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EW Barker Center for Law & Business Working Paper 21/06

NUS Law Working Paper 2021/023

# Restructuring Business Trusts as Unregistered Companies

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**[Uploaded November 2021]**

# RESTRUCTURING BUSINESS TRUSTS AS UNREGISTERED COMPANIES: INTERMEDIATE HYBRID ENTITIES[1]


## Abstract

*There has been a revival in the use of alterative business forms which harks back to the unincorporated joint stock company that was often a partnership with trust characteristics. REITs and business trusts form a large component of the Singapore Exchange but there are issues with their liquidation and restructuring, particularly involving overseas assets. A recent Delaware Chapter 11 case discussed what a business trust is and whether it is a separate entity. In turn, the concept of legal persona has been linked with affirmative asset partitioning by a UK Supreme Court veil piercing case. Such partitioning existed with partnerships and trusts and this was recognised by Victorian legislatures which crafted early company legislation. They could be seen as "unregistered companies" and wound up and restructured in a way that paralleled an incorporated company.*



**Keywords:** Company Law; Trusts and Equity; Insolvency and Restructuring; Business Trusts; Asset Partitioning; Separate Legal Personality; Unregistered Companies; Partnerships


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[1] Francis Rose, "Raising the Corporate Sail" [2013](4) LMCLQ 566, 568, sees the limited liability partnership as an intermediate or hybrid form of association that may not fully be a separate legal entity.

CONTENTS

# I Introduction

Corporate restructuring is happening all around the world as attempts are made by some financial centres to become international debt restructuring centres in the midst of troubled economies, now with Covid-19 which has hit the hospitality sector especially hard. But problems in the bond market started much earlier, with the decline in commodity prices in 2012 and 2015 badly impacting the resource and shipping sectors worldwide, and recovery has not been able to remove default fears in these sectors due to previous overleveraging. In Singapore, there has been a significant number of defaults on wholesale bonds listed on the Singapore Exchange since 2016, which includes those of many foreign entities, as well as some companies and business trusts set up in Singapore that are discussed in Part II, often involving assets overseas, such as in the Chapter 11 restructuring of the Eagle Hospitality Real Estate Trust (EH-REIT) discussed in Part III.

While there may have been some contractual workouts in Singapore, the uncertainty linked with them have meant that most restructurings have taken the form of formal schemes of arrangement, which since the Companies (Amendment) Act 2017 (now Insolvency, Restructuring and Dissolution Act 2018 (IRDA) which came into force in July 2020) have had some elements of Chapter 11 woven into them. There are serious expropriating effects in this regard as a 75% vote can override the wishes of the minority creditors and shareholders through exit consents, variation of rights and compulsory acquisitions. In the case of creditors, the new provisions in Singapore also allow a cramdown if the requisite majority cannot be obtained. As such, questions of oppression can arise with informal work-outs (even if in accordance with the trust deed) and so there has been greater use of statutory procedures even in the US if unanimity is required for bondholder votes in a contractual workout.[2]

The application of trust scheme voting is always analogized with what is done for the company. The issue with business trusts, however, has been with respect to jurisdictional basis for such schemes. It is ostensibly Order 80 of the Singapore Rules of Court[3] or Part 64 of the UK Civil Procedure Rules[4] which gives the court supervisory jurisdiction over trusts, although it has been said by an Antipodean judge that this inherent power did not include the winding up of trusts[5]. However, any reorganisation could simply be in line with the trust deed as opposed to formal corporate restructuring rules and the problems discussed above might still remain. We will see that we have to delve into the past to understand the statutory basis for trust restructuring, by

[2] See *CNH Diversified Opportunities Master Account v Cleveland Unlimited,* No 42, 2020 WL 6163305 (NY, Oct 22, 2020).

[3] Cap 322, R 5, 2014 Rev Ed.

[4] The CPR were made pursuant to the Civil Procedure Act 1997, which replaced the Rules of the Supreme Court 1965 (SI 1965/1776) and County Court Rules 1981 (SI 1981/1687), and which came into force on 26 April 1999.

[5] RW White, 'Trusts – An Australian Perspective', Paper presented at the Higher Courts Seminar, New Zealand Institute of Judicial Studies (New Zealand, 21 and 24 May 2010), [35], referring to *Re Gaydon* [2001] NSWSC 473, 29-30.

understanding the nature of asset partitioning in relation to companies in Part IV, partnerships and trading trusts in Part V, and those provisions in Commonwealth Companies Acts with respect to 'unregistered companies' in Part VI.

It will be argued below that asset partitioning creates a notional fund that has its own personhood for the purposes of liquidation and restructuring which was the concern of the early drafters of the UK Joint Stock Companies Acts[6], with the later Companies Act 1862 having almost half of its provisions on winding up and schemes of registered companies and partnerships or associations as that was the first time they were differentiated when prior to that all were considered joint stock companies. Such a notional fund has been used to explain the floating charge which English law has struggled to explain how it does not latch onto any collateral but floats as present security over the entire business undertaking of a company until a crystallizing event occurs, and may be one reason why Australia has tried to remove the fixed/floating charge divide in its Personal Property Security Act 2009 (Cth). The most famous of English commercial law academics, Professor Goode, has long championed the US position of seeing the fund as having a separate existence to explain the floating charge since the first edition of his book in 1988, *Legal Problems of Credit and Security*, and which is repeated in the Sixth Edition.[7] In particular, it is stated that:

> In English law, a fund is considered to have an existence distinct from that of its components. The contents of the fund are constantly changing as assets are removed from the fund and new assets come into it, but the identity of the fund remains unchanged….Indeed, an open-ended fund (i.e. one which by the terms of its establishment is capable of increase with the addition of new assets) has a notional existence even at times where there are no assets comprised in it.…An analogy is not hard to find. The interest of a beneficiary in a trust fund is exactly in point.[8]

From the US, Merrill and Smith have argued from a property and informational cost perspective that both secured transactions and trusts create intermediate rights.[9] The institutions that facilitate those rights through asset partitioning are themselves sometimes intermediate or hybrid entities. While the focus of this article is on the trust as an institution which is more obviously compared to the corporation, Hansmann and Kraakman pointed out at the same time that asset partitioning is about priorities and this can also be achieved with secured

[6] It has been estimated that 30% of companies registered between 1956 and 1883 became insolvent, many within 5 years: A Fallis, *Evolution of British business forms: a historical perspective* (ICAEW, 2017), 19.
[7] Louise Gullifer, *Goode on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th ed, 2018), [4-03 - 4-07].
[8] *Ibid*, [4-04]. See also Eilís Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (OUP, 2nd ed, 2014), 322 that Goode's theory 'has attracted significant judicial support in modern leading cases' such as *Re Spectrum Plus Ltd* [2005] 2 AC 680, 139 *per* Lord Walker. See also *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, 11 *per* Lord Millett.
[9] Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101(4) Columbia Law Review 773.

transactions.[10] The possible difference which has recently been highlighted is that the creation of an entity is needed for floating priority whereas security interests create fixed priority.[11] While this is not the floating charge discussed above but the flexibility for administrators of its assets to reorder priorities if desired, the question of the business trust creating floating charges amplifies the need to understand separate personality from a wider perspective which otherwise 'on its own does not serve a meaningful economic function'.[12] Even old unincorporated associations allowed for claims against a 'common fund'[13] where trustees might be joined as defendants when they borrowed money for the trust which fund they committed to repay instead of themselves. While it was thought then that 'it is not always satisfactory'[14] and modern writers are right to argue that the trust is still not a separate entity in the same way that a company is,[15] it also does not accord with common business sense to argue that only the trustee, as opposed to the trust as a notional fund, can be sued even if it clearly assumed no personal liability on the loan that was made to the trust.[16] Indeed, a long time ago in the US, Story J in *Wood v Dummer*[17] saw the assets of a company as a 'trust fund' in the days when it was not clearly a separate entity as we know it now but its assets were committed to creditors[18]. So our understanding of full personality only evolved over time and may still be different across jurisdictions. But understanding its key attributes has again become vital presently with other forms of businesses getting into financial difficulties with different constituents having claims on them. While some may feel that legal personality is required for the bankruptcy process to work, Eldar and Verstein have pointed out that there is receivership over secured assets which serves the same function.[19] Singapore has had to deal with some of these issues given the difficulties faced by its business trusts.

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[10] Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organization Law' (2000) 110(3) Yale Law Journal 387.

[11] Ofer Eldar and Andrew Verstein*, '*The Enduring Distinction between Business Entities and Security Interests' (2018) 92(2) Southern California Law Review 213.

