

Trusts and Shared Property BY TEY TSUN HANG [Singapore: Centre for Commercial Law Studies, Faculty of Law, National University of Singapore, 2010. 108 pp. (main text) + 30 pp. (endnotes). Hardcover: US\$30.00]

Trusts, Credit Security and Trading BY TEY TSUN HANG [Singapore: Centre for Commercial Law Studies, Faculty of Law, National University of Singapore, 2010. 203 pp. (main text and endnotes included). Hardcover: US\$35.00]

I. TRUSTS AND SHARED PROPERTY

Equity, through the mechanism of the trust, may generally be thought to encompass a dualistic approach capable of resolving non-commercial shared property disputes through the use of either the resulting trust or the common intention constructive trust as alternative vehicles of remedy. In this monograph, the author addresses head-on this dualistic characteristic of equity-in-action by offering a broad-picture critique of the law in an effort to convince readers that the common intention constructive trust should prevail over the resulting trust as the preferred analytical vehicle whenever equity intervenes to resolve shared property disputes in non-commercial contexts.

The monograph is organised into six chapters and contains useful evaluations of landmark cases such as *Stack v. Dowden* [2007] 2 A.C. 432 (H.L.) and *Lau Siew Kim v. Yeo Guan Chye Terence* [2008] 2 S.L.R.(R.) 108 (C.A.) [*Lau Siew Kim*]. In Chapters III and IV, the reader is given an exposition of Hong Kong's and Singapore's approaches regarding the question whether the common intention constructive trust is preferred over the resulting trust when problems regarding shared property arise before the courts. Although the reason why Hong Kong is specifically chosen for dedicated discussion is unclear, it can be surmised that this was meant to give an illustration of how an Asian jurisdiction in the common law world has shifted away from the resulting trust approach in favour of the common intention constructive trust, thus leaving the reader with the thought as to whether Singapore law should follow suit and, if so, how the Court of Appeal's decision in *Lau Siew Kim* which favoured the resulting trust approach should be viewed in future.

The central thesis in the monograph which may be distilled from Chapters I-IV is this: while the interplay between the presumption of resulting trust and the presumption of advancement (as exemplified in *Lau Siew Kim*) appears in theory to provide a viable alternative to the common intention constructive trust as a remedial response for non-commercial shared property disputes, *in practice* the common intention constructive trust should prevail as the preferred approach because of its contextual sensitivity. By this, however, the author does not mean the total abolition of the resulting trust, because “the use of a resulting trust analysis can still be relevant in the commercial context, where parties are presumed to be at arm’s length” (at p. 54). In driving this thesis, the author alludes to several perceived deficiencies in the approach taken by the courts in Singapore. For example, the endorsement of the twin presumptions of resulting trust and advancement as the default rule in *Lau Siew Kim* is heavily criticised for establishing a rule of law which lacks contextual sensitivity (at p. 50); and the emphasis in *Lau Siew Kim* on the “timelessness” of certain established categories of relationships under the doctrine of the presumption of advancement is similarly criticised (at pp. 49, 50).

One especially valuable contribution of this monograph to existing scholastic discourse is the author’s attempt to tackle the subject matter from a perspective that transcends mere legalistic argumentation. For instance, the author (at p. 52) makes the argument that adopting the common intention constructive trust as the preferred analytical vehicle for resolving non-commercial shared property disputes carries the advantage of minimising litigation risks in society. This, according to the author, makes the common intention constructive trust a more attractive remedial response compared with the resulting trust, which is perceived to conduce higher risks of litigation. Similarly, the author (at pp. 55-58, 101) addresses the concern that recognising the common intention constructive trust as a default rule in resolving property disputes arising from ‘de facto’ relationships may not be in Singapore’s social policy interests, given that “[i]f the aim of the presumption of advancement in closing its door to ‘de facto’ relationships is to discourage such relationships by refusing to provide legal protection to such category of persons, hence reflecting a policy preference for marriage, it is possible that the imposition of a common intention constructive trust would undermine this” (at p. 57).

The author also advances the view that proprietary estoppel should rightly be conceived as a “supplementary legal device” to the common intention constructive trust, “meant [only] to be invoked in cases where an application of legal principles would not allow the courts to ‘fashion remedial justice’” (at p. 5). In so doing, he highlights an important observation that proprietary estoppel is a conceptually distinct doctrine from the common intention constructive trust because “the former focuses on ‘representations with general expectations of proprietary entitlement’, while the latter emphasises ‘bargains in respect of beneficial ownership’” (at p. 16). Unfortunately, the discussion stops short of examining the relationship between proprietary estoppel on the one hand and the remedy of restitution under the law of unjust enrichment on the other, save only with the assertion that “insofar as proprietary estoppel is conceived to perform substantially the functions of unjust enrichment, it must be rejected” (at p. 27).

In the penultimate Chapter V, the author launches into a discourse examining, *inter alia*, the concepts of the ‘institutional’ and ‘remedial’ constructive trusts, with

the view ultimately taken that the ‘institutional’ conception of the constructive trust is defensible because it is, contrary to certain views expressed elsewhere by other commentators, not one of closed categories (at p. 91). The reader should note that the author has since published an article which deals more specifically with the particular subject matter in much greater detail (see Tey Tsun Hang, “Constructive Trusts—Deciphering and Distinguishing ‘Institutional’ and ‘Remedial’” (2011) 23 *Sing. Ac. L.J.* 250).

All in all, the monograph offers valuable insights on the subject matter and it is recommended to both academics and practitioners.

II. TRUSTS, CREDIT SECURITY AND TRADING

The trust as an institution is widely regarded as a prized instrument of trade and commerce given the proprietary remedies that it affords in the event of legal disputes arising between commercial parties. This monograph examines precisely how modern trust law has, in varying degrees, shifted away from traditional conceptions of what the “irreducible core” characteristics of a trust has often been understood to be (at pp. 1-3).

