlenniy Bank* v. *Pugachev*[1] raises the profound question as to the proper basis on which to invalidate a trust, even where it satisfies the usual certainty and formality requirements and does not infringe the concept of irreducible core of trustee obligations.

Turning to the trustees' liability to trust creditors in the event of insolvency, the discussion exposes the potential unfairness arising from the unitary nature of the legal personality of the trustee in cases where the trustee has incurred liability on behalf of the trust. Without distinguishing between his or her personal and fiduciary capacities, the trustee's personal assets are put at risk to meet the trust liabilities. The trustee may protect himself or herself through an appropriate contractual limitation clause. Alternatively, the law may consider introducing statutory limitation on trustee liability, such as Article 32 of the Jersey Trusts Law.[2]

Finally, as climate change and sustainability developments have become global concerns, the beneficiaries may disagree as to how trustees, generally guided by the *Cowan* v. *Scargill* principle of maximising financial returns in the absence of explicit direction in the trust deed, should exercise their powers of investment. Unlike the corporate context, where corporate social responsibility is a recognised pillar of corporate governance, it is more difficult to argue that investment in the family trust context should be guided by a sustainability strategy.[3] Lady Arden suggests that on encountering such a disagreement with the beneficiaries, even though there is no obligation on the part of the trustees to consult the beneficiaries, the trustees would be wise to confer with their beneficiaries. There are two clear benefits to a consultative approach to the problem for the trustee. First, where all the trust beneficiaries are of majority age and sound mind, their concurrence in a certain course of action would provide good defence against an allegation of breach of trust raised by them subsequently. Second, such an approach would help to preserve good relations between the beneficiaries and trustees.

Part I of this book considers various legal issues arising from growing Asian wealth. In Chapter 3, Thomas P. Gallanis points out that private wealth in Asia is substantial, representing 33 per cent of the global population of high-net-worth individuals; yet, there is a dearth of legal analysis of Asian wealth, particularly by texts written in English. This part of the collection aims to contribute to the literature by offering chapters on legal issues in relation to Asian wealth transmission, investments in international real estate, familial disputes, family offices and private trust companies. While many issues are considered in this volume, other pressing concerns arising from the growth of Asian wealth have not been aired due to space

[1] [2017] EWHC 2426 (Ch).
[2] Considered in *Investec Trust (Guernsey) Limited* v. *Glenalla Properties Limited* [2018] UKPC 7.
[3] Where pension trusts are concerned, see Susie Daykin, 'Pension Scheme Investment: Is It Always Just about the Money? To What Extent Can or Should Trustees Take Account of Ethical or ESG Factors When Investing?' (2014) 28(4) *Trust Law International* 165.

constraints. This does not mean that these topics are less important. On a macro level, growing Asian wealth raises important issues like inequality, taxation, and philanthropy. Certainly, we are acutely aware that these topics are significant and, indeed, inequality and taxation have been dealt with by Tony Molloy in our previous collection, *Trusts and Modern Wealth Management*, edited by two of the current editors together with Kelvin F. K. Low. Philanthropy is another topic that goes hand in hand with rising wealth. Further, with the growth of wealth, many Asian families seek to increase their philanthropic activities. Thus, philanthropy during the time of COVID-19 was the main theme of our 2021 *Trusts, Wealth and Philanthropy* conference jointly convened by the University of Melbourne, Singapore Management University and the University of York. We hope that this volume will inspire more scholarly work on these and other topics associated with Asian wealth.

