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MERRILL AND SMITH'S INTERMEDIATE RIGHTS LYING BETWEEN CONTRACT AND PROPERTY: ARE SINGAPORE TRUSTS AND SECURED TRANSACTIONS DRIFTING AWAY FROM ENGLISH LAW TOWARDS AMERICAN LAW?

HANS **TJIO***

This article analyses intermediate rights lying between contract and property described by Merrill and Smith** and the disclosure and protective strategies they suggest the law has adopted to deal with them. It finds their views confirmed by recent developments in the Singapore law of trusts and secured transactions. For the former, the nascent recognition that a beneficial interest is "a right against a right" has given it the flexibility to deal with both family and commercial trusts by weakening the property-based beneficiary principle and recognizing the separate entity of the trust fund. In the latter, Singapore courts are characterizing more unusual forms of security as a registrable floating charge that is not seen as a proprietary interest. The move towards more function as opposed to form here may reflect a continental drift away from English law towards American law as Singapore adapts to Chapter 11 type provisions introduced in May 2017 into its corporate restructuring legislation.

I. INTRODUCTION

There has been a revival in attempts to understand the meaning of property rights around the world amongst lawyers and laypersons, partly because of the Unexplained Wealth Order ("UWO"), which may lead to non-conviction based asset forfeiture. In countries like the UK (under the *Criminal Finances Act 2017*),[1] this requires a person who is reasonably suspected of involvement in, or being connected to a person involved in, serious crime (whether in the UK or elsewhere) to explain their interest in a property, and to explain how it was obtained, where there are grounds to suspect that the person's known lawfully obtained income would be insufficient to acquire the property. The UWO was first used against 2 London properties in Feb 2018.[2] It is an *in rem* order that does not require the satisfaction of tracing rules, which

* Professor, Faculty of Law, National University of Singapore. I would like to thank Tan Yock Lin, Tan Cheng Han, Richard Nolan, Rachel Leow, Hu Ying and an anonymous referee for helpful suggestions and constructive comments. I would also like to thank the Centre for Banking & Finance Law at NUS Law for its financial support which enabled the hiring of student research assistants Delphine Goh and Daniel Ang who have assisted in this work.

** Thomas W Merrill & Henry E Smith, "The Property/Contract Interface" (2001) 101 Colum L Rev 773.

1 *Criminal Finances Act 2017* (UK), c 22.

2 An appeal against the first orders imposed by the National Crime Agency was dismissed by the High Court: *National Crime Agency v Mrs A* [2018] EWHC 2534 (Admin), thus requiring Mrs A to explain how she acquired her property.

still requires a link between the claim and the property as it is based on the concept of exchange.[3] The UWO does not, however, itself lead to asset forfeiture and is a civil power of investigation. The *Proceeds of Crime Act 2002*[4] is then utilized to forfeit the relevant property with the failure to provide a response to a UWO raising a presumption that the property is recoverable as the *POCA* is otherwise governed by orthodox property rules.[5]

But academics have been closely relooking the meaning of property for at least 20 years now.[6] There is clearly a push back against the realist perspective that had seemed to have taken hold prior to that point in time. Traditional notions of property as a thing had given way to relational concepts which laid more stress on the legal significance of the rights that the owner had over its property. It was said in the context of debt financing that "(p)roperty could mean either the *res*, the subject of ownership, or the rights exercisable over that *res*".[7]

Realists at the extreme argued that property was a meaningless concept by itself and it was the qualifying conditions and consequences of qualification that mattered.[8] So long as we could find most of the incidents of property it did not matter what the label was. But labels are a very powerful organizing idea, and they nudge us into a particular mental model. The realists had a point in that property assumed almost mystical qualities, such as in determining whether beneficiaries had sufficient proprietary interests under a trust in order to have rights to information about the trust. This line of argument finally ended with the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*[9] whose headnotes state that "a proprietary right was neither sufficient nor necessary for the exercise of the court's jurisdiction". Property was simply too loosely used previously as proxy for the search for fiduciary duties of accountability owed by discretionary trustees to the beneficiaries.[10]

Today, academics again see property more as the thing itself, even if partly as a way of organising relations between persons. The bundle of rights argument is too atomic or devoid of content[11] but there is little danger of going back to the other extreme as is perhaps still the case with civilian law and recognising only tangible property as such. Certainly the UWO challenges any notion of the absolute sanctity of the thing itself. Instead, the modular theory of property law put forward by Henry Smith[12] still has as its core the right to exclude others from the thing and is not significantly different from Penner's[13] argument that property is properly understood as a "right

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3 Richard C Nolan, "Civil Recovery after Fraud" (2015) 131 LQR 8.

4 *Proceeds of Crime Act 2002* (UK) [*POCA*], c 29.

5 *R v May (Raymond George)* [2008] UKHL 28.

6 See *eg* James E Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997).

7 Fidelis Oditah, *Legal Aspects of Receivables Financing* (Sweet & Maxwell, 1991) at 32.

8 Alf Ross, "Tu-tu" (1957) 70 Harvard LR 812; Felix S Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum L Rev 809 although recognizing the exclusionary role of the property label (at 815).

9 [2003] 2 AC 709 (PC) (appeal from Isle of Man).

10 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, especially Kirby P at 421-422. See three other areas in which "property notions were injected to supply the normative force that was otherwise unarticulated": Pey-Woan Lee, "Inducing Breach of Contract, Conversion and Contract as Property" (2009) 29 OJLS 511 at 518.

11 Henry E Smith, "Property as the Law of Things" (2012) 125 Harvard LR 1691 at 1722.

12 *Ibid*. See also Thomas W Merrill, "Property and the Right to Exclude" (1998) 77 Nebraska LR 730.

13 Penner, *supra* note 6.

to a thing". So when we refer to a thing, it is perhaps best placed in its proper context by Merrill and Smith:

> When we encounter a thing that is marketed in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing—not to enter upon it, not to use it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is. In effect, these universal duties are broadcast to the world from the thing itself.[14]

On any set view presently, the touchstone is exclusion, although sometimes in a broader sense.[15] Merrill and Smith state that "(e)xclusion rules represent a simple and universal "organising idea" that allows a multitude of individuals with a small amount of information to interact in mutually beneficial ways that would be impossible in a world that had only governance rules."[16] They stress the importance of information costs in explaining differences in rights that bind the world and customised rights. So property at its highest can adopt only a few certain forms,[17] in order to reduce information costs given that so many people are affected by it (either by the need to avoid or to acquire it). By contrast, *in personam* rights are the subject of negotiation *inter partes*. This can be helped by default rules, which can be modified, in order to reduce transaction costs.

This article is, however, not ambitious enough to deal directly with property theory and is more about what Merrill and Smith referred to as rights lying between contract and property, and more in the context of the commercial and financial world. They argue that it is possible to have two intermediate situations which affect indefinite but singular persons (quasi-multidal), and definite but numerous persons (compound paucital). These exist whether one sees property as the polar extreme of contractual rights, or whether there is whole spectrum of "property" rights. In these intermediate areas, which include the trust structure and secured transactions, Merrill and Smith find the legal responses in these intermediate situations also governed by the economics of information costs. Here the law attempts to compensate for incomplete information on the part of one or more parties when it starts affecting either larger numbers of persons or the affected parties become less identifiable. This requires the disclosure of additional information (where contracting is still possible)

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14 Thomas W Merrill & Henry E Smith, "What Happened to Property in Law and Economics" (2001) 111 Yale LJ 357 at 359.