[12] *Ibid*, 240. Eldar and Verstein admit at 255 that 'Security interests provide fixed priority, but they must be alloyed with entities because security interests do not adequately protect pools from the owner's bankruptcy.'

[13] *Ideal Films v Richards* [1972] All ER 271 UKCA.

[14] Allen Afterman and Robert Baxt, *Cases and Materials on Corporations and Associations* (Butterworths, 3rd ed, 1980), 72.

[15] Mark Leeming 'Six Differences between Trustees and Company Directors' (2020) 94(4) ALJ 254.

[16] Lynton Tucker *et al, Lewin on Trusts*: Volume I (20th ed, 2020), [27-093]. Winding up a trustee does not automatically dissolve the trust: *Application of Valad Commercial Management Ltd* [2010] NSWSC 646.

[17] 30 Fed Cas 435 (no 17944) (CC DMe1824), Bayless Manning, *A Concise Textbook on Legal Capital* (Foundation Press, 2nd ed, 1981), 28.

[18] Margaret M Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century' (2003) 51(2) UCLA Law Review 387, 432.

[19] (n 11), 241.

## II Singapore Business Trusts

There is no single exhaustive definition of the term 'business trust' in any case or statute under Singapore law and, as the term is understood, a business trust is simply a trading trust that is a business enterprise with unitholders and creditors which is structured as a trust that offers an alternative to the corporation in terms of carrying on a business. In the UK and Australia, the main concern was and continues to be with how creditor rights are protected when lending to the trading trust through the trustee, although 40 years ago Professor Harold Ford famously called it a 'commercial monstrosity'[20]. That said, the Singapore Business Trusts Act contains a definition of the term 'business trust' which applies for the purposes of the said Act which contains certain mandatory provisions and is different from the Delaware Statutory Trust Act made up mainly by a series of default provisions.

That Singapore law recognizes a concept of 'business trust' quite apart from the Business Trusts Act is clear from the fact that many trusts which carry on business in Singapore exist and are regulated outside of the statutory framework of the Business Trusts Act. In this regard, real estate investment trusts or REITs were introduced into the Singapore capital markets from 2001, with the first, the CapitalMall Trust, listed in 2002 and regulated as a collective investment scheme (CIS) under the Securities and Futures Act (SFA). The regulators then turned their attention to other forms of business trusts for shipping and other forms of securitization. It enacted the Business Trust Act in 2004, which was modelled on Australia's Managed Investment Scheme regime to create a regime for public infrastructural trusts. Where units in a business trust are offered to the investing public, it has to comply with the share and debenture prospectus requirements in Pt XIII of the SFA (which are different from the ones applicable to CIS REITs). One major difference with CIS REITs is that the business trust does not have tax-transparency and is taxed as an entity. Further, under the Business Trust Act, there has to be a merged trustee-manager as opposed to a separate trustee and manager. REITs can, however choose to be authorized as a 'collective investment scheme' or registered as a 'business trust' as they fall under both definitions in the legislation (although the former are largely open-ended, and the latter closed-ended, REITs are both as, even if its units are legally redeemable, redemption is suspended while the REIT is listed on the Singapore Exchange and its units tradable on the secondary market)[21]. But the disadvantage of a CIS REIT that is authorised as a collective investment scheme compared to one registered as a business trust is that the former has to comply with the Code of Collective Investment Scheme[22], which includes investment limits and gearing ratios, and so

[20] HAJ Ford, 'Trading Trusts and Creditor Rights' (1981) 13(1) Melbourne University Law Review 1. See now James Allsop CJ, 'The Intersection of Companies and Trusts' (2020) 43(3) Melbourne University Law Review 1129.

[21] See S Tregillis, Assistant Managing Director, Securities and Futures Department, MAS, 'Managed Funds in the Region: Opportunities and Challenges' Seventh Asia Oceania Regional Meeting, 10 April 2002, [14-15] suggesting that the regulatory outcomes of the collective investment scheme and business trusts are designed to be the same.

[22] Promulgated under s 321 of the Securities and Futures Act (Cap 289, 2006 Rev Ed).

there is less risk taking involved. When listed on the Singapore Exchange, however, both are subject to similar financial reporting and continuous disclosure requirements as are applicable to listed companies. The Code on Take-overs and Mergers[23] also applies to them.[24]

Almost all Singapore REITs have been authorized or recognized as collective investment schemes under the Securities and Futures Act. As of January 2020, Singapore had 41 CIS REITs and 3 property trusts (registered under the Business Trust Act) spanning industrial, retail, healthcare, office/commercial, hospitality, diversified and speciality sectors listed on the SGX with a market capitalisation of S$111.9 billion, which is more than 12% of the market capitalisation of the Singapore Exchange. REITs comprise a quarter of the top 20 stocks by turnover on a day-to-day basis.[25] Over 80% of these REITs and property trusts own offshore assets across Asia Pacific, South Asia and Europe and they provided an average dividend yield of 6.2%. The problem is that they started to borrow more, with the regulated leverage limit first set at 35% of total assets initially, then with an alternative of 60% where they had a credit rating, before coming back to a flat 45% regardless of a rating in 2016, and then with Covid-19 in 2020, at its present 50% regardless of a rating.

With the need to regulate takeovers and restructurings of both REITs that are authorized as collective investment schemes and registered as business trusts, the Securities Industry Council, which oversees takeovers (like the UK Takeover Panel) promulgated Practice Statements in 2007 and 2008 to specify that these fell within the Takeover Code which was at that time drafted to cover listed companies only (the Code has since been amended to make this clear). Importantly, the 2008 SIC Practice Statement on Trust Schemes in respect of Mergers and Privatisations said that even though there were no provisions in the Securities and Futures Act and Business Trust Act for schemes of arrangement, both REITs that were authorized as collective investment schemes and registered as business trusts could be merged or privatized using trust schemes analogous to those in section 210 of the Companies Act so long as the trustee or trustee-manager obtains Court approval under Order 80 rule 2 of the Rules of Court (which gives the Court inherent supervisory jurisdiction over trusts).

Since then, we have seen, chronologically, the winding up of a maritime business trust, the takeover by way of a scheme of arrangement of a foreign-property based business trust, and then most recently a privatization scheme of a standalone CIS REIT, which also involved the disposal of its Australian assets[26]. In the last case involving Soilbuild, at the court hearing approving the scheme, however, the High Court judge Coomaraswamy J reportedly expressed 'great interest in a separate question as to where the legal basis of a Reit trust scheme can be found' and said that it was 'mindful of the fact that (it had) doubts about the basis on which the

[23] Promulgated under s 139(2) of the Securities and Futures Act.
[24] Singapore Code on Take-overs and Mergers, Introduction, s 2.
[25] SGX Chartbook: SREITs & Property Trusts, January 2020.
[26] In the interim, there were trust schemes for OUE Hospitality Trust, Frasers Logistics & Industrial Trust, Capitaland Commercial Trust and Viva Industrial Trust.

rights of unitholders can be expropriated, even under a trust scheme'[27]. This was so even though the second of the cases, *Re Croesus Retail Asset Management Pte Ltd*, carried a fully reasoned reported judgment which analogized the listed business trust there with the corporate form for restructuring purposes and said that it was 'apparent that the proposed orders largely paralleled that in an application for a scheme of arrangement under section 210 of the Companies Act'[28]. The *ex parte* matter was subject to the court's supervisory jurisdiction with the Securities Industry Council having indicated that the trust scheme was exempt from various provisions of the Code on Take-overs and Mergers subject to unitholder and court approvals being obtained that were similar to those required of shareholders in a corporate scheme.[29] This required, amongst other things, the approval, by a majority in number[30] representing three-fourths in value of the unitholders, of the scheme and various amendments to the trust deed (to implement the scheme).

It is perhaps the case that the expropriating effects of a compulsory acquisition of units in a takeover at fair and reasonable value is less clear than in cases especially of insolvent restructurings where creditor and unitholder rights are varied. As such, the need to find perhaps more solid jurisdictional grounds are needed. What was noted by Aedit Abdullah J in *Re Croesus*[31] was that it was unlike a traditional trust that had to comply with the 'beneficiary principle'[32] in which the beneficiaries equitably owned trust assets. This is not the case with REITs and business trusts in Singapore where the trust deed expressly says they do not and only have rights to due administration of the trust against the trustee and/or manager. The trust assets are beneficially in suspense; owned by a separate entity comprised of the trust fund; or by the trustee in a patrimony separate from its own and this can be committed to creditors (both secured and unsecured) who lend money to the trust through the legal hand of the trustee. The fact that the beneficial interest in trust property cannot be held in suspense and must be owned by some party has, however, been recognised in the case of a Singapore unincorporated association[33] and this

[27] Rae Wee, 'Reits should be careful with trust schemes of arrangement', Business Times (Singapore) 1 July 2021.