In Chapter 3, Thomas P. Gallanis considers the use of US law and legal institutions for wealth transmission by citizens and residents of Japan or China. Five prominent mechanisms found in US law are unpacked, namely wills, revocable and irrevocable trusts, life insurance policies, retirement accounts, and survivorship interests in real property by joint tenancies or transfer-on-death deeds. In exploring these mechanisms, Gallanis expertly tackles the difficult conflict of laws issues in international wealth transmission. He also deals with the implications of US tax in relation to succession. This chapter is invaluable to the wealth advisors of citizens and residents of Japan or China with assets or a significant presence in the United States. Gallanis ends the chapter by identifying five policy questions in relation to Asian wealth in the United States. First, does the United States have the right rules on choice of law given that wealth is mobile and often intangible? Second, should the ability of foreigners to own real estate in the United States be circumscribed? Third, does the United States have the right rules for the treatment of trusts as compared to corporations? Fourth, does the United States have the right rules to determine source and situs of income and capital? Finally, when should the laws and legal institutions facilitate the transmission of private wealth of citizens of another country? No doubt, these penetrating policy questions form an invaluable agenda for research by scholars in the field.

Edward S. W. Ti's chapter (Chapter 4) takes up the second policy question posed by Gallanis albeit from the perspective of Australia, New Zealand, and Canada. The topic of Asian wealth is often tied not just with international trusts but also with investments in foreign real estate. Anecdotally, Asians demonstrate a fondness for real estate investments all over the world. This chapter tackles the topic of the impact of Chinese wealth and their investments in residential property in the West. According to Ti, the recent narrative is that wealthy Chinese people are buying residential property in Western countries such as Australia, New Zealand, and Canada causing the property market to become unaffordable for the local population. Ti helpfully unpacks the Chinese motivations for buying residential property in the West. The reasons include the rise of wealth in China and astronomical housing

costs in major cities such as Beijing and Shanghai, making real estate in the West seem like affordable investments. Other soft factors driving these buyers include planning for children who study abroad, possible immigration, diversification of wealth portfolio, and economic and political confidence in those Western countries. According to policymakers, the influx of these foreign buyers has resulted in the local population being outpriced. Hence, governments in those countries had to enact regulatory measures to prevent foreigners from buying real estate. This chapter then embarks on a careful study of the regulatory responses in Australia, New Zealand, and Canada. The regulatory measures include approval by government bodies before purchase and enhanced stamp duties for foreigners buying real estate. In the case of New Zealand, there is an outright ban on foreigners from purchasing residential property.

Ti's thesis appears to be twofold. First, Ti argues that 'if a particular group is specifically highlighted by a country's lawmakers to justify the enactment of a law, there ought to be specific data or evidence to back this up'. Second, the author makes a plea for more temperate remarks in relation to the regulatory responses so as not to stir up anti-Chinese sentiments. Presumably, such anti-Chinese sentiments may have negative repercussions on not just foreigners but also on permanent residents and citizens of those countries who have an Asian background.

In relation to the author's second thesis, the editors are in complete agreement with the need for sensitivity by political leaders. As seen by the recent pandemic, anti-Asian feelings have led to ugly verbal abuse and unprovoked physical attacks on members of the Asian community living in the West, especially women and the elderly. However, Ti's first thesis, that there should be more data before policymakers suggest a particular group is responsible for the rise in the property market, is a more nuanced issue. While the editors agree that it is not a good idea to make intemperate remarks, the point is that there is indeed empirical data from other developed jurisdictions such as Singapore and the United States (as demonstrated by Thomas P. Gallanis's chapter) that Chinese buyers are among the largest group of foreigners buying international real estate. Furthermore, China has also enacted regulatory measures to discourage its citizens from making real estate investments abroad. Indeed, Ti concedes that he is not making the argument that 'Chinese investors are never the cause of housing unaffordability'. It is the present editors' view that regulatory responses to prevent housing prices from becoming unaffordable to its local population are completely justified, though intemperate remarks are unhelpful and potentially dangerous.