15 Ideas of exclusion may be wider in that it is more about exclusive enjoyment: Eric R Claeys, "Property 101: Is Property a Thing or Bundle" (2008) 32 Seattle U LR 617 at 650. Honore's list of *in rem* rights can also be seen to centre around such exclusivity: Antony M Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107-147. An owner may be seen as an "exclusive agenda setter", Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 University of Toronto LJ 275.

16 Thomas W Merrill & Henry E Smith, "The Property/Contract Interface" (2001) 101 Colum L Rev 773 at 795.

17 Thomas W Merrill & Henry E Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 Yale LJ 1. According to *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) at 1247-1248, three criteria need to be satisfied: it has to be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

or standardization of features (where it is not). The former is more for quasi-multidal situations and the latter for compound paucital but not exclusively so.[18]

But as affected persons become more numerous or harder to identify *ex ante* the rights that are protected should logically become more *in rem* or multidal in nature[19] and start becoming a thing that binds the world. Merrill and Smith describe the dynamic nature of how things become reified:

> 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.[20]

We shall see that this seems to have been borne out in the context of Singapore much as Merrill and Smith predicted. First, where the trust creates an intermediate situation, and is increasingly recognized as having a beneficiary principle that may not involve ownership of trust property. At the same time, the trust is slowly being reified in practice as a separate entity, and the courts have begun to recognise this. If there is any contribution to property law here, it is that there is an inverse relationship between a property-based beneficiary principle and the trust's separate legal personality. Consequently, as long as there is disclosure, unsecured creditors can look directly to the trust fund for repayment. Second, we will see that there are security interests which, while not fully proprietary, are increasingly being standardized as a protective measure due to their increasingly widespread use. The usual position with novel security interests is that they are characterized as floating charges, and not at either extreme as purely contractual devices or fixed charges. They require charge registration as a floating charge whether structured as an agreement to grant a charge in the future or a fixed charge where the lender has insufficient control over the collateral.

II. Trusts as Intermediate Situations

The fact that the trust situation creates an intermediate situation rather than something that is fully proprietary from the perspective of ownership of the subject matter of the trust underlies the recent Singapore Court of Appeal decision in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*[21] ("*De La Sala*"). Here, the Court did not pierce the corporate veil for the benefit of the "putative beneficial owner of *both* the shares and the assets" of the companies because a "beneficial interest in a company's shares does not imply a beneficial interest in the company's *assets*".[22] The Court, however, utilised the presumption of resulting trust to find

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18 Merrill & Smith, *supra* note 16 at 808.

19 Hohfeld used them quite interchangeably: Wesley Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16, (1917) 26 Yale LJ 710.

20 Merrill & Smith, *supra* note 16 at 808.

21 [2018] 1 SLR 894 (CA).

22 A shareholder does not have a right to the assets of the company but at best a factual expectancy to the underlying assets: see *Kosmopoulos v Constitution Insurance Co of Canada* [1987] 1 SCR 2. Compare *Macaura v Northern Assurance Co, Ltd* [1925] AC 619 (HL).

that, while the relevant companies' assets did not belong to the putative beneficial owner, given that these companies did not have "trading operations", their assets were beneficially owned by two other companies. These companies had earlier funded the acquisition of those assets and had not given them over to the relevant companies or transferred them for consideration so that a "resulting trust would remain imprinted on those assets as they passed from corporate vehicle to corporate vehicle". As to the nature of the interest under a trust, Phang JA stated:

> It is for this reason that beneficial "ownership" has been described as "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.[23]

This is possibly the first time that a court has accepted such a characterization of a beneficial interest, although it was largely used in contradistinction with a legal or absolute interest in property. Even in a fixed interest trust, the beneficiary would usually not have a right to present enjoyment of the trust property, which may be deferred by the terms of the trust. However, its beneficial and equitable ownership interest is manifested in its right to see to the restoration of the trust fund. This view was accepted by the UK Supreme Court in *Akers v Samba Financial Group*[24] where Lord Mance JSC, with whom the other justices agreed, said:

> [The] beneficiary has only the right to have the trust assets restored to the original trustee, or, if the trust was a bare trust to which the rule in *Saunders v Vautier* (1841) 4 Beav 115, applies, to himself…

There is, however, possibly a slight, though significant difference in the two approaches in that the UK courts see the beneficiary's equitable interest as proprietary (with this essentially being a negative right to exclude primarily and to reclaim secondarily[25]). By contrast, Singapore courts see the beneficial interest as a right against a trustee which binds third parties deriving their rights from the trustee but which is not necessarily proprietary. The right against a right falls just short of a right against a thing, but has a fair amount of persistence as it binds third parties who acquire rights *derived* from the trustee's right which can itself be against a thing or an indivisible personal right such as a bank account.[26]

There is clearly something circular to such persistence, however. In *Akers*, Lord Mance was troubled by this when he said that:

> As to what constitutes "property" this is always "heavily dependent on context… something can be 'proprietary' in one sense while also being non-proprietary in another sense": M Conaglen, "Thinking about proprietary remedies for breach of

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23 [2018] 1 SLR 894 (CA) at para 145.

24 [2017] AC 424 (SC) at para 46, noted Richard C Nolan, "Dispositions and Equitable Property" (2017) 133 LQR 353.

25 Richard C Nolan, "Equitable Property" (2006) 122 LQR 232, which was approved in *Akers v Samba Financial Group*, *ibid*, at paras 15 and 46.

26 Ben McFarlane & Robert Stevens, "The Nature of Equitable Property" (2010) 4 J Equity 1 at 3-6. It has recently been held that cryptocurrencies may be the subject matter of a trust even if "there may be some academic debate as to the precise nature of the property right": *B2C2 Ltd v Quoine* [2019] SGHC(I) 3 at para 142.

confidence" [2008] Intellectual Property Quarterly 82, 89, referring to R Nolan, "Equitable Property" (2006) 122 LQR 232, 256-257. As the Chancellor noted 16 ITELR 808, para 62, there is a school of thought (which can be dated to *F W Maitland, Equity—a Course of Lectures* (1936)) which analyses the equitable interests created by a common law trust not as proprietary, but as personal or "obligational", even as against third parties. The issue "whether trusts are properly seen as part of the law of property or as an aspect of the law of obligations" is described in *Burrows, English Private Law*, 3rd ed (2013), para 4.140 as a "difficult question"; see also *Burrows, The Law of Restitution*, 3rd ed (2011), pp 191-193, Nolan, "Equitable Property" 122 LQR 232. Supporters of a personal analysis include *B McFarlane, The Structure of Property Law* (2008); see also G Watt, The Proprietary Effect of a Chattel Lease" [2003] Conveyancer and Property Lawyer 61. A recent discussion of the pros and cons of each analysis appears by P Jaffey in "Explaining the Trust" (2015) 131 LQR 377. Jaffey concludes that, although a trust involves personal rights against the trustee, only a proprietary analysis explains satisfactorily those aspects which concern the beneficiary's position vis-à-vis third parties, such as the trustee's creditors and recipients of unauthorised transfers of trust property.[27]

The fact that "a personal right in respect of things can be proprietary and valid against third parties is a unique feature of English property law."[28] It might not really matter whether we classify something as proprietary, except when it does. We have seen this played out in English law previously with contractual licences, where it was at one time thought that it would be a mistake to exclude them from the realm of property.[29] The landlord and tenant arrangement is another intermediate position examined by Merrill and Smith (along with bailment as the last of four) and there is something to be said for fluidity in the use of the property label. But we should continue to reserve it for when it really matters and see these as intermediate positions that may be sufficiently proprietary for certain purposes. This avoids the danger that "'(f)raud" becomes "trust" which becomes "property" irrespective of what was intended'.[30] At the same time, it has recently been said "(w)hen a proprietary analysis of the trust is overtaken by an obligational analysis, it can encourage too great a fluidity in the trust construct".[31]

There are certainly many parts of the trust structure that are neither fully contractual nor fully proprietary. Merrill and Smith point out that a beneficial interest is mainly *in personam* when asserted against the trustee as it affects only a small identified group of persons,[32] and needs an intermediate strategy like notice to work against third parties.[33] For the former situation, it was held by the European Court of

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27 [2017] AC 424 (SC) at para 15 *per* Lord Mance JSC, with whom all the other Justices agreed.