[28] *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811, 6.

[29] The Securities Industry Council also required that an independent financial adviser be appointed to advise the unitholders.

[30] Since amendments introduced by the Companies (Amendment) Act 2014, which took effect from January 2016, the court has the power to disapply the majority in number requirement.

[31] *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811, 11. More recently, Phang JA stated in *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA* [2018] SGCA 16, (n 91) that 'beneficial 'ownership' has been described as 'a right against a right'.

[32] This requirement may have been weakened with wide discretionary trusts: *United States v All Assets Held in Account Number 80020796 in the name of Doraville Properties Corp*, Civil Action No 13-1832 (March 5, 2018).

[33] 'Like nature, the law abhors a vacuum in ownership': *Lee Chuen Li v Singapore Island Country Club* [1992] SGHC 165, 48 *per* Hwang JC. This was said in the context of a gift to an unincorporated association characterized as an accretion to the funds of the association under the contract-holding approach in *Re Recher's Will Trust* [1971] 3 All ER 401.

weighs in favour of the conclusion that a business trust has some form of separate legal persona[34].

Singapore law is moving to the position in the US, where trusts in certain US states are conferred legal entity status[35] with, for example, Delaware's Statutory Trust Act making separate personality the default position; and some leading US academics see the common law trust as already having such persona[36]. In Canada, where US law may have its greatest influence, the REIT has also been recognised as being a separate entity,[37] so that the REIT trustees were seen to owe fiduciary duties to the REIT and not the unitholder beneficiaries. Building on this, it will be argued from Part IV below that the business trust is an 'unregistered company' that can be wound up under sections 245 and 246 of IRDA (previously sections 350 and 351 of the Singapore Companies Act) and subject to a scheme of arrangement under section 210 of the Companies Act and sections 63 and 64 of IRDA. Some recent developments shed light on why this is the case.

## III US Chapter 11 and UK Veil-Piercing

EH-REIT was authorised as a collective investment scheme under the Securities and Futures Act and listed on the Singapore Exchange in May 2019. Problems arose with its prospectus disclosure made exclusively to non-US investors in relation to the lack of financial information in relation to 6 hotels in the EH-REIT stable of assets of 19 US hotels. With the onset of Covid-19 affecting the hospitality industry, the counter was suspended in March 2020 without having paid any dividend. The gearing ratio of 45%/50% prescribed by the Code of Collective Investment Scheme was also waived as its debts grew.[38] In December 2020, the REIT Manager was removed by the REIT Trustee pursuant to a directive of the Monetary Authority of Singapore. In January 2021, the Singapore High Court gave various orders to assist EH-REIT in that although it had not been able to appoint a replacement REIT Manager, the REIT Trustee was empowered to take any action it deemed 'necessary for the management and administration of [EH-REIT] and its business.' In particular, the REIT Trustee sought and obtained power to take immediate action on behalf of EH-REIT to join the Chapter 11 cases that had been commenced with respect to its SPV affiliates in the United States. Almost immediately, Chapter 11 proceedings in respect of EH-REIT itself commenced in the US Bankruptcy Court in the District of Delaware. The basis for the Court

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[34] Recently effectively rejected by the UKPC in *Re Investec Trust (Guernsey) Ltd* [2018] UKPC 7, (n 85).

[35] Steven Schwarcz, 'Commercial Trusts as Business Organisations: Unravelling the Mystery' (2003) 58(2) Business Lawyer 559, although he questioned whether federal bankruptcy courts would recognize this (at 582).

[36] Ibid, see also Hansmann and Kraakman, (n 10), 416.

[37] *Locking v McCowen* (2015) ONSC 4435, *cf* Robin F Hansen, 'Legal Personality and the Canadian REIT' (2017) 23(4) Trusts and Trustees 400.

[38] Covid-19 has increased the imperative (rightly so) to preserve existing businesses. In many countries, wrongful trading rules which are intended to stop a company incurring further debts when there is no reasonable possibility of repaying them, have been suspended.[38] As the leading UK corporate law academic Paul Davies has said, *Introduction to Company Law* (Clarendon, 3rd ed, 2020), 236 'continued trading in the vicinity of insolvency might be absolutely the right thing'.

assuming jurisdiction under Title 11 US Code was, however, challenged by a major creditor on the basis that EH-REIT was not a 'business trust' registered under the Business Trust Act and that it was not a separate entity needed for filing for bankruptcy protection. Title 11 US Code provides that only 'a person ... may be a debtor' under Chapter 11. It goes on, however, to state that this include a 'corporation' which in turns includes a 'business trust'.

Chief Judge Sontchi[39] held that EH-REIT was eligible to file for Chapter 11 bankruptcy. The test was whether it was a business trust under Singapore law and not under Federal bankruptcy or common law (although the learned judge noted that 'the weight of authority falls in favor of applying federal common law'). Instead, preferring the 'bedrock' Supreme Court decision of *Butner v US*[40], the judge held that the insolvency or bankruptcy process should not alter pre-bankruptcy entitlements, as that would give people the incentive to trigger off the insolvency processes to reorder their rights.[41] Given that the expectations of the parties were that Singapore law would govern EH-REIT (both in terms of its formation and dissolution), Sontchi J held that EH REIT was an 'eligible debtor' under the Bankruptcy Code. The judge acknowledged that this was partly because '(t)he Trust Deed makes clear that acts taken by the REIT Trustee in its capacity as trustee of EH-REIT bind EH-REIT, and not (the Trustee).'[42]

Chief Judge Sontchi found that EH-REIT was a business trust under Singapore law and that it did not need legal personhood for this to be so although he also thought that if legal personality were required for a business trust, it had 'some attributes of legal personhood, which are sufficient to support a finding that it is a business trust'. Cross-border issues, however, cloud matters. It may be that another business trust could have difficulties being recognized in another jurisdiction which, unlike Delaware or the US, does not have its own business trust legislation or familiarity with such. If so, it is important that we understand the essential attributes of legal personhood.

In this regard, greater insight into corporate personality has been provided by the recent UK Supreme Court decision in *Hurstwood Properties (A) Ltd v Rossendale Borough Council*[43]. This decision confirms that the doctrine of veil piercing in the UK is very narrow as it is about making a company liable for the actions or fault of the controlling shareholders, *ie* removing entity shielding that protects the company's assets from the creditors or claimants of the controllers or shareholders, and not vice versa, *ie* removing limited liability on the part of the shareholders or controllers for any corporate debt or wrong. What was sought here was the latter as two local authorities argued that the veil should be pierced with respect to certain tax mitigation schemes

[39] *In re EHT US1, Inc, Chapter 11* Case No. 21-10036 (CSS) (1 June 2021).
[40] *Butner v. United States*, 440 U.S. 48 (1979), discussed at 19-20 of the Judge Sontchi's opinion, ibid.
[41] Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986); Douglas G Baird and Anthony J Casey, 'Bankruptcy Step Zero', (2012) Sup Ct Rev 203, 204. See also Douglas G. Baird, *Elements of Bankruptcy* (Foundation Press, 4th ed, 2006), 6.
[42] Judge Sontchi's Opinion, (n 39) 5.
[43] *Hurstwood* [2021] UKSC 16.

set up by ratepayers using special purpose vehicles. These ratepayers were landlords who tried to shift liability for business rates to these SPVs which were granted leases as tenants. These SPVs had no assets or liabilities and in one case was allowed to be struck off the register of companies almost immediately so that liability for business rates than fell on the Crown through *bona vacantia*. In the other case the ratepayer attempted to take advantage of a special exemption from rates for a company undergoing voluntary winding up, which is where the SPV was placed shortly after being granted the lease. As a matter of statutory interpretation of the relevant rate legislation, the Supreme Court held that there was a triable issue whether the landlords remained liable for business rates throughout the duration of the leases as the ownership of the property did not in fact shift to tenants.[44] Assuming that it did, however, the Supreme Court refused to pierce the corporate veil and relied on what was said by Lord Sumption in the Supreme Court earlier in *Prest v Petrodel Resources Ltd*[45] that:

> "Piercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company.

Even assuming that the SPVs were controlled by the landlords (they were not shareholders, who was instead an individual who was also the SPVs' director), the Supreme Court in *Hurstwood* held that the 'evasion' principle of Lord Sumption in *Prest* that was linked to the abuse of separate personality only allowed making a company liable for breach of an obligation owed by its controlling shareholder. This is quite different from the obligations or liabilities incurred by the company subsequent to incorporation which is sought to be extended to the controllers due to the perceived unfairness of having a company shield the controllers from liability through things done by the company. Instead, here the Court thought that:[46]

> The abuse in the present case lies in the way in which the SPV's liability for rates is then sought to be dealt with, by the abusive processes by which the SPV is either dissolved or put into liquidation. The law provides comprehensive remedies for abusive behaviour of that kind, which do not require the piercing of any corporate veil.