Turning to a different topic, Lusina Ho, in Chapter 5, investigates the issue of mental capacity required for wills and lasting powers of attorney in Hong Kong and Singapore. Certainly, this is an important topic given the rapidly greying population of these two jurisdictions – and many other Asian jurisdictions. Specifically, Ho explores the application of mental capacity law derived from England to the cultural contexts of Hong Kong and Singapore. In this chapter, she demonstrates that

there are great tensions inherent in efforts to apply English law, which is rooted in notions of individual autonomy, to these Asian jurisdictions. Ho carefully analyses the Hong Kong cases showing that the presumption of testamentary capacity with respect to wills that are duly executed and rational on their face is ambivalent, having only been endorsed in certain first instance decisions. In contrast, Singapore courts embrace the presumption of testamentary capacity but appear to define 'irrationality on the face of the will' differently from their English counterparts. There are hints that a Singapore court may consider a will to be irrational if certain beneficiaries are chosen and other beneficiaries are cut out from inheritance.

In this chapter, Ho also traverses an under-investigated area, that is, mental capacity for executing lasting powers of attorney. While Hong Kong courts have yet to seriously consider undue influence in relation to power of attorney, Singapore courts have had the benefit of several major decisions where the lasting powers of attorney were vitiated on the ground of undue influence. Ho rightly concludes that the key to protecting against both undue influence and testamentary incapacity is to seek good quality legal service in preparing and executing these documents.

The stereotypical Western view of the Asian family is one where the family is a harmonious unit and disputes are rare and frowned upon. However, the next two chapters, Chapter 6 by Rebecca Lee and Chapter 7 jointly written by Yip Man and Tang Hang Wu, demonstrate that this view is misconceived. Asian families, especially wealthy families, like all families do have their fair share of disputes.

In Chapter 6, Rebecca Lee explores inheritance disputes from the Hong Kong perspective. She demonstrates a recurring undercurrent in these cases, namely that Hong Kong law, which is based on English law and like English law shows a firm commitment to testamentary freedom, often clashes with perceived familial obligations arising out of local cultural expectations. These cultural norms include an unspoken expectation that certain family members will inherit some parts of the testator's wealth. When these expectations are frustrated, the family members may be tempted to apply for maintenance from the deceased's estate. Interestingly, Rebecca Lee demonstrates that the Hong Kong statute for maintenance of family members is narrower than its English counterpart, requiring the applicant to have been maintained either wholly or substantially by the testator prior to his or her demise. Hence, in both cases discussed by Rebecca Lee, the applicants failed to obtain any maintenance. She argues that the denial of maintenance in these cases shows that the principle of testamentary freedom remains the dominant legal value found in Hong Kong law despite the perceived importance of familial obligation in Chinese culture.

Outside testamentary disputes, another fertile ground for familial disputes are trust disputes. Wealthy Hong Kong families have for many years settled their wealth on discretionary trusts, both domestically and in offshore jurisdictions, as part of their succession planning. Many of these settlers are domiciled in China and hence subject to Chinese forced heirship rules. Since these trusts effectively oust forced

heirship rules, they have become the foci of disputes. Rebecca Lee discusses such a trust dispute in the context of litigation involving HSBC as trustee of the Lo Family Trust. In this case, the matriarch settlor claimed that there was a common understanding between her and the trustee that the trustee was to give overriding weight to her instructions, instead of following the trustee's duty to treat all beneficiaries fairly. Unsurprisingly, Madam Lo's assertion was rejected by the Hong Kong Court *inter alia* on the ground that this would mean that the trust would be a sham. Other reported trust disputes considered by Rebecca Lee include an application to the Royal Court of Jersey for the Court's blessing for transfer of trust assets involving the family of Hong Kong's largest property developer. In conclusion, Rebecca Lee argues that full testamentary freedom appears to be both the prevailing approach and the starting point of Hong Kong succession and trust law.