28 Wenwen Liang, *Title and Title Conflicts in Respect of Intermediated Securities under English Law* (Cambridge Scholars Publishing, 2013) at 17.

29 Kevin Gray, *Elements of Land Law* (London: Butterworths, 2nd ed, 1993) at 926-927.

30 JD Davies, "Constructive Trusts, Contract and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land" (1980) 7 Adelaide LR 200 at 212.

31 Jessica Palmer & Charles Rickett, "The revolution and legacy of the discretionary trust" (2017) 11 J Equity 157 at 176.

32 Merrill & Smith, *supra* note 16 at 845.

33 Smith, *supra* note 11 at 1707.

Justice in *Webb v Webb*[34] that the right of the beneficiary to sue the original trustee was not a right *in rem*. Even when tracing against third parties, there have been cases which suggested that the burden was on a claimant to show that the third party had notice of its prior interest.[35] This, though, is conflating the defence of *bona fide* purchaser without notice with the elements of an *in personam* claim, where liability may not be strict. The vindication of property rights is usually thought to underlie tracing. And yet there are many discordant voices even in this regard.

Stone argued a long time ago that the "real reason for the liability of third persons is the unconscientious interference with the right *in personam* which the [beneficiary] has against the trustee."[36] More recently, Langbein said that that "equitable tracing is simply a mode of enforcing the trust deal."[37] While they may reflect the position in the US, it has recently been said of tracing rules in the UK that "in the current rules of tracing, there is both obligation and property but, while perhaps not obvious at first blush, it is obligation that dominates".[38]

These arguments appear even stronger with knowing receipt and dishonest assistance where the proprietary element is even weaker as imposing personal liability on third parties is closer to the imposition of a personal right against that party although it was once named a form of constructive trusteeship. Singapore courts clearly require unconscionability for former and dishonesty for the latter as we move back towards the *in personam* end of the spectrum of rights generated by the trust structure.[39] UK courts too acknowledge this although they continue to struggle with the notion that some of these personal actions are derived from vitiated transfers of property or value where liability may be strict.[40]

In a sense, McFarlane and Stevens are really harking back to the Maitland observation that trusts are "an institute of great elasticity and generality; as elastic, as general as contract."[41] The reliance by Singapore courts on these academic arguments may reflect the fact that they have to apply extant trust law to things as diverse

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34 [1994] QB 696.

35 *Polly Peck v Nadir* [1992] 2 Lloyd's Rep 238 (CA). Compare this decision with the Privy Council's approach in *Credit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13 which held that whether in tracing or knowing receipt the question of what constitutes notice or knowledge is the same although the burden of proof is on the recipient in the former instance. See also *Heperu Pty Ltd v Belle* [2009] NSWCA 252 (volunteer had notice), discussed by Ben McFarlane, "Trust and Knowledge: Lessons from Australia" in Jamie Glister & Pauline Ridge, eds, *Fault Lines in Equity* (Hart Publishing, 2012).

36 Harlan F Stone, "The Nature of the Rights of the Cestui Que Trust" (1917) 17 Colum L Rev 467 at 477.

37 John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale LJ 625 at 648.

38 Derek Whayman, "Obligations and Property in Tracing Claims" (2018) Conv 157 at 174.

39 See *eg, Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased)* [2013] 3 SLR 801 (CA), referring to the *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 4 All ER 121. See Hans Tjio, "No Stranger to Unconscionability" 2001 JBL 299.

40 Particularly the speeches of Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Philip Tan* [1995] 2 AC 378 (PC) and *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 (HL), which doubted the correctness of *Akindele*. In *Credit Agricole Corporation and Investment Bank v Papadimitriou*, *supra* note 35 at para 32, Lord Sumption said that even for knowing receipt, we are in the "realm of property rights".

41 FW Maitland, *Lectures on Equity* (Cambridge University Press, 1910). Compare James E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014) 27 Can JL & Juris 473.

as small family trusts, bond indentures,[42] "massively discretionary trusts",[43] and investment vehicles like real estate investment trusts ("REITs") and business trusts that are constantly evolving through solicitor drafting. Strict notions of property and ownership may not find a proper fit in some of these cases and it may be that courts in Singapore are responding more quickly to the challenges posed, albeit in the context of the assessment of damages for breach of trust, by the House of Lords in *Target Holdings Ltd v Redferns.*[44] There Lord Browne-Wilkinson 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." There does not have to be a separate law of commercial trusts as such, just the recognition that extant trust law can accommodate different kinds of trusts.

Such an approach gives more flexibility in recognising intermediate rights falling short of the fullest meaning of property in various forms of trusts. There are thus default rules provided by the *Trustees Act*[45] for family trusts where only few persons are affected and contracting does not create informational problems for outside parties like creditors since there is little borrowing. This is also how Merrill and Smith see the US family trust where default fiduciary duties are provided under the Restatement on the Law of Trusts. Some are penalty defaults that force stronger parties to get round it by revealing information to the other informationally disadvantaged party when they contract around it. The example they give is with a trustee signing contracts for the trust where the trustee is liable unless he says that he is doing so for the trust. This is important for us in the Commonwealth when trustees start to borrow on behalf of the trust as the position in the UK is that only secured creditors can look directly to the trust fund for repayment and unsecured creditors can only sue the trustee. In Singapore, however, the practice is coming round to the US position as the trust is increasingly given a separate legal existence[46] so that unsecured creditors can look directly to it and not just indirectly through the trustee's right of indemnity. This will be fully discussed in the next part although it should be stated here that the "right against a right" does not exist in a vacuum and could by itself speak to the endurance of the identity of the fund. But modifiable default rules are low level protection, even if they require disclosure to work, when compared to mandatory

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[42] Here there is a right against a trustee's right to institute proceedings against the issuer/borrower to enforce the issuer/borrower's obligations pertaining to the notes. Bondholders may, however, have direct rights upon default. The courts have held that the ultimate beneficial holders of notes, in those cases, were creditors of the issuer company and may be entitled to vote directly in a scheme and judicial management depending on how the restructuring provision is phrased: *Re Swiber Holdings Ltd* [2018] SGHC 211.

[43] A phrase coined by Lionel Smith, "Massively Discretionary Trusts" [2017] Current Legal Problems 17.

[44] [1996] 1 AC 421 (HL) at 435. But compare the actual decision there on causation with *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 5. See further, *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 (HC). Austin Scott left commercial trusts out of the US Restatements of the Law of Trusts as he saw the trust more as a sophisticated gift and favoured its proprietary characteristics in his debates with Maitland: Langbein, *supra* note 37, at 645-646.