Courts in the US[47] and Singapore[48] still maintain a wider notion of veil piercing but this may be to miss the essence of separate personality. In any case, *Prest* and *Hurstwood* would suggest that if it is about removing limited liability there are usually many ways to do so without piercing the

[44] The UK Supreme Court reversed the Court of Appeal on this point, which had upheld the High Court on this. On veil piercing, it upheld the Court of Appeal decision which had reversed the High Court.
[45] *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415, 16.
[46] *Hurstwood*, (n 43) 74.
[47] See Stephen Bainbridge and Todd Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar, 2016) ch 9. For a comparative view, see Cheng Han, Tan, JiangYu, Wang and Christian Hofmann, 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives' (2019) 16(1) Berkeley Business Law Journal 140.
[48] Hans Tjio, Lee Pey Woan and Pearlie Koh, *Company Law* (Academy Publishing, 2015) ch 6.

corporate veil. Consistent with this, the UK Supreme Court in *Okpabi v Royal Dutch Shell Plc*[49] recently held that a holding company can be liable for the acts of a subsidiary to the extent to which the parent took over, or shared with the subsidiary, the management of the relevant activity (something that control by the parent might demonstrate without veil piercing).

## IV Asset Partitioning and Separate Legal Personality

*Hurstwood* and *Prest* align separate personality with what Hansmann and Kraakman,[50] at the start of the millennium, called affirmative asset partitioning or 'reverse' limited liability as opposed to the conferring of limited liability to shareholders which they called defensive asset partitioning that can be contracted for without seeing a separate entity. The former protects the corporate entity in that its assets are insulated from the bankruptcy of its shareholders and directors. Importantly it facilitates entity lending, as creditors can look to the segregated fund that has been committed by directors without consulting the shareholders who do not expect to be asked for repayment.

Meeting the legitimate expectations of commercial parties can be seen in both the US EH-REIT and UK veil piercing cases in that persons conducted their affairs in the first case expecting Singapore law and not US law to govern EH-REIT in terms of whether it was a business trust and in the second that the tenant corporations would be liable for business rates going forward and not the landlords. Extrapolating from both these cases, the argument here is that our understanding of what asset partitioning really means is that it allows for direct claims against the segregated trust fund by creditors with whom it contracts, and which in turn must be capable of being wound up and restructured as has been the experience in Singapore with respect to its REITs and business trusts. For perhaps a stronger legal basis for this than has hitherto been provided we have to relook the old unincorporated deed of settlement company which Televantos[51] has recently said was really a partnership, sometimes with a trust attached to it.

Much of this highlights the importance of work done 20 years ago with respect to organizational law by Hansmann and Kraakman. There was clearly something fermenting at that time in the East Coast of America amongst its leading law and economics scholars. Asset partitioning was really a property argument about the efficiencies created by a bifurcated property structure. This was linked to the whole information costs story of property of Merrill and Smith from around the same time which was that property as a thing was about exclusivity and correlated with information costs but where the latter was low parties were given autonomy to structure their rights contractually. In between were intermediate rights between contract and property where

[49] [2021] UKSC 3. See also *Vedanta Resources Plc v Lungowe* [2019] UKSC 20. Compare the US Supreme Court's approach in *United States v Bestfoods* (1998) 524 US 51.
[50] H Hansmann and R Kraakman, (n 10).
[51] Andreas Televantos, *Capitalism before Corporations* (Oxford, 2020) Pt 1.

the strategy was disclosure and then mandatory rules as things started becoming more 'proprietary'. Merrill and Smith describe the dynamic nature of how things become reified:[52]

> Intermediate situations… will adopt rules that encourage disclosure of information where contracting over the rule remains a realistic option, or immutable rules designed to protect parties with incomplete information where contracting over the rule is not perceived to be a realistic option. These intermediate rules will impose more standardization as the informational demands on third parties increase.

Merrill and Smith separately referred to 'entity property' as one that separates management from the use and enjoyment of property in situations where complexity in relation to property ownership shifted the focus from exclusion to governance.[53] Intermediate situations do not necessarily lead to that and so although bailment[54] and secured transactions were seen to create intermediate rights, they did not necessarily lead to the creation of 'entity property' as opposed to trusts. Recently, however, Eldar and Verstein suggest that some forms of security, such as the 'cells' in a protected cell company, which segregates various funds within a company, may have some of its characteristics.[55] But it clearly exists with the corporation and perhaps a bit less so with trusts where the usual bifurcation is at the property level (horizontally between legal and beneficial ownership) rather than at the level of the entity[56]. While it is said that the company could be a thing in itself and perhaps subject to 'mandatory standardisation'[57] the fear there is whether it in fact has been given too much personality in the US[58] when it is still seen as an 'artificial construct' in Singapore[59]. If so, what is its defining characteristic across both time and space? We need to know this as other business entities do not have the same mandatory standardisation because they are considered intermediate or hybrid entities, such as

[52] Merrill and Smith, (n 9) 808.
[53] Merrill and Smith, *Property: Principles and Practices* (Foundation Press, 2nd ed, 2012) 646-651 that this covers leases, condominiums and cooperatives (which involve possessory interests) and the corporation, trusts and partnerships (which involve non-possessory interests).
[54] Merrill and Smith, (n 9) 811-819 and Christopher M Newman, 'Bailment and the Property/Contract Interface' (September 2, 2015). George Mason Legal Studies Research Paper No. LS 15-12, Available at SSRN: https://ssrn.com/abstract=2654988.
[55] (n 11) Pt V.
[56] Merrill and Smith, (n 53) 647.
[57] Robert C Ellickson, Carol M Rose and Henry E Smith eds, *Perspectives on Property Law* (Wouters Kluwer, 4th ed, 2014), 351, which asks '(i)s the nexus of contracts the corporate law analogue of the bundle of rights picture of property?'
[58] Compare in the US context, Jonathan R Macey and Leo E Strine, 'Citizens United As Bad Corporate Law' (2019) 2019(3) Wisconsin Law Review 451. This may be because it has had the longest experience with incorporated companies through its state charters, see Blair, (n 18) at 423 *et seq*. Consequently, David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (CUP, 2018) argues that there is less of a contractarian basis for US company law.
[59] *Townsing Henry George v Jenton Overseas Investments Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597, 77.

partnerships and trusts, which can 'serve as substitutes'[60] and require notification to third parties before they have the necessary status to be claimed against, liquidated and restructured.

Blair[61] previously identified 4 aspects of personhood that were in effect: perpetual succession, the ability to sue and be sued in its own name, asset partitioning and the separation of ownership and management although she admits that many SPVs today are just there for asset partitioning purposes. The leading UK corporate law academic John Armour has also said that we should not overanalyze separate personhood and that '(t)he possession of personality does not entail the possession of a fixed set of legal capacities'.[62] It has also been pointed out by the late Professor Sealy that until *Salomon v Salomon* in 1897 that, despite earlier Victorian legislation (Joint Stock Companies Act 1844 and Limited Liability Act 1855 and further consolidating Acts in 1856 and 1862*),* '"the company" was regarded as the associated members rather than the legal entity'.[63] What therefore is the baseline meaning of separate personality? To say that is always just contextual risks the same criticism made of the bundle of rights theory of property law. If exclusivity lies behind property as a thing, it should be asset partitioning that lies behind the essence of separate legal personality.