Continuing with the theme of familial disputes, in Chapter 7, Yip Man and Tang Hang Wu examine the legal contests over the family wealth of high-net-worth families in Singapore. The first part of the chapter demonstrates that for many wealthy Asian families, the members of the family are deeply intertwined with, and often inseparable from, the family wealth and business. The consequent collectivist thinking about family property often gives rise to grave difficulties when deciding the individual ownership of family assets amongst family members on the demise of the family's patriarch or matriarch. The second part of the chapter embarks on a deep dive into five landmark cases in Singapore to extract further insights into family disputes. Several factors emerge as drivers of familial disputes: they include a culture that prefers sons over daughters, a culture of informality in relation to beneficial entitlement of shares in the family company, the unclear ownership status of real estate, and the effect of the declining mental capacity of the family's patriarch or matriarch. The normative implications that emerge from these family wealth disputes are that English property and trusts doctrines, which are received by the courts of Singapore and used by them to unravel these conflicts, are hardly the ideal tools to resolve family disputes caused by a perceived breach of Asian familial and cultural norms. Yip and Tang then proceed to provide a roadmap to careful succession planning to minimise such familial disputes: to bridge the gap between a legal system that still manifests the cultural norms of its English (often nineteenth century) origins and the familial and cultural norms of (twenty-first century) Singapore.

Vincent Ooi and Chan Ee Lin end this part in Chapter 8 by tackling the opaque world of family offices and private trust companies. They also consider the use of Singapore's Variable Capital Company in structuring private wealth. Family offices and private trust companies are commonly used structures by wealthy families all over the world and yet are never mentioned in any of the major trust textbooks. Thus, this chapter contributes to the literature by providing an 'on the ground' survey of how wealthy Asian families are structuring their wealth. Beyond the descriptive account of the structures, Ooi and Chan provide insightful analysis of settlors who attempt to retain control over the trusts they establish and the methods

by which the trusts' integrity may be preserved. Ooi and Chan propose certain strategies including setting out clear roles and responsibilities in terms of management of the structures, how decisions are made within the context of the family office or private trust company, and how future disagreements will be handled. This chapter should be read together with the earlier chapters on familial conflict because such disputes are usually framed by these structures. The larger theme that emerges from Ooi's and Chan's piece is that just as companies should have a proper governance structure, wealthy families should also establish proper family governance structures in their trusts, trust companies, and private offices. Indeed, proper family governance structures appear to be one of the most important factors in avoiding family disputes.

The second substantive part of this book is entitled 'The Changing Legal Context'. Legal systems have always been faced with change, but rarely so much change, in so short a time, as today. Both the human and the technological context of trust law is changing rapidly around us. Chapters 9–12 all deal with what might be called the internal development of trust law, whereas Chapters 13–15 address the external regulation of trusts.

Chapter 9, 'Trusts of Cryptoassets', by Kelvin F. K. Low, addresses the changing technological context of trust law. Cryptoassets have very rapidly established themselves in the world economy. Whether that is a good thing, or a bad thing, is for others to decide. But the one thing the law would be very ill-advised to do is simply to try and ignore this genuinely novel phenomenon. The process of common law accommodation, seen so often in other contexts, and particularly in another time of enormous change, the Industrial Revolution of the eighteenth and nineteenth centuries, has once again risen to the challenge. This time, the leading development came in New Zealand, in the *Cryptopia* case,[4] with its recognition of cryptoassets as the subject of property rights and the Singapore Court of Appeal in *Quoine Pte Ltd* v. *B2C2 Ltd*,[5] albeit in the form of *dicta* on the issue of a trust over cryptoassets.

Some cryptoassets are readily assimilable into the existing legal framework as choses in action. In these cases, the new technology of cryptoassets is simply a novel way of recording the existence of, and dealing with, the benefit of obligations – in other words, choses in action. These new means of structuring an existing concept may still raise questions, such as the application of formality rules, but the questions are limited and not particularly difficult in concept.