[45] Cap 337, 2005 Rev Ed Sing.

[46] The US trust is treated as a *de facto* separate legal entity by the common law, and legally so in state business trust legislation: Steven Schwarcz, "Commercial Trusts as Business Organisations: Unravelling the Mystery" (2003) 58 Business Lawyer 1 at 25. See *eg Delaware Business Trust Act*, §3801(a).

rules. As more people are affected by a trust, such as in the case of a commercial trust with numerous investors, this becomes more of a compound paucital situation, and so with US mutual funds under their *Employee Retirement Income Security Act of 1974*[47] we find that there are non-waivable fiduciary rules. There is also prospectus disclosure required by the capital markets where investment products are offered to the public which usually fully discloses the trust deed or at least its salient terms. This is also the case in Singapore with unit trusts and REITs under the *Securities and Futures Act*[48] and business trusts under the *Business Trusts Act*[49]. These add mandatory provisions to the trust deed and in the case of the business trust also expressly removes the operation of default provisions of the *Trustees Act*.[50]

III. Two Inversely Correlated Notions of Property—Weakening the Beneficiary Principle and Growing the Trust's Separate Legal Personality

It is sometimes difficult, no matter how precisely the user of the property label tries to be in Hohfeldian terms, to discern the perspective which is used to see the property. As an example of this from company law, it was said that "(g)overnment officials within China believe that the joint stock system is just a property organisation form and does not mean private ownership".[51] In the trust context, Sitkoff has said that "like the corporation and other organisational forms, the trust blends external in rem asset partitioning with internal *in personam* contractarian flexibility" but that tracing protected a different interest. Although both are about its effects on third parties, there are at least two property perspectives here. One is with ownership of the underlying property, which in the context of the trust was linked to the beneficiary principle. The other is the organizational form which may create separate personality that can be used to deal with the outside world. Smith believes his modular theory of property explains both.[52] They are, however, linked. Indeed, in the context of the trust, it is the beneficiary principle (which required trust beneficiaries to own the trust assets and militates against non-charitable purpose trusts) that makes it difficult for the trust fund to be separately ring-fenced and treated as a separate legal entity. But ring-fencing the fund is one step removed from seeing the trust as an entity similar to a company.[53] Private ownership of property in the context of the company is only of shareholders owning shares in the company and the company owning the underlying assets. There is no reverse veil piercing at common law as was recently reaffirmed

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47 *Employee Retirement Income Security Act of 1974*, Pub L No 93-406, 88 Stat 829.

48 Cap 289, 2006 Rev Ed Sing.

49 Cap 31A, 2005 Rev Ed Sing.

50 Section 94 of the *Business Trusts Act* (Cap 31A, 2005 Rev Ed Sing). It is likely that the trust deed of a unit trust or REIT would also expressly disapply the *Trustees Act*.

51 See Larry C Backer, *Comparative Corporate Law* (Carolina Academic Press, 2002) at 1358-1369.

52 Smith, *supra* note 11 at 1722 (higher-level modularization).

53 In *Lee Chuen Li v Singapore Island Country Club* [1992] 2 SLR(R) 266 (HC) and *infra* note 67, the comment that "the law abhors a vacuum in ownership" was made 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. As with some charitable trusts, the fund itself is given some separate recognition.

by the Court of Appeal in *De La Sala*[54] that would allow a shareholder to claim that it owns the company assets. The Singapore REIT has similarly evolved that way, and attempted to replicate the company's separate legal personality. This is a clause from the first Singapore REIT (which offer was aborted in 2002 but which has since been inserted in the trust deed of every Singapore REIT):

> The Trust Deed sets out the rights of the Unitholder. Each Unit represents an undivided interest in the (REIT). A Unitholder has no equitable or proprietary interest in the underlying assets of the (REIT) and is not entitled to the transfer to it of any asset or of any estate or interest in any asset of the (REIT). A Unitholder's right is limited to the right to require due administration of the (REIT) in accordance with the provisions of the Trust Deed, including by suit against the Trustee or the Manager.

The bifurcation of property where trusts are concerned in Singapore since around 2002 was the first step in creating separate personality for listed REITs which Hansmann and Mattei pointed out US trusts clearly have and is a function of trust law there.[55] It was never really attempted for unit trusts in Singapore prior to that.[56] But they also conclude that affirmative asset partitioning is really so that the trust fund can be committed to creditors (both secured and unsecured) without further consent from beneficiaries. Singapore law has moved in that direction as well even though separate personality was first introduced to insulate unitholders from stamp duty payable on sales of real property interests when they transfer their units on the secondary market (as the clause above means that those units are instead choses in action against the trustee or manager, much like a share).[57] So the reification is of the trust rather than the fund, which should have actually come about first as asset partitioning may be a consequence of separate personality but can arise without it. The archetypal loan facility agreement in the case of a REIT or business trust would now also include this particular undertaking (and will be announced by the board):

> The Property Company and the Trustee will also provide an unconditional and irrevocable guarantee in favour of the lenders under the Facility Agreement, (in the case of the Trustee) with recourse limited to the assets of the (Trust).

This was introduced as REITs found difficulties borrowing on an unsecured basis,[58] such as through bond issuances. Although there is some English academic comment

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54 *Supra* note 21. See further *Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] 5 SLR 689 (HC).

55 Henry Hansmann & Ugo Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73 NYU LR 434. The follow up on the company was by Henry Hansmann & Reinier Kraakman, "The Essential Role of Organization Law" (2000) 110 Yale LJ 387.

56 While there is nothing in the Singapore Code on Collective Investment Scheme on this, reg 2.6.2(1) in Chap 2 of the UK Collective Investment Schemes sourcebook provided that "the interests of the *unitholders* in an AUT [authorised unit trust] consist of *units* (including fractions of a *unit*), each representing one undivided share in the *AUT's scheme property*." [emphasis in original]. *Cf* John Armour, "Companies and Other Associations" in Andrew S Burrows, ed, *English Private Law* (Oxford: Oxford University Press, 2013) at 3.119.

57 See further, Hans Tjio & Lee Suet Fern, "Developments in Securities Law and Practice" in Teo Keang Sood, ed, *SAL Conference 2006: Developments in Singapore Law between 2001 and 2005* (Singapore: Academy Publishing, 2006).

58 This may confirm a recent thesis that the creation of an entity is needed to create floating priority (not the floating charge discussed below but the flexibility for administrators of its assets to reorder priorities)

supporting such an approach committing the trust fund,[59] the UK courts have never recognized it. 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 against creditors of the trust only to the extent of the trust property. In *Re Investor Trust (Guernsey) Ltd*,[60] 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."[61]

In Canada, however, where US law may have its greatest influence, the REIT has also been recognised as being a separate entity,[62] so that the REIT trustees were seen to owe fiduciary duties to the REIT and not the unit-holder beneficiaries. Strengthening the separate personality of the trust has the added advantage that the trust may be liquidated as an entity when in most of the Commonwealth it is usually the trustee or trust company that is wound up. The Australian case which shows the difference in the two kinds of winding up is *Application of Valad Commercial Management Ltd.*[63] In April 2017, Rickmers Maritime Trust, a business trust listed on the Singapore Exchange, was wound up as an entity under the *Business Trusts Act* after it tried unsuccessfully to restructure its bonds. While there is no doubt that seeing the trust as an entity is somewhat fictional, and a matter of convenience, the Singapore Court of Appeal has pointed out that the company is also an "artificial construct",[64] and Armour has said that we should not overanalyze separate personhood.[65]

As we have seen, strengthening the separate personality of the trust which can then be committed to creditors formally lending to the trustee means that the very traditional beneficiary principle that required beneficiaries to have equitable ownership of trust property has been weakened. This appears to be happening concurrently in Singapore, where courts may have also moved away from English law in the meaning of the common law beneficiary principle required for a valid private trust

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whereas security interests create fixed priority: Ofer Eldar & Andrew Verstein, "The Enduring Distinction Between Business Entities and Security Interests" (2018) 92 Southern California LR (forthcoming). Secured creditors are protected when lending to Commonwealth trusts but not unsecured creditors who can only look to the trustee for repayment.