## V Partnerships and Trusts as Intermediate Entities

If we look at the progress of the partnership it does suggest that this may be the case. Hansmann, Kraakman and Squire[64] describe English general partnerships as already having had 'weak entity shielding' ever since *Craven v Knight*[65], and this partly explains the continued relevance of the general partnership form not just up to the early 20th century when it was still more prevalent than the company[66], but today. While this case and *ex parte Crowder*[67] together created the 'jingle rule' – 'Partnership estate to partnership creditors, private estate to private creditors, anything left over from either go to the other', only its first part accords with principle and still remains in many Commonwealth jurisdictions.[68] But this suggests that asset partitioning in the

[60] Merrill and Smith, (n 53) 647.
[61] Margaret M Blair, 'The Four Functions of Corporate Personhood' in Anna Grandori ed, *Handbook of Economic Organization* (Edward Elgar, 2013) ch 23, 440.
[62] John Armour, 'Companies and Other Associations' in Andrew S Burrows ed, *English Private Law* (Oxford: Oxford University Press, 2013) at 3.17.
[63] Len Sealy, 'Directors' 'Wider' Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13(3) Monash University Law Review 164, 165.
[64] Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119(5) Harvard Law Review 1333, 1381.
[65] (1683) 21 ER 664.
[66] A Fallis (n 6) 24.
[67] (1715) 23 ER 1064.
[68] See JJ Henning, 'Criticism, Review and Abrogation of the Jingle Rule in Partnership Insolvency: A Comparative Perspective' (2008)(3) 20 South African Mercantile Law Journal 307, 320 (Insolvency Partnerships Order 1994). See further J Getzler and M Macnair, 'The Firm as an Entity before the Companies Acts' in Paul Brand, Kevin Costello, W. N. Osborough (eds), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference* (Four Courts Press, Dublin, 2005) 267-288.

sense of protecting the interests of partnership creditors still exists (and will be seen when we examine the 'unregistered company' in Part VI). The weakness of the partnership was that it was easily dissolved even if it had some recognition in litigation despite not formally being a legal entity.[69] In respect of Blair's fourth point, however, the default position was that all partners would be involved in management until various limited partnership legislation came into being to strengthen the external effects of limiting the involvement and liability of some partners. However, Televantos points out that this was not seen as a problem in those days where the partnership was viewed in fact as more trustworthy than the corporation as it also brought the partners' credit into the picture[70]. It has even more recently been said by Harwell Wells[71], that:

> Thus, while it is correct to state that the partnership was not a legal person, stopping there would leave us with a mistaken impression of how partnership law functioned. Best to follow the advice of one legal historian and "inquire behind the label . . . in order to find out what it actually involves."

In the US, Chapter 11 was introduced in 1978 to include partnerships at a time when the 'aggregate' non-entity view of partnerships still existed. It was only with the (Revised) Uniform Partnerships Act in 1992 that the partnership was seen as a separate legal entity. And even so that is only the default position and so it continues to exist alongside the non-entity view of the partnership.[72] Wells describes how the Delaware Supreme Court recently recognized that a limited liability partnership could choose not to be a separate entity in *United States v Sanofi-Aventis*[73] so that it was dissolved when a partner left the firm. In many parts of the Commonwealth, while the partnership is not a separate legal entity, we shall see that partnerships could be wound up and restructured as an unregistered company, largely because its ability to partition assets meant that it continued to carry on as a popular form of conducting business long after the introduction of joint stock company legislation in 1844, the separation of registered companies from partnerships and other associations in 1862 and even the fullest recognition of a company's separate legal personality in 1897.

What about trusts? They do not have perpetual succession and are subject to rules against perpetuities. The initial REITs in Singapore carried a 'royal lives clause' to satisfy the requirement that the perpetuity period not extend beyond a life in being plus 21 years. From December

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[69] Afterman and Baxt, (n 14) 142. Televantos, (n 51) 28, 168.

[70] Ibid, 29. The problem as Blair points out, (n 18) 413, is that the mutual nature of the partnership hindered growth that required centralised control.

[71] Harwell Wells, 'The Personification of the Partnership' (2021) 74 Vanderbilt Law Review (forthcoming), 8.

[72] See Christine Hurt and D Gordon Smith, *Bromberg and Ribstein on Limited Liability Partnerships, The Revised Uniform Partnership Act, and The Uniform Limited Partnership Act (2001)* (Wolters Kluwer, 2015 ed) §8.201.

[73] Wells, (n 71) 33, which drew the facts and conclusion in the case from *In re Plavix Marketing Sales Practices*, 315 F.Supp.3d 817 (D.N.J. 2018), vacated and remanded by I*n re Plavix Marketing, Sales Practices, and Products Liability Litigation*, 974 F3d 228 (3d Cir. 2020).

2004,[74] however the Trustees Act was amended so that there is a default 100 years for a trust to remain in existence. Since then none of the REITs and business trusts in Singapore specify the perpetuity period. Where litigation is concerned, however, Morley[75] thought that they could always sue in the trustee's name as was the case with the old deed of settlement companies that were in effect partnerships with trust characteristics. Televantos states that 'trustees acted as the legal personality for the firm'[76]. He, however, felt that Morley may have overstated the case with respect to the limited liability of beneficiaries as even if the trustees were primarily liable the beneficiaries could still be in certain circumstances[77]. As we have seen, however, that is not the main thrust of asset partitioning which is about insulating the entity.

But what is it about the trust, which clearly is not fully a separate entity in the sense that it cannot own property in its own name or sue or be sued in its own name (which a company can by virtue of *eg* s 19(5) of the Singapore Companies Act and first seen in the UK Joint Stock Companies Act 1844, s 25, with perpetual succession from the UK Joint Stock Companies Act 1856, s 13) that gives it some legal status if sufficient notice of it is brought to parties that contract or deal with it? The ability to sue in the trustees' name may support what Hansmann and Kraakman said, that:[78]

> The law of trusts makes the trustee, vis a vis creditors with who he contracts, two distinct legal persons: a nature person contracting on behalf of himself, and an artificial person acting on behalf of the beneficiaries…While it is sometimes said that the common-law trust lacks legal personality, in our view it is, on the contrary, quite clearly a legal entity, and trust law is consequently a form of organizational law.

The idea of a trustee with a separate patrimony is a civilian idea[79]. Instead, US trusts have developed statutorily in a way that makes the trust a separate entity[80]. However, Eldar and Verstein describe how the protected cell company today creates separate 'cells' that partition assets and may have some entity status, which is not dissimilar to a trustee having two separate

[74] Trustees (Amendment) Act (No. 45 of 2004).
[75] John Morley, 'The Common Law Corporation: The Power of the Trust in Anglo-American Business History' (2016)(8) 116 Columbia Law Review 2145, 2187.
[76] Televantos, (n 51) 38.
[77] Ibid, 45. See further, Robert DM Flannigan, 'Beneficiary Liability in Business Trusts' (1984) 6(4) Estates and Trusts Quarterly 278, 284-287 and Maurice C Cullity, 'Liability of Beneficiaries – A Rejoinder' (1985) 7(1) Estates and Trusts Quarterly 35, 36.
[78] (n 10) 416.
[79] Magda E Raczynska, 'Parallels between the civilian separate patrimony, real subrogation and the idea of property in a trust fund' in Lionel Smith ed*, The Worlds of the Trust* (Cambridge University Press, 2013) 454.
[80] John D Morley and Robert H Sitkoff, 'Trust Law: Private Ordering and the Branching of American Trust Law' in Andrew S. Gold *et al* eds, *The Oxford Handbook of the New Private Law* (OUP, 2020) 338.

patrimonies.[81] Regardless, asset partitioning has done something here to segregate the trust fund either in the trustee's hands or on its own in a way that can be committed to creditors. That would be in Hansmann and Kraakman's view the 'core defining characteristic of a legal entity'[82], and is central to the associated concomitant ideas of winding up and restructuring of the fund. We will see that this was the case in early company legislation which did not have all the bells and whistles attached to how we regulate the corporation today. The problem though with Blair's fourth test in relation to the separation of management and ownership was that it meant that with the trust the starting position was that the trustee that borrowed on behalf of the trust would be personally liable as it was still the legal owner of the property. Creditors could only reach the trust fund through being subrogated to the right of indemnity which the trustees had against the trust fund as agent. While Hansmann and Mattei[83] describe how US law moved away from this to recognise direct claims against the fund so long as notice was given to the third party as a default position, this practice is a more recent phenomena with Singapore business trusts which came about when it became clear that some of them had to borrow more as the gearing ratios were relaxed for REITs and the business environment worsened. Trustees expressly refused to assume personal liability and directly committed the trust fund only.