However, certain other cryptoassets are more fundamentally problematic for the legal order, because they do not constitute a claim on anyone, and so it is hard to view them as choses in action. The very phrase 'chose in action' betrays the problem: a chose in action necessarily involves, as the very words indicate, a claim against someone enforceable (only) by action. But an asset such as a bitcoin is not

4 Ruscoe v. Cryptopia Ltd (in liq) [2020] NZHC 728.
5 [2020] SGCA(I) 2.

a claim against anyone. It is just digital information processed in accordance with the specific programming of a particular computer network. And how often have we been told that information cannot be property? Yet many objections to conceptualising information as the subject matter of property rights do not apply to cryptoassets. Most importantly, the limitless replicability of most information is simply not possible in the context of a bitcoin: the code – the information – constituting a bitcoin is as unique as a particular gold coin bearing a serial number, and that code only has meaning within the specific programming of a particular computer network.

Low makes a very useful contribution to working out some of these problems in the context of trust law. It is an area of enormous importance, where academic investigation and theorisation can be very useful, as witness the work of Fox and Green, cited in the *Cryptopia* case.[6] It is also an area where academics can make a significant contribution through their participation in the many important institutional responses to the rise of cryptoassets by (*inter alia*) the Law Commission of England and Wales (in its Digital Assets Project), the Bank of England (in its Central Bank Digital Currency Taskforce), the Monetary Authority of Singapore (in its Project Ubin), UNIDROIT (in its project on Digital Assets and Private Law) and the Bank for International Settlements' research into, and reaction to, such developments.

James Lee's chapter, Chapter 10, looks at the changing social context of trust law: the ways in which practitioners, acting for settlors, seek to test the boundaries of trust law and develop new structures – or at least seemingly new structures – for the management of wealth. As Lee notes, so far in the United Kingdom, most of the accommodation of these developments – or not – has occurred in judicial decisions, whereas other jurisdictions, particularly New Zealand but also Singapore and many offshore jurisdictions, have recently used statute law to develop their law of trusts.

Lee investigates the doctrine of the 'illusory trust', which was to the fore in the Privy Council decision of *Webb* v. *Webb*.[7] The interrelation of this doctrine and the doctrine of sham trusts could still usefully be clarified in judicial decisions, though conceptually the distinction is clear. Sham trusts involve an apparent or ostensible attempt to create a trust, where, because of proven fraud, the courts are entitled to disregard the language of the trust and use extrinsic evidence to conclude that such language is simply a sham and of no effect, so that the purported trust property is in fact simply held for the benefit of the settlor. Illusory trusts, by contrast, involve an exercise in construction: the very words of the trust instrument, when looked at in the round, and as a whole, lead to the conclusion that there are no trusts for the benefit of people other than the settlor, but simply an outright trust for him or her. In other words, as a matter of construction, the courts reach the conclusion that the settlor has simply remained beneficial owner of the assets. The result of applying each doctrine is the same, but the means of reaching it are distinct.

6 [2020] NZHC 728 at [63]–[65].
7 [2020] UKPC 22.

Lee's chapter also raises two other important themes. First, the extent to which the courts' resolution of ostensibly novel problems can be found in their reaction to developments earlier in time. Second, the question of what might be the best institutional forum for the future development of trust law.

As regards the first of these questions, Lee cites a vitally important point made by Kós P extrajudicially in New Zealand: 'Perhaps in equity more than any other part of our law, one drives ahead safely with one eye on the rear vision mirror'. It is a fascinating realisation that many apparent human changes in the context of trust law are, on closer inspection, nowhere near so novel as the technological changes: human beings change much less fundamentally, and much less rapidly, than technology. For example, trust law has for centuries had to deal with overbearing settlors who wish to retain many powers over the trust assets. One example of this is the law surrounding powers of appointment, from the seventeenth- and eighteenth-century law on general powers to the development of intermediate powers in the 1970s and 1980s. There is much to be learned from the thoughts of our forebears, even if we choose different outcomes today.