59 A1.159 of the chapter on England in David Brownbill *et al*, eds, *International Trust Laws* (Jordan, looseleaf) (Update 47 - November 2010).

60 [2018] UKPC 7.

61 *Ibid* at para 63. See also A Ollikainen-Read, "Creditors' claims against trustees and trust fund" (2018) 24 Trust & Trustees 177 and Hans Tjio, "Leading to a Trust (2005) 19 Trust Law International 75".

62 *Locking v McCowen* (2015) ONSC 4435, criticized by Robin F Hansen, "Legal Personality and the Canadian REIT" (2017) 23 Trusts & Trustees 400.

63 [2010] NSWSC 646.

64 *Townsing Henry George v Jenton Overseas Investments Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 (CA) at para 77. Compare in the US context, Jonathan R Macey & Leo E Strine, "Citizens United As Bad Corporate Law" (August 16, 2018) U of Penn, Inst for Law & Econ Research Paper No. 18-28; Yale Law & Economics Research Paper No. 598, online: SSRN <https://ssrn.com/abstract=3233118>.

65 Armour, *supra* note 56 at Ch 3.

as they have taken a less proprietary view of the trust.[66] It was previously similar in that there had to be an owner in equity of trust property as "[like] nature, the law abhors a vacuum in ownership": *Lee Chuen Li v Singapore Island Country Club.*[67] Earlier attempts in England to see the *Re Denley's*[68] trust as a non-charitable purpose trust that is validated by the existence of an enforcer were replaced by the view that there were, in that case, existing beneficiaries that enabled the trust to be enforced.[69] Some Singapore cases that seemed to take a more liberal approach towards purpose trusts did not gain further traction.[70]

Recently, however, in *Re Croesus Retail Asset Management Pte Ltd*,[71] which concerned a listed business trust being analogized with the corporate form for restructuring purposes as the *Business Trusts Act* did not provide for this (unlike liquidation),[72] Aedit Abdullah J recognised that:

> Croesus differs from an orthodox and traditional trust since the unit holders are expressly stated not to have any equitable proprietary interest in the trust property but only a right to compel due performance by the trustee…

This should be contrasted with Abdullah JC's (as his Honour then was) earlier judgment in *Zhao Hui Fang v Commissioner of Stamp Duties* ("*Zhao Hui Fang*"), where he referred to both the High Court and Court of Appeal decisions in *Koh Lau Keow v Attorney-General*, both of which rejected the possibility of the existence of non-charitable purpose trusts as they violated the beneficiary principle.[73]

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66 Compare Ben McFarlane & Charles Mitchell, *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 14th Ed., 2015) at 17-092.

67 *Supra* note 53 at para 48, *per* Michael Hwang JC.

68 *In re Denley's Trust Deed, Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373.

69 Paul Matthews, "From Obligation to Property and Bank Again" in David J Hayton, ed, *Extending the Boundaries of Trusts and other Ring-fenced Funds* (Kluwer, 2002) at 203.

70 *Bermuda Trust (Singapore) Ltd v Wee Richard* [1998] 3 SLR(R) 938 (HC).

71 [2017] 5 SLR 811 (HC).

72 *Ibid*, drawing parallels with section 210 of the *Companies Act* (Cap 50, 2006 Rev Ed Sing) on corporate schemes of arrangement. The court used its inherent jurisdiction under Order 80 rule 2 of the Rules of Court after the Securities Industry Council indicated that the trust scheme was exempt from various provisions of the Takeovers Code subject to unitholder and court approvals being obtained that were similar to that required of shareholders in a corporate scheme. This required, amongst other things, the approval, by a majority in number representing three-fourths in value of Croesus unitholders, of the scheme and various amendments to the trust deed (to implement the scheme). However, his Honour said that:

> In an O 80 r 2 application, the main focus is on the interest of the beneficiaries and the terms of the trust … uppermost in the court's consideration would be adequate protection in the circumstances for unit holders as putative beneficiaries in an investment vehicle…

73 [2013] 4 SLR 491 (HC), where Tay Yong Kwang J (as he then was) said at para 18:

> In *In re Endacott, Corpe* (deceased) *v Endacott* [1960] Ch 232 at 246, Lord Evershed MR held that:
>
> No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries.

In the Court of Appeal, [2014] 2 SLR 1165 (CA), Chao Hick Tin JA (as he then was), who delivered the judgment of the court, said at para 18(a):

> The following propositions are undisputed by the parties:
>
> (a) The Trust must be a charitable trust to be valid. This is because (i) the Trust is stated to be 'in perpetuity' and would be void for offending the rule against perpetuities (which does not apply to charitable trusts); and (ii) the Trust is a purpose trust with no definite beneficiaries and is void unless charitable.

One way to rationalise the cases is that there is a difference between equitable ownership (which we have seen argued essentially as negative concept, involving largely a primary exclusionary right and a secondary right of recovery for misapplication) and factual beneficiaries who actually enjoy the property presently but who are not legally seen as beneficiaries, such as those that on one view were accepted in *Re Denley's*[74]. Abdullah JC suggested such a distinction earlier in *Zhao Hui Fang*, where he said that "there is no suggestion that such factual beneficiaries have rights of alienation or exclusion against others, lacking thus the crucial hallmarks of ownership".

But the more recent developments in Singapore suggest that trust beneficiaries need not be owners of the underlying property and having *de facto* beneficiaries suffices to validate a trust. Although their comments were made in the financial context of a statutory trust accepting money from investors, which need not have the characteristics of a common law express trust, the Court of Appeal in *MF Global Singapore Pte Ltd v Vintage Bullion DMCC*[75] also thought that it may well be in the nature of a non-charitable purpose trust had it come about at the time the moneys were received or accrued and before segregation.[76] No doubt some of this is simply a matter of statutory interpretation, but we have seen how the Privy Council was guided by the common law position when refusing to see that Jersey legislation had committed the trust fund to creditors and removed recourse to the trustee.[77]

This position adopted in Singapore for business trusts appears to be consistent with some unit trusts in Australia. In *CPT Custodian Pty Ltd v Commissioner of State Revenue*[78] it was held that a unit trust holder did not have a specific interest in trust property. Strangely, offshore jurisdictions again appear slower to respond to the needs of commercial trusts, possibly taking their cue from English courts. This is seen in the Jersey decision of *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited*[79] which is probably the only reported case that has recently examined the nature of the unit trust in some detail. Here, the judge in analysing the nature of unit trusts stated that "unitholders are beneficiaries of the unit trust, so that they do have beneficial interests (perhaps of a limited kind) in the trust property".[80]

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74 *Supra* note 68. The question there was whether a trust which was for the setting up of recreational facilities for the enjoyment (not ownership) of employees of the corporate settlor was valid. These were, at best, indirect beneficiaries with a negative *locus standi* to see that the trust was properly administered.