Although there is some English academic comment supporting such an approach committing the trust fund,[84] the UK courts have not recognised this recently. For example, the Privy Council recently examined provisions of the *Trusts (Jersey) Law 1984* (as amended) which attempted to limit the trustee's personal liability to creditors of the trust only to the extent of the trust property. In *Re Investec Trust (Guernsey) Ltd*,[85] the Board accepted that the Jersey Act had attempted to modify English common law trust principles which were still premised on the creditor claiming against trust assets by being subrogated to the trustee's right of indemnity. This was dependent, amongst other things, on the state of accounts between trustee and beneficiaries, and whether the trustee had acted in breach of trust. However, it held that the common law position was not varied as the statute had to be absolutely clear that this was intended, as this was a 'radical departure which should not lightly be inferred or implied in the absence of clear words'[86]. But again, as with the partnership, we may have forgotten our trust roots when the deed of settlement company was a more utilised business form than the registered corporation. There were old cases which held that to borrow 'as trustee only' was

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[81] (n 11) Pt V. Separate funds are also created by the new Singapore variable capital company, discussed by Tan Yock Lin and Valerie Wu, *Report on the Enactment of Non-Charitable Purpose Trusts*, Singapore Academy of Law, Law Reform Committee (May 2021) [3.49].
[82] (n 10) 393.
[83] Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73(2) NYU Law Review 434, 460-3.
[84] A1.159 of the chapter on England in David Brownbill *et al* eds, *International Trust Laws* (Jordan, looseleaf) (Update 47 - November 2010).
[85] [2018] UKPC 7.
[86] Ibid, [63]. See also A Ollikainen-Read, 'Creditors' claims against trustees and trust fund' (2018) 24(2) Trusts & Trustees 177.

enough to negative personal liability on the part of the trustees.[87] This of course did not mean that a separate entity would be made liable although any problems of privity can be overcome by arguments of mutual benefit and burden given that the trust deed would have authorized the trustee to borrow on behalf of the fund. But, at the least, this showed that the trustee would not be liable in terms of its own personal estate but only in terms of the fund it administered, which again could be held in a separate patrimony or as a separate being. In contrast, Lewin's argument[88] is that the trustee should be personally liable except in the one circumstance where 'the liabilities concerned are contractual liabilities which the trustee entered in on terms that his personal liability is limited to the trust assets'. In these situations there is a need to bring a trust fund to an end if there are insufficient assets. However, while such negotiated terms are unusual with family trusts, it is almost always the case now with business trusts that the terms of the trust as well as the loan document will make it clear that the trustee is only committing the trust fund to the agreement.[89] Some form of asset partitioning will have occurred even if not to the same extent as in the case of directors borrowing on behalf of a company.

If it is true as Smith suggests that separate personality is just another module in his idea of property as a thing,[90] it may substitute for another module known in Commonwealth trusts as the 'beneficiary principle'. This requires beneficiaries to actually have an equitable interest in trust property as they are the owners of it. But we have seen in the case of all Singapore REITs and business trusts that the trust deed expressly says that the unitholders do not have such an equitable or proprietary interest and only have claims against the trustee and/or manager for the due administration of the trust. This sounds like the interest a shareholder has in the company but is also consistent with other developments in Singapore where a trust beneficiary is seen even in more traditional family trusts to only have a

> "right against a right" , ie, a right to constrain or control the way another person exercises his right to deal with a thing, rather than a right against the thing itself: see Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1.[91]

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[87] *Gordon v Campbell* (1842) 1 Bell App 428 and *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, 368.

[88] *Lewin on Trusts*, *supra* n 16, [27-096] *et seq*. Contrast Ford, (n 20) 30 that even if no separate entity is created, a direct claim bypassing the trustee against the fund can be recognized.

[89] English courts have not heeded the warnings of Lord Browne-Wilkinson in the English House of Lords in *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL) at 435 who said that:

> it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind.

Compare the US position: John D Morley and Robert H Sitkoff, (n 80) Pt IV.B.

[90] Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691, 1722 (higher-level modularization).

[91] *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA* [2018] SGCA 16, 145.

It has been said of Australian discretionary trusts that they are in a 'midst of a doctrinal revolution'[92]. Singapore law may also have evolved in the direction of US trusts which have relaxed the beneficiary principle[93] and separate legal personality has been accorded somewhat at common law and then clearly by their various statutory provisions which was assumed by the 1988 Delaware Business Trust Act and now more specifically by the 2003 Delaware Statutory Trust Act. However, as with partnerships, this is only a default position as provided in §3801(g). Even so, Title 11 US Code, as we have seen, recognised both the partnership and the business trust (in the latter case under the definition of a corporation)[94]. The Delaware provision does, however, give the court a discretion not to subject them to the Bankruptcy Code[95]. In Singapore, by contrast, separate legal personality is not expressly mentioned in the Business Trust Act nor in the consultation paper to the proposed statutory non-charitable purpose trust (NCPT)[96]. As with charitable trusts[97], however, the fact that the purpose dominates can mean that the fund itself of the NCPT will be given some separate recognition as asset partitioning is stronger than in private trusts where beneficiaries have a proprietary and/or equitable interest in the trust assets.

Hansmann, Kraakman and Squire[98] have, separately, identified 'entity shielding' as more susceptible to abuse today than 'owner shielding', particularly given the way in which an increasing number of business vehicles have been recognised as separate legal entities (see, for example, the limited liability partnership, although the UK Law Commission has said that proposal to confer this on all forms of registered partnerships 'would not be taken forward'[99]). They believe that the next stage in the evolution of organisational law is to deal with this problem, which 'subordinates the claims to entity assets of an individual's personal creditors without obtaining their consent or even, indeed, giving them specific notice'[100], both within and outside of bankruptcy. But this is not a problem with publicly listed business trusts discussed here as Hansmann and Mattei has described it as a penalty default[101] that clear notice is necessary to inform third parties that they can claim against fund only and not the trustee personally.

Consequently, whether we are looking at an intermediate right, or intermediate or hybrid entity, it is sufficiently reified by the notice given to those dealing with the right or entity. It is said that

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[92] Jessica Palmer and Charles Rickett, 'The revolution and legacy of the discretionary trust' (2017) 11(2) Journal of Equity 157, 183.
[93] Morley and Sitkoff, (n 80) endnote 41.
[94] 11 USC §101(9)(A)(v).
[95] 12 DE Code §3801(g).
[96] Tan Yock Lin and Valerie Wu, (n 81).
[97] George G Triantis, 'Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises' (2004) 117(4) Harvard Law Review 1102, 1153; discussing the *cy pres* doctrine at Part III.C.1.
[98] Hansmann, Kraakman and Squire, (n 64) 1343–1356.
[99] English Law Commission Rep No 283 and Scottish Law Commission Rep No 192, Nov 2003, [3.42].
[100] Hansmann, Kraakman and Squire, (n 64) 1401.
[101] Hansmann and Mattei, (n 83) 461.

where there are no transactions costs, there is neither the need for property rights[102] nor a firm[103]. But even with transaction costs, as there must be, the solutions need not be binary. Where greater disclosure can lower transactions costs there is less need for the mandatory rules which accompany full property or entity rights, such as in the case of the registered company. Ever since 1849 there have in effect been winding up provisions pertaining to unincorporated associations, and it is to these we now turn in order to understand which entities those provisions applied to and for what purpose. The suggestion here is that 19th Century draftspersons knew that they had to provide for the asset partitioning effects of a partnership or trust and were concerned first with its winding up and later scheme of arrangement. Even if today it is seen as an inferior business form to the use of a corporation, there was enough to deal with its 'essential role' through the creature of the unregistered company.

## VI Unregistered Companies: Winding Up and Schemes of Arrangement

Unfortunately, much of how the provisions on winding up 'unregistered companies' came about is forgotten and today many associate Part VI of the UK insolvency Act 1986 with foreign companies.[104] It is true that in the UK it now only applies to formal unregistered companies under the Unregistered Companies Regulations 2009[105], and not, for example, trade unions: *Re National Union of Flint Glassworkers*.[106] However, the original provisions, which were actually inserted by amendments in 1849 to the Joint Stock Companies Winding-Up Act 1848 were of general application as well to first partnerships and then associations and were interpreted that way by the courts. These then found their way into the consolidating Joint Stock Companies Act 1856 which continued to treat joint stock companies, partnerships and associations without differentiating them and then the Companies Act 1862 s 199. This was the first Act to differentiate registered and 'unregistered companies' and where half of its 210 sections were concerned with their separate winding up[107]. These provisions were subsequently found in the UK Companies Act 1929 s 338 and then UK Companies Act 1948 s 399. It is that last section that the Singapore provisions are based, as was the case with Australia's Companies Act 1961 s 315,

[102] Steven NS Cheung, 'The Transaction Costs Paradigm' (1998) 36(4) Economy Inquiry 514.
[103] Ronald Coase, 'The Nature of the Firm' (1937) 4(16) Economica 386.
[104] See eg Andrew R Keay, *McPherson and Keay, The Law of Company Liquidation* (Sweet & Maxwell, 4th ed, 2018) [2-045]; Christian Pilkington, *Schemes of Arrangement in Debt Restructuring*, (Sweet & Maxwell, 2nd ed, 2017), 4-003.
[105] SI 2009/2436, which subjects these unregistered companies to more provisions in the Companies Act 2006 than *eg* the previous Companies (Unregistered Companies) Regulations SI 1985/680.
[106] [2006] BCC 828, 12.
[107] Part VIII on unregistered companies was separated from Part IV titled 'Winding up of Companies and Associations under this Act' which drew many of its provisions from the 1856 Act that except for the 'unable to pay its debts' ground of winding up in turn consolidated many things from the Joint Stock Companies Winding Up Act 1844 and 1948: see Meng Seng Wee, 'Misconceptions about the 'Unable to Pay Its Debts' Ground of Winding Up' (2014) 130(4) LQR 648, 654.

but even academics around that time already saw 'unregistered companies' as mainly concerned with foreign companies.[108]

In Singapore presently, an 'unregistered company', however, still 'includes a foreign company and any partnership, association, club or company but does not include a company incorporated under the Companies Act'.[109] The major difference with the UK provisions are that the partnership is not included there as there are separate provisions for partnerships governed by the Insolvency Partnerships Order 1986 (now 1994). But the idea is still that partnerships can be wound up as an entity.[110] The other difference is that UK unregistered companies there can be wound up voluntarily by virtue of section 221(4) of the Insolvency Act 1986 if the EU Regulation on Insolvency Proceedings apply and so removes a restriction that was introduced in the UK Companies Act 1862 s 199(2) and later the Companies Act 1948 s 399(4). The latter still exists in Singapore where the jurisdiction over unregistered companies is only in respect of involuntary winding up.