As regards the second of these questions, different jurisdictions have found different balances between judicial development and statutory development of trust. Lee points out that the response in the United Kingdom has been largely judicial, though the response elsewhere, for example, in New Zealand and Singapore, has been much more a matter of statute law. It is very hard to say which response is in any sense 'better'. Each response has its merits and demerits. The judicial response is hugely flexible and nuanced, but that may come at the cost of some uncertainty, especially in the early stages of the response. By contrast, the statutory response can provide a sense of clarity – sometimes misplaced, given that statutes have to be interpreted – but that certainty can come at the cost of inflexibility and difficulty in coping with unanticipated situations. The United Kingdom has, historically, shown something of a *via media* through these apparently contrasting approaches: it tends to allow developments to occur initially through the proposals of practitioners in trust instruments, and the disposal of disputes about them by the courts; and then an emerging consensus is often enacted in new trustee legislation.

The contrast between judicial and legislative development of trust law is also apparent in the next two chapters, Chapter 11 by David Pollard and Chapter 12 by Tobias Barkley. Both focus on pension (superannuation) trusts, some of the largest and most economically and socially important trusts in the world today.

Pollard's chapter deals with the developing English law applying public law concepts of good decision-making to private law institutions such as trusts. The judges are the drivers of this process. It is hardly surprising that trusts as big and as important as pension trusts attract more scrutiny, through litigation, than traditional family trusts, and that the judges are more willing to impose stricter (albeit still liberal) standards on decision-making by trustees of such trusts. Crucially, of course, the beneficiaries of such trusts are not volunteers but bought and paid for their rights under the trust. This fact clearly warrants and legitimates greater judicial oversight of pension trustees.

The more difficult question, however, is how far the judges will apply new principles developed in one particular area of trust law – pension trusts – to all trusts, including traditional family settlements where the justification for more intrusive oversight of trustees is less. This question of the scope for application of developing principles raises squarely issues, noted above about judicial development of the law: the possibility of nuance, whereby the judges distinguish between pension trusts and other types of trusts, coupled with uncertainty in the law until such nuance is established – or else is definitively rejected.

Barkley's chapter addresses Australian superannuation law. This provides an interesting counterpoint to the previous chapter, not just because of the difference in jurisdiction, but also because so much regulation of pension trustees in Australia is statutory in origin. And again, the distinction noted above between judicial and statutory development of the law shows itself. Statutory rules are, on their face, clearer, and apply to a clearly defined category of trustees – superannuation trustees. Superannuation trustees are easy to identify, because superannuation trusts require prior administrative approval: the trustees of those trusts that have such prior approval are superannuation trustees, easily identified by reason of that prior approval. (While it is possible that an unapproved superannuation scheme might attract the statutory regulation of its trustees, this situation is not going to be common: in other words, identification of who is a superannuation trustee, as opposed to some other kind of trustee, is, in the vast majority of cases, going to be easy.) So, the scope for application of the new statutory rules is certain, easy to identify, and stable. However, the content of those rules can still leave doubt. And, more interestingly, the possible effect of the new statutory rules by analogy on areas to which they do not directly apply raises difficult and as yet unanswered questions.

Chapter 13, by Simone Wong, moves the discussion into a new area. While this chapter is still concerned with recent changes in the law applicable to trusts – the effect of unexplained wealth orders on trusts in English law – the perspective of her chapter is different. The previous four chapters (Chapters 9–12) were concerned with the development of internal trust law rules, that is, the development (whether by judicial decision or by statute) of the relationship between trustees and beneficiaries, which in turn may have some effect on the extent to which a settlor achieves her or his desired goals. Unexplained wealth orders, an important new weapon in the fight against financial crime, particularly money laundering, concern the external regulation of the holders of wealth, including trustees, by public authorities.

The trust has traditionally been a private institution, in the sense of not being subject to the scrutiny of outsiders, including public authorities, as well as in the sense of being a private law institution. Indeed, historically, one of the great attractions of using a trust structure to manage wealth was its privacy and the absence of public scrutiny, intervention, or supervision. This was seen by settlors and trustees as a considerable advantage of trust structures, as opposed to, say, corporate structures, where some degree of disclosure and publicity has always been part of the