75 [2016] 4 SLR 1248 (CA) at para 55 referring to a similar analysis in *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) and others* [2010] 3 SLR 82 (HC).

76 Although finding it not necessary to decide the point, the Court of Appeal in *MF Global Singapore Pte Ltd v Vintage Bullion DMCC*, *ibid* at para 56, appeared to see that the relevant regulations required segregation before the trust would arise. Conversely the UK Supreme Court in *Re Lehman Brothers International (Europe)* [2012] UKSC 6 found as a matter of statutory interpretation that there was no need for segregation for the statutory trust there to arise in favour of customers whose money had not been set aside. The Quistclose trust (*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL)) may also arise without the need for segregation of the loan monies (*Gabriel v Little* [2013] EWCA Civ 1513); particularly where it is closer in nature to a resulting trust as opposed to an express trust. The absence of the need for segregation does not support either the beneficiary principle nor separate trust fund existence but reinforces the argument that these are intermediate situations that are not proprietary from some perspectives but may be from others.

77 *Re Investor Trust (Guernsey) Ltd*, *supra* note 60.

78 [2005] HCA 53. Compare, however, *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90.

79 [2014] JRC 102D.

80 *Ibid* at para 44.

In Singapore, by contrast, the beneficiary principle may well be one that does not require the beneficiary to own property but only to have a right to see that the trust is properly carried out. It was recently said by Palmer and Rickett that "we are in the midst of a doctrinal revolution".[81] That is evidenced in how the courts are dealing with the non-charitable purpose trust as well as the discretionary trust in onshore jurisdictions like Singapore and Australia. For once, England and its dependencies appear to be behind the curve, possibly because of fear of policy stultification.[82] But it is not clear what policy today requires a property-based beneficiary principle. Protecting third parties dealing with the trust through trustees will better be achieved by recognising the trust as a separate entity that can be signalled to those third parties.[83] While the internal governance of the trust may require some non-derogable rules to maintain faithfulness to the trust concept, if the concern is with the core obligations of a trustee, this can equally be enforced by a protector of the trust.[84]

Indeed arguments are made at the other extreme for holders of mere powers to be given standing to represent a trust as the test should be one of who are the "true intended beneficiaries" and "to focus on those who have lost property is too narrow".[85] A long time ago, the House of Lords in *McPhail v Doulton*[86] recognized that trust powers and mere powers were more similar than dissimilar. While they acted on it by prescribing a similar test for certainty of objects, there has been little follow up since in England, although here offshore jurisdictions like Jersey seem to have recognized that even holders of mere powers have standing to seek reconstitution of a trust fund.[87] It is, however, the case, that whatever interests you validly have may not give you what you want or need in the particular circumstances you find yourself in.[88]

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81 Palmer & Rickett, *supra* note 31 at 183.

82 Paul Matthews, *supra* note 69. The Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export)* [2018] 1 SLR 363 (CA) applied this test in the context of illegality. Although there was an independent cause of action in unjust enrichment for the total failure of consideration, the policy importance of the *Moneylenders Act* (Cap 188, 2010 Rev Ed Sing) meant that recovery of the illegal loan was not permitted.

83 Henry Hansmann & Reinier Kraakman, "Agency Problems and Legal Strategies" in Kraakman *et al*, eds, *The Anatomy of Corporate Law* (Oxford: Oxford University Press, 2004) at 31 argue that even mandatory rules can be enabling in that it permits an entity to signal its characteristics in an environment where parties choose which legal form they prefer. David J Hayton, "The Irreducible Core Content of Trusteeship" in AJ Oakley, ed, *Trends in Contemporary Trust Law* (Clarendon, 1996) at Ch 3 deals only with irreducible core content within the internal structure of trusts and not in its external relations with third parties.

84 John H Langbein, "Mandatory Rules in the Law of Trusts" (2004) 98 Northwestern U LR 1105 at 1106 argues that such rules can be further sub-divided into those that restrict the settlor's intent and those that promote the settlor's true intentions.

85 Richard C Nolan, "Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures" in Paul Davies & James E. Penner, eds, *Equity, Trusts and Commerce* (Hart Publishing, 2017) at 167 and 175.

86 [1971] AC 424 (HL). *Underhill and Hayton's Law of Trusts and Trustees* (LexisNexis, 19th ed, 2017) at 1.68 state that it was only with *Schmidt v Rosewood Trust Ltd*, *supra* note 9, that the distinction was fully removed. This was a Privy Council decision from the Isle of Man.

87 *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003.

88 Jessica Hudson, "Equitable ownership and restitution of misapplied trust property" (2017) 11 J Equity 245 at 253 says that discretionary beneficiaries may not have a proprietary interest for certain purposes but would have for others.

Even if these non-charitable purposes trusts or discretionary trusts satisfy the beneficiary principle and/or test of certainty of objects, the beneficiaries may not have the *locus standi* to challenge the forfeiture of the assets by the state. This is how a US court saw a wide discretionary trust governed by Singapore law which covered US dollar assets: *United States v All Assets Held in Account Number 80020796 in the name of Doraville Properties Corp*.[89] The US *in rem* action (which is an early example of non-conviction asset forfeiture in that some link between the property and unlawful activity was required) inverted the way claims are made out and set us on the path that we are now on. Previously, claims had to be made against persons and so the argument would be that beneficiaries had interests that could be seized by the authorities or recovered by private claimants.[90] In the *in rem* action the notional defendant is the thing itself, and it is for beneficiaries to then argue that they have an interest that allows them to defend the claim. In this situation, beneficiaries will have difficulty pointing to an interest sufficient to challenge forfeiture by those authorities. Such modern forms of asset forfeiture reduces information costs as it puts the onus on the lowest cost avoider to explain how the thing and its ownership came about. We may see more of this with the Unexplained Wealth Order in the UK, and courts there may find it harder to hold the line with the beneficiary principle and this would possibly finally strengthen the separate personality of the trust there.

The weaker intermediate position that trust beneficiaries find themselves in is also reflected in how the remedial constructive trust works in insolvency. The Singapore High Court in *Sumitomo Bank v Thahir Kartika Ratna*[91] ("*Pertamina*" case) was the first in the Commonwealth to adopt a robust approach toward the taking of bribes by fiduciaries and found a constructive trust created there. At the moment, however, it appears that the trust imposed is institutional in nature and based on a pre-existing interest rather than one declared by the court.[92] The Chief Justice of Singapore has, extra-judicially, cogently argued, however, that there may be instances of fiduciary gain that may best remedied through the use of a more flexible remedial constructive trust.[93] This appears to be the position in Australia and the US, where it is likely that a remedial constructive trust that is imposed in these situations could be modified in insolvency situations.[94] This also seems to be the case with the presumed resulting trust arising from the absence of intention to transfer beneficial

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89 Civil Action No 13-1832 (5 March 2018).

90 See the then Chief Justice of Singapore Chan Sek Keong, "Opening Address" in Hans Tjio, ed, *The Regulation of Wealth Management* (Singapore: NUS Centre for Commercial Law Studies, 2008) at xxv who thought that discretionary trusts are sufficiently proprietary when claimants in a matrimonial dispute assert that they have a personal claim against discretionary beneficiaries that they seek to extend to trust assets.