That the greater concern is with cross-border jurisdiction can be seen in the textbooks which, for example, spend a great deal of time with these provisions on when jurisdiction can be assumed if, for example, the foreign company has no assets in the country or if 'foreign company' or 'association' includes international organisations, which it does not.[111] But 'association' is of broad remit and it has in the past included unincorporated associations such as registered and unregistered friendly societies, joint stock companies, building societies, loan societies and allotments.[112] A Singapore textbook also states that it includes:

> charities, associations, societies…which are not incorporated, but hold assets in the name of trustees. The claims of creditors are only against those assets and do not extend to personal claims against the personal assets of the members or trustees, when the bankruptcy jurisdiction would apply against those individuals.[113]

This suggest that mid-19th Century legislatures knew what they were doing when they introduced these provisions to provide for the winding up of partnerships, trusts and other associations which as we have seen had certain asset partitioning functions under the Joint Stock Companies Acts. And as these entities started being overtaken by the corporate structure, it was perhaps out of an abundance of caution that they retained the provisions in the later Companies Acts. Still, as we have seen and are seeing now, it makes more sense to try and wind up the notional fund as an entity as opposed to for example, the partners or trustee and then try to rely on their

[108] See K Lipstein, 'Jurisdiction to Wind Up Foreign Companies' (1952) 11(2) CLJ 198. For Singapore, see *Woon's Corporations Law* (LexisNexis, looseleaf) [152.2].
[109] Section 245 of IRDA, which replaced s 350 Companies Act in July 2020.
[110] See eg RC I'anson Banks, *Lindley & Banks on Partnerships* (Sweet & Maxwell, 16th ed, 1990) [27-04].
[111] Derek French, *Applications to Wind Up Companies* (OUP, 3rd ed, 2015), [1.132] discussing *International Tin Council, Re* [1987] Ch 419.
[112] French, ibid [1.137].
[113] Woon, (n 108) [7151].

rights of indemnity from the fund in order to create an equitable distribution when the fund itself is what has to be liquidated. Something would be lost in that other process due to the still uncertain nature and sometimes unavailability of that right of indemnity.[114]

One difficulty, however, is that since section 4 of the Joint Stock Companies Act 1856, the relevant Commonwealth Companies Acts have required incorporation in relation to partnerships or associations consisting of more than 20 persons which are set up for gain. In relation to the equivalent provisions in the UK Companies Act 1862 section 4, Jessel MR in *Sykes v Beadon*[115] certainly thought that a unit trust scheme was caught by this provision. However, this was overruled by the still leading Court of Appeal authority *Smith v Anderson*[116] soon after on the basis that there was insufficient mutuality between unit-holders for them to be in partnership; that investment in securities was not a business; and that if there were a business it was carried out by the trustees and not the unit-holders. Unlike a partnership where the default position is that the partners manage together, the trust separates management from beneficial ownership. James LJ thought that the unitholder beneficiaries there were similar to debenture holders. And this is true of the REIT and business trust in Singapore. The problem with the 'unregistered company' winding up provisions is that it has been argued by Green that the unit trust is not one as it is not an unincorporated association.[117] However, Green allows that associations in the nature of trading companies are included, referring to *Re St James Club*[118] which said that there has to be an association for profit or gain. Similarly Payne[119] also relies on that case to state that it is only clubs that are not covered. Business or trading trusts are in that sweet spot where they

[114] See Allsop, (n 20). New Zealand Trusts Act 2019 s 86 (No 38 of 2019, which came into effect on 30 January 2021) now allows creditors to be subrogated to a trustee's right of indemnity (which is for expenses and liabilities incurred) even if, for some reason, the trustee is not entitled to be fully indemnified. The final version was different from the draft proposed by the New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, August 2013) ch 16. This only applies if the creditor has given value in good faith and the trust property has received a benefit from the transaction between the trustee and the creditor, and the creditor can only rely on the trustee's indemnity to the extent of the value given.
[115] (1879) 11 Ch D 170.
[116] (1880) 15 Ch D 247; *cf* HAJ Ford, 'Unit Trusts' (1960) 23(2) MLR 129, 134, who thought that a unit trust could be covered.
[117] Brian Green, 'The Dissolution of Unincorporated Non-Profit Associations' (1980) 43(6) MLR 626, 637 cites no authority for this proposition. It is true that unit trusts have their own winding up regime under collective investment regulations such as Australia's Corporations Act 2001 Part 5C.9 governing managed investment schemes (with unregistered schemes in s 601EE). There is likely no inherent court jurisdiction to wind up a trust: White, (n 3). For the regulatory regime in the UK, see McFarlanes, *Collective Investment Schemes: Law and Practice* (FT Law & Tax, 1996) [A.3150] *et seq.*
[118] (1852) 2 DE GM & G 383, Green, ibid.
[119] Jennifer Payne, *Schemes of Arrangement*: *theory, structure and operation* (CUP, 2014), 25-6. In Singapore this case was also relied on to exclude clubs from 'associations' by the Chief Justice of Singapore in *PP v Wong Hong Toy* [1985-1986] SLR(R) 126; [1985] SGHC 11, 71, 75.

are not required to incorporate and yet will be seen to have sufficient asset partitioning in operating a business to be considered unregistered companies for winding up purposes.

Yet things continued to evolve over time. As we have seen, from 1849 the minimum number of partners or associates required to come under the corporate winding up provisions was 7 which then became 8 in 1862. At the same time the minimum number to incorporate a company fell from 25 in 1844 to 7 in 1856. It is hard to work out how these figures interact. In Singapore, the Companies Act, which came into being in 1967, required incorporation with 20 members but an unregistered company only included partnerships and associations with at least 5 members (this was based on the Australian 1961 Companies Act s 314). This continued in Singapore until the coming into effect in July 2020 of the Insolvency, Restructuring and Dissolution Act removed any numerical requirement given that single member companies widely exist. Conversely, in Australia, the previous definition of 'unregistered company' for purposes of involuntary winding up (now in the Corporations Act 2001 s 583) has been replaced by that of 'Part 5.7 body' in the Corporations Act 2001 s 9 but that still includes 'a partnership, association or other body (whether a body corporate or not) that consists of more than 5 members and that is not a registrable body'. It is said, however, that winding up partnerships in Australia under the Corporations Act 2001 is 'possible, but not very probable'[120]. Again, this is in line with the legitimate expectations of commercial parties where it is perhaps in the more financialised markets when disclosures have improved that they know that there can be significant assets partitioned by single member SPVs.

We should not, however, confuse winding up jurisdiction with schemes of arrangement as it may be that their jurisdictional reach even in respect of foreign companies are different, and wider in the context of schemes.[121] Where associations were concerned, they could be wound up from 1849 but were only subject to scheme jurisdiction later. This is because the scheme itself with respect to registered companies only came about through the 1862 Companies Act section 136 and could only be made in a voluntary liquidation (and acceded to by three-quarters of the creditors both in number and value), which would have clearly ruled out the unregistered company as that could only be wound up involuntarily under s 199. However, Payne points out that s 159 did indirectly allow for a scheme in the compulsory winding up of a registered

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[120] Keith L Fletcher, *The Law of Partnerships in Australia* (Lawbook Co, 9th ed, 2007) [7.215].