The monograph contains one introductory chapter and four subsequent chapters each dedicated to a different type of commercial ‘trust vehicle’ illustrating how the modern commercial policy of trust law has facilitated the use of commercial trusts in the common law world today. In the introductory chapter, the author begins by alluding to the modern phenomenon in offshore Caribbean jurisdictions, characterised as a “fragmentation of the traditional trust”, that involves “the use of trusts such that the institution of trust might be seen to have been stripped of any substantial content, and reduced to an empty label that can be affixed to any one of a variety of property-holding institutions according to the whims of settlors or local legislatures who want to buy into the comforting connotations of a ‘trust’” (at p. 1). This is followed by a bold and thought-provoking response to the various intellectual postulations of the trust (*i.e.* the contractarian, obligational and proprietary conceptions of the trust) where the author proffers an alternative conception which views the trust pragmatically as a “transformative” institution (at pp. 6-8). In support of this stance, the author argues, *inter alia*, that the trust has historically been a “policy-laden and policy-fuel[l]ed vehicle designed to deliver its facilitative economic capabilities” and that “[i]t is the impermanence of what is dictated by what policy demands that gives the trust its transformative attribute, in the sense that it is not monolithic, but evolutionary and pliant in nature” (at p. 7).

It is against this general backdrop that the author proceeds in Chapters II-V to examine four types of ‘trust vehicles’, commonly used in commercial and business settings, so as to demonstrate the plausibility of the ‘transformative trust’ thesis propounded in the introductory chapter. In Chapter II, for example, the author raises the controversy borne out by two competing understandings of the proper legal basis for the *Quistclose* trust (as evinced in the decisions of Lord Wilberforce and Lord Millett in *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1970] A.C. 567 (H.L.) and *Twinsectra Ltd. v. Yardley* [2002] 2 A.C. 164 (H.L.) respectively) to illustrate the courts’ painstaking efforts in finding creative ways to manoeuvre certain legal trappings of the traditional understanding of the trust, so as to convince the common

law world that such a new category of trust is defensible on the theoretical level. Indeed, it can be surmised that the very fact that the English courts have indulged in these justificatory exercises underlines their willingness to recognise the policy objective of the *Quistclose* trust, viz., to encourage creditors to extend credit to distressed companies in the name of “corporate rescue” (at p. 24).

In Chapter III, the author discusses the principle found in *De Mattos v. Gibson* (1858) 4 De G. & J. 276, 45 E.R. 108 (C.A.) which affords proprietary protection—by way of employing the doctrine of trust powers—to a promisee under a contract against a third party in special circumstances. The author observes that “[w]ith the development of the principle [in *De Mattos v. Gibson*], the transferability of property will be less restricted because many more parties would be able to enjoy the same piece of property by contractually promising to respect a prior party’s interest in it” (at p. 86). This has important implications in the commercial world because the principle serves a practical purpose in “maximising the use of property especially in the shipping industry, thus facilitating commerce” (at p. 97). This is in line with the author’s view in the introductory chapter that “[w]ith regard to the proprietary remedies of *trust* law, it has been recognised that the modern *commercial* policy of trust law is to facilitate the use of commercial trusts because they offer special attributes that cannot be replaced by contract law” (at pp. 2-3 (emphasis in original)).

In Chapter IV, proceeds retention of title clauses in commercial contracts are discussed, with a particular focus placed on the plausibility of reading a trust as opposed to a registrable charge into such contractual arrangements between trading parties dealing at arms’ length with each other. In particular, extensive discussion is undertaken of the Australian case of *Associated Alloys Pty. Ltd. v. ACN 001 452 106 Pty. Ltd. (in liquidation)* [2000] 202 C.L.R. 588, where the majority in the High Court of Australia departed in its approach from other common law jurisdictions by holding that proceeds retention of title clauses are, in appropriate cases, capable of constituting a trust of future-acquired assets in a commercial setting. According to the author, this case “is a testament to the potential of a proceeds [retention of title] clause drafted as a trust—as opposed to a charge—to contribute to the protection of creditors, as well as the facilitation of commerce” (at p. 154). Again, this may be thought to be consistent with the ‘transformative’ attribute of the trust which the author had asserted in the introductory chapter.

Finally, the Australian construct known as the “trading trust” and described by the author as “a clear example of the modern day trust entering the commercial arena” (at p. 179) is examined in Chapter V. In this reviewer’s opinion, this chapter most closely exemplifies how the traditional understanding of the dynamics in the relationship (including the rights, duties and obligations) between the settlor, trustee and beneficiary *inter se* have transformed in modern times under the trading trust paradigm conceived in Australia. The purpose for such transformation is to recognise the validity of new innovative commercial trading vehicles “established primarily for the avoidance of taxes that an incorporated company was subject to, and for the protection of trust property from the insolvency regime, rather than the holding of assets by the trustee in the traditional sense” (at p. 180).

Apart from playing a supplementary role to the introductory chapter, Chapters II-V also assume a role of apprising the reader of the various legal intricacies as well as the essential requirements that surround the valid constitution of each of the

four types of 'trust vehicles' examined. References to cases decided in Singapore, Malaysia, Hong Kong, Canada, Australia and New Zealand are, where appropriate, made throughout these chapters, giving the analysis a comparative quality.

Daring, insightful and comparative in its analysis, this monograph provides a thought-provoking read, while at the same time providing a fairly comprehensive exposition of the modern trust laws related to each of the four 'trust vehicles' examined in Chapters II-V. That makes this monograph a useful read for both academics and practitioners interested in this field of law.

SEOW FU HONG COLIN
Justices' Law Clerk
Supreme Court of the Republic of Singapore