91 [1992] 3 SLR(R) 638 (HC) affirmed in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 (CA). See Hans Tjio, "Rethinking the Personal and Proprietary Distinction" [1993] Sing JLS 198.

92 *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097 (CA), noted by Hannah Lim Yee Fen, "Trade Marks, Territoriality and Trusts" (2016) 28 Sing Ac LJ 277.

93 Sundaresh Menon CJ, "Bribes, Secret Commissions, and the Institution of the Trust, a Matter of Loyalty" (5 October 2018), online: Supreme Court <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/stabribes-secret-commissions-and-the-institution-of-the-trust-a-mat.pdf>. See further Alvin W-L See, "Unauthorized Fiduciary Gains and the Constructive Trust" (2016) 28 Sing Ac LJ 1014.

94 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 and § 544(a) of the Bankruptcy Code, USC, Title 11. Compare *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250

interest to the recipient. Singapore courts have consistently recognized that this unjust factor leading to the reversal of the enrichment underlies the imposition of the resulting trust but it has also been stated that while this may result in personal restitution, not all circumstances involving a vitiated intention will confer a resulting trust in favour of the donor.[95]

Benjamin once said that with respect to the need for certainty of subject matter in trust creation that earlier cases were eroded as "case law approached the financial markets".[96] Micheler, however, pointed out that *Hunter v Moss* is consistent with US authority.[97] There is a larger story here with respect to the extent that the drive to promote Singapore law which commenced a decade ago has resulted in greater acceptance of US cases by the Singapore courts. Certainly, we are witnessing this where debt restructuring is concerned, but that is a direct result of the adoption of Chapter 11 provisions by the *Companies (Amendment) Act 2017* in May 2017. Bankruptcy is, however, a federal matter in the US and Singapore courts are likely to be guided by decisions of the US District Courts of the Southern District of New York.[98] Linked to it are security interests discussed in the next part that are governed by Article 9 of the *Uniform Commercial Code*, which has been adopted by all 50 states. US trusts are subject to differing state law, however, and it will be harder to use cases from there to develop Singapore trust law given those differences. But some theories as to the nature of beneficial interests under a trust have helped. Seeing the trust as an intermediate situation creating a right against a right means that the rules governing it are often not mandatory.[99] It would consequently be unfair to say that trust law has been distorted by modern financial and commercial needs if it is inherently flexible. In Singapore, that flexibility has allowed practice to first develop and then its courts to recognize the separate legal existence of the trust (and not just ring-fencing the fund) at the expense of the traditional beneficiary principle.

IV. Secured Transactions Also Create Intermediate Rights that May Not Be Proprietary

Intuitively, the form of security the fits this heading would be the floating charge, although arguments will be made below that even the fixed charge may not create immediate proprietary interests. Merrill and Smith also see security interests creating intermediate rights:

> Security interests arise with an *in personam* agreement between a debtor and a creditor to make a transfer of the full bundle of in rem rights to the creditor upon the happening of a future contingent event, non-payment of the debt.[100]

(SC) although perhaps this issue was not directly relevant there: The Hon William Gummow AC, "Bribes and Constructive Trusts" (2015) 131 LQR 21 at 26.

95 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 (CA) at para 48. See further Jeremiah Lau, "Legal and Beneficial Entitlement to Joint Bank Accounts with Volunteers" (2018) 33 Banking & Finance LR 345.

96 Joanna Benjamin, *Financial Law* (Oxford: Oxford University Press, 2007) at 21.12.

97 Eva Micheler, *Property in Securities: a Comparative Study* (Cambridge: Cambridge University Press, 2007) at 7.3.3.2.

98 Which along with Delaware deal with large bankruptcies of corporate groups: Jay L Westbrook, "Secured Creditor Control and Bankruptcy Sales: Am Empirical View" (2015) U Ill L Rev 831.

99 Langbein, *supra* note 84.

100 Merrill & Smith, *supra* note 16 at 850.

This may be why so few countries have accepted the *Hague Securities Convention* which conversely tries to make the transfer of intermediated securities just a contractual matter governed by a version of the proper law of the contract, with passing regard for the *lex situs*.[101] It is also clearly the case that Singapore courts do not see security interests as purely contractual in nature. In an earlier Court of Appeal decision in *Electro Magnetic (S) Ltd (under judicial management) v Development Bank of Singapore*[102] it was said that:

> A security over a property consists of some real or proprietary interest, legal or equitable, in the property as distinguished from a personal right or claim thereon. A right of set-off is a personal right; it is a right given by contract or by law to set one claim against the other and arrive at a balance.

But neither would Singapore courts see some security interests as fully proprietary either. In *Diablo Fortune Inc v Cameron Lindsay Duncan*[103] ("*Diablo*"), the Court of Appeal, for which Chong JA delivered the only judgment on behalf of a full court, upheld the decision at first instance that the shipowner's lien upon sub-hires and sub-freights belonging or due to a charterer or any sub-charterer created a charge over the sub-hires and sub-freights. It was not just a contractual device but a floating charge from the point of agreement, and so was void against the liquidator for non-registration as a company charge under section 131(3)(g) of the *Companies Act*.[104]

The *Diablo* court held that a floating charge is present security but not present property and the lien shared the characteristics of a floating charge laid out by Romer LJ in *Re Yorkshire Woolcombers Association*,[105] the most important of which was that the borrower had freedom to carry on its business in the ordinary way using the collateral. This was the case even though any collateral is extinguished when the sub-freight, if any, is paid over to the charterer or original debtor. In stressing the significance of crystallization, Chong JA said:

> On a conceptual level, we are of the view that while a floating charge confers an immediate security interest, the charge enjoys a proprietary interest in the charged assets only after the event of crystallization.[106]

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[101] This can be the law of the place where the intermediary holding the securities has a qualifying office, which will invariably be New York or London. See further Liang, *supra* note 28. Only 3 countries have adopted the *Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*, which came into force on 1 April 2017: the US, Switzerland and Mauritius.

[102] [1994] 1 SLR(R) 574 (CA) at para 11. See also *Re Bank of Credit and Commerce International SA (No 8)* [1998] 1 AC 214 (HL) at 226 per Lord Hoffmann: "(a) proprietary interest by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him…"

[103] [2018] 2 SLR 129 (CA), noted by Ian Teo, "Registrability of liens on sub-freights: The last word or not" (2018) LMCLQ 490. The effect of this decision has been reversed by changes introduced by the *Companies (Amendment) Act 2018*, which came into effect on 1 October 2018. This recognises the shipowners' lien, which includes the lien over sub-freights, as an unregistrable floating or fixed charge: section 131(3AB).

[104] Cap 50, 2006 Rev Ed Sing.

[105] [1903] 2 Ch 284 at 294-295, upheld by the House of Lords in *Illingworth v Houldsworth* [1904] AC 355 (HL).