[121] Collins J in *Drax Holdings Ltd, Re* [2003] EWHC 2743 (Ch); [2004] 1 WLR 1049; [2004] BCC 334; *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476. See now Philip Morrison, 'Cross-border schemes of arrangement: rationalising one basis for jurisdiction' [2019](3) JBL 185. This is consistent with the fact that schemes were not seen as insolvency proceedings for the purposes of EU Regulation 1346/2000 on Insolvency Proceedings [2000] OJ L160/1. This came into force on 31 May 2002. See now recast Regulation 2015/848 on Insolvency Proceedings [2015] OJ L141/19, which came into effect on 26 June 2017, at Annex A (which was amended by Regulation 2018/946 on replacing Annexes A and B to Regulation 2015/848 on Insolvency Proceedings [2018] OJ L171/1, effective from 26 July 2018). See further Christian Pilkington, (n 104) Ch 4 and Payne, ibid, 287 suggesting that 'concerns regarding forum shopping are groundless'.

company[122], but this did not bind dissentient creditors whose approval was not required and nothing was said there about allowing an 'unregistered company' to undergo that process. Section 204 (which deems it a company only for winding up provisions, which would include the derived scheme) was worded broadly enough to tag onto s 159 so long as court approval was sought. Things were made clearer by the Joint Stock Companies Arrangement Act, 1870, which introduced a general half in number and three-quarter in value requirement for these winding-up derived schemes and extended scheme jurisdiction to all companies that were 'liable to be wound up under "The Companies Act 1862"' (which as we have seen included the involuntary winding up of unregistered companies). It was only in the UK Companies Act 1907 s 38 that schemes could proceed independently of winding up.[123] From that point, all scheme jurisdiction was extended to unregistered companies and the provisions were first consolidated in the Companies (Consolidation) Act 1908, then by the consolidating UK Companies Act 1929 s 153 which then became UK Companies Act 1948 s 206. The latter is still found in Singapore's Companies Act s 210 where '"company" means any company *or society* liable to be wound up under this Act' with the words in italics drawn from Australia's Companies Act 1961 s 181(10). This included unregistered companies so long as it could potentially be wound up regardless of how and whether it is[124]. But the provisions in Singapore are today more ambitious than the UK and Australia in one respect.

For certain UK schemes, sections 900 and s 901J (for companies in financial difficulties) of the UK Companies Act 2006 continue to only apply to registered companies. This was drawn from section 208 of the 1948 Act which concerned schemes where 'the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company ") is to be transferred to another company (in this section referred to as "the transferee company"'. For all other forms of schemes it includes 'companies liable to be wound up under the UK Insolvency Act 1986', as was in effect the case with section 206 of the UK Companies Act 1948. While Singapore adopted a similar distinction in sections 212 and 210 respectively in its scheme provisions, the former was then amended in 2015[125] so that there is now no difference in that both sections apply to unregistered companies. In the consultation process leading to these changes,[126] it was noted that this was the case in section 413 of the Australia Corporations Act 2001 (the present day equivalent to section 212 of the Singapore Companies Act) as well as Part 15 of the New Zealand Companies Act 1993 s 235. Where the former is concerned, it is true that foreign companies are included in their scheme provisions,

[122] Payne, ibid, Pt 1.2.
[123] Member schemes were introduced by s 24 of the UK Companies Act 1900, which supports the affirmative asset partitioning narrative here.
[124] *Re Punj Lloyd Pte Ltd* [2015] SGHC 321. As to what 'liable to be wound up' means, see Philip Morrison, (n 121) 190-1.
[125] Act 36 of 2014, which came into effect in July 2015.
[126] The Steering Committee for Review of the Companies Act (June 2011), [3.42] thought that the concern was about practicality although *lex situs* rules could also be an issue.

but these are registered foreign companies carrying on business there. By contrast, with New Zealand, as in Singapore, the provision includes not just unregistered foreign companies but, as has been largely forgotten, associations and partnerships as well (although New Zealand has, like the UK, now removed the reference there to partnerships).

## VII Conclusion

It is important to continue to see the differences between the trust and corporation.[127] Whereas the latter has had difficulties with too much risk taking in order to boost short-term shareholder value[128], the business trust has lower risk reward ratios due to the duty of impartiality which imposes on trustees the need to balance the interest of income and capital beneficiaries or unit-holders.[129] It has also been argued that business trusts are much better placed to capture modern goals of sustainability and corporate purpose.[130] They, however, also partition assets, though perhaps not as fully as the company due to weaker capital lock-in.[131]

Asset partitioning means that there is a separate entity with respect to at least the fund. It can exist on its own or as a different part of the trustee's patrimony. Where the corporation is at one end of the spectrum capturing the 'web of agency relationships'[132] from an internal contractual viewpoint and a separate being from an external property one, there is a spectrum of intermediate or hybrid entities with different grades of contractarianism and persona attached to them. For these to work without mandatory rules there has to be enough disclosure to third parties dealing with them. Since asset partitioning is about committing a fund to creditors, it must then be capable of liquidation and reorganisation as this is what commercial people expect. Where business trusts are concerned, the former was possible from around 1849 and the latter to varying degrees from 1862 onwards, with the scheme of arrangement fully applicable from 1907. The draftspersons of the 19th Century were cognisant of the needs of commerce when they crafted corporate legislation. Just as the highest courts now recognise that veil piercing is linked to removing asset partitioning, what legislators of yore saw was that there was a need to provide for claims against a partitioned fund and their subsequent winding up and restructuring even if the business did not take the form of an incorporated company.

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[127] Lee Pey Woan, 'Remedying the Abuse of Organisational Forms: Trusts and Companies Considered' (2019) 13(2) Journal of Equity 211. Also see M Leeming, (n 15).

[128] One of the most egregious examples being the Boeing saga with the 737 Max: J Ford, 'Boeing and the siren call of share buybacks' *Financial Times* August 4, 2019.

[129] Schwarcz, (n 35) 577.

[130] Lee-Ford Tritt and Ryan S Teschner, 'Re-Imagining the Business Trust as a Sustainable Business Form' (2019) 97(1) Washington University Law Review 1. At a moral level, it may have more of a separate personhood than a company which some saw as driven by shareholder value; *cf* Margaret M. Blair and Lynn A. Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) Virginia Law Review 247.

[131] See Blair, (n 18) 450 *et seq* discussing the weaker formal capital lock-in of partnerships in general.

[132] Frank H Easterbrook and Daniel R Fischel, 'Corporate Control Transactions' (1982) 91(4) Yale Law Journal 698, 700 who focused on this at the expense of separate personality.

But care needs to be taken in not allowing for too much customisation of business entities. Zhang[133] has correctly pointed out that frustration costs increase with mandatory rules. But too much individual preference cause problems. As we have seen there has to be sufficient disclosure to third parties like creditors before their claims can be redirected to a segregated fund rather than the fund's agents. Even if that works in a particular jurisdiction such as the US and Singapore with respect to the business trust, there may be problems in a cross-border situation when it comes up against another jurisdiction that sees things differently. Even something created statutorily like the limited liability partnership may have difficulty being recognised in another jurisdiction without such legislation, although the concern there is more with defensive rather than affirmative asset partitioning. Where the latter is concerned in the case of the business trust, however, seeing it as creating two separate patrimonies in the trustee's hands, at least where assets are concerned, might in fact allow its recognition more readily in civilian jurisdictions[134]. The fact though that English law has had difficulties in seeing the trust as a separate entity in terms of its liabilities should warn us about being too creative with business structures. These structures were reified through many years of mandatory or sticky default rules. Some may try to freeride on the broad acceptability of their labels by then insisting on even greater freedom in negotiating how those structures actually worked. Here, we should heed the warning at first instance of Sir Browne-Wilkinson VC in *Welsh Development v Exfinco*,[135] in the context of how the legal form of a transaction usually determined its substance, who said that 'those who live by the sword may also die by the sword'. One has to live with the legal consequences of a purely literal construction when arguing for a particular transactional form, there by way of sale rather than a loan with unregistered security, and cannot have other parts of an agreement subject to a different method of interpretation. Once we start becoming too flexible internally, an entity may lose external legitimacy. Recognising that a creditor can have a direct claim against the trust fund, which can in turn be liquidated or restructured as an unregistered company, is probably as far as we can go in terms of the latter's separate personality.

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23 August 2021

[133] Taisu Zhang, 'Beyond Information Costs: Preference Formation and the Architecture of Property Law' (2020) 12(1) Journal of Legal Analysis 1.
[134] Lionel Smith, 'Trusts and Patrimonies in Remus Valsan (eds), *Trusts and Patrimonies* (Edinburgh, 2015) Ch 3. See also Valsen's Introduction, Ch 1.
[135] [1991] BCLC 936, 947,