[106] *Supra* note 103 at para 47. Conversely, in *Re Spectrum Plus Ltd (in Liquidation)* [2005] 2 AC 680 (HL) at para 139, Lord Walker said that "the charge has a proprietary interest but its interest is in a fund of circulating capital, and until the chargee intervenes (on crystallization of the charge) it is for the trader, and not the bank, to decide how to run its business". Eilis Ferran, *Principles of Corporate Finance Law*

Diablo is consistent with the Canadian approach (before they did away with floating charges under their Personal Property Security Acts), where in *Royal Bank of Canada v Sparrow*[107] it was said that the floating charge did not create any "legal title to the collateral" until crystallization. A recent English decision that the *Diablo* court relied on also held that it is the point of crystallization that creates a property right.[108] It is also somewhat consonant with *De La Sala* as the floating charge and beneficial interest under a trust are often analogized, and the latter was seen as "a right against a right".[109] Certainly, it has been pointed out by Ferran[110] that the floating charge lacks "asset constraint", a quality of security identified by Westbrook in a pre-default situation.[111] There may still be weak restraints in that the use of the borrower of the underlying collateral must still be in the ordinary course of business. While freedom is given to the debtor by a floating chargeholder, this is to deal with the collateral subject to the floating charge only in the *ordinary course of business*: *In Re Panama, New Zealand & Australian Royal Mail Co.*[112] There are, in other words, limits to the freedom. Rights are given to the floating chargeholder to protect the fund, for example, by way of an injunction to prevent the debtor from disposing of its assets outside the ordinary course of business.[113]

What then o f the fixed charge as the difference between certain fixed charges and the floating charge may not always be that apparent. At first instance in *Duncan, Cameron Lindsay v Diablo Fortune Inc* ("*Diablo HC*"),[114] the lien was also seen as a charge over book debts registrable under section 131(3)(f) of the *Companies Act* and was likely a fixed charge. The Court of Appeal did not disturb this finding on appeal and this was recognized by the amendments to section 131 that have now been passed to make the lien over sub-freight both an unregistrable floating charge as well as an unregistrable charge over book debts. Indeed, both courts in Singapore approved the very first decision to see the lien as a registrable charge of the English High Court in *The Ugland Trailer*.[115] There, Nourse J implicitly saw the lien over sub-freights there as creating a fixed charge given his views that a bank taking a later fixed charge is affected by notice of the existence of the lien as opposed to notice of the exercise of the lien (since notice of a floating charge does not *per se* affect subsequent fixed chargees).

(Oxford: Oxford University Press, 2008) at 372 ("Ferran") states that this "implicitly rejects yet another theory on the nature of the floating charge… of which the major proponent is Gough".

107 [1997] 1 SCR 411 at para 46.

108 *Western Bulk Shipowning III A/S v Carbofer Maritime Trading APS* ("*The Western Moscow*") [2012] 2 Lloyd's Rep. 163 at para 50. It should be noted, however, that *The Western Moscow* did not concern charge registration as the charterers were not incorporated in the UK nor likely foreign companies to which the then charge registration regime applied. The question there was whether an interest had arguably been created for the purposes of the continuation of a freezing order obtained by the shipowners against the sub-charterers.

109 See *eg Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at para 6. See also *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th ed, 2017) at 4-04 ("Goode and Gullifer"). This case also holds that a security does not necessarily create a trust structure, as in Singapore does *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317.

110 Ferran, *supra* note 106 at 369.

111 Jay L Westbrook, "The Control of Wealth in Bankruptcy" (2004) 82 Texas LR 795 at 808.

112 (1870) LR 5 Ch App 318.

113 *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366 at 378.

114 [2017] SGHC 172.

115 *In re Welsh Irish Ferries Ltd* ("*The Ugland Trailer*") [1986] 1 Ch 471.

This is where there is some difference between *Diablo* and McFarlane and Stevens' view of equitable rights for they also see a fixed charge (as opposed to a mortgage)[116] or a floating charge after crystallization as creating just a right against a right that like beneficial interests under a trust is short of a right to the thing or property. Indeed, their argument is that a pre-crystallized floating charge only creates a power to acquire a right to a right, which is something even weaker, like a mere equity.[117] The touchstone of security is that the duty of chargor to chargee is defeasible upon performance of the duty secured by the charge.[118] Aside from the legal mortgage, it is not necessary to see security interests as creating present property interests.

The view that even the fixed charge is more an encumbrance than property carved out of the underlying collateral perhaps underlies what Abdullah J said most recently in *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) v BP Singapore Pte Ltd*[119] ("*Jurong Aromatics*"):

> As a charge is an encumbrance on the full equitable ownership which exists to benefit the chargee, it differs from an assignment, as currently understood, which is a transfer of ownership of some portion of interest in the property. This is reflected in the definition of a charge as a non-possessory security whereby the charged property is appropriated to the discharge of an obligation without any transfer of ownership (see para 6.17 of *The Law of Security and Title-Based Financing* by Hugh Beale, Michael Bridge, Louise Gullifer & Eva Lomnicka (Oxford University Press, 2nd Ed, 2012)). The important aspect is the appropriation of the property for a specific purpose, *ie*, the discharge of a primary obligation, by way of the security interest.

In the Singapore Court of Appeal in *Qilin World Capital Ltd v CPIT Investments Ltd*,[120] which was an appeal from the Singapore International Commercial Court, Dyson Heydon IJ (delivering the judgment of the court) said that the share pledge, which was more accurately termed "shares used as security for the Loan", did not involve the transfer of legal or beneficial title.[121] Even more recently, Chong JA, (delivering the judgment of the court, as he did in *Diablo*) in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd*[122] held that using "proprietary interests" language for an equitable charge (which was not an equitable mortgage) was unhelpful as was seeing a garnishee order *nisi* as creating an equitable charge (even if had some proprietary

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116 In contrast, for the floating charge, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis, looseleaf) at 19.320 point out that, occasionally, when a court says that there is no proprietary interest created they mean that is no transfer of title such as with a legal mortgage as opposed to a proprietary interest carved out of the title by a charge.

117 This is similar to a power to rescind for misrepresentation, McFarlane & Stevens, *supra* note 26, at 8 and 26.

118 *Ibid* at 23.

119 [2018] SGHC 215 at para 45.

120 [2018] 2 SLR 1 (CA); [2018] SGCA (I) 1 at para 47.

121 Contrast another appeal from the Singapore International Commercial Court in *Yuanta Asset Management International Ltd v Telemedia Pacific Group Ltd* [2018] 2 SLR 21 (CA); [2018] SGCA(I) 3 at para 55(a) where Rix IJ said that that a share pledge or charge may make the pledgee or chargee a trustee holding the collateral on behalf of the pledgor or chargor, something which was rejected by Woo J in *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 and the High Court of Australia in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588.

122 [2019] SGCA 5 at paras 15 to 18.

remedies). The court was only prepared to see a "narrow definition" of "proprietary interest" for the garnishee order which was:

> a much less extensive right to prevent the owner of the property from exercising his "full, unfettered right to 'deal' with the property charged" in a manner that is inconsistent with the rightholder's interest" (as in *Lyford* at 273; see also William James Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) ("*Company Charges*") at pp 38-39).

This may be contrasted with the position in England.[123] For example, *In the Matter of Lehman Brothers International (Europe) (In Administration)*,[124] Briggs J (as he then was) said that it "is that right of specific enforcement which transforms what might have otherwise been a purely personal right into a species of proprietary interest in the charged property". There is a bit of a slippery slope here as other cases have directly applied the maxim that equity deems done that which ought to be done without the need for specific enforceability, which in any case is "an amorphous concept".[125] The use of the maxim is perfectly fine if the reference is to intermediate rights but possibly too fluid for property rights.

The greater flexibility accorded by academic views on the intermediate nature of security interests crucially helps explain fixed charges over future book debts, like sub-freights where, as Chong JA acknowledged in *Diablo*, "the shipowner may not have information about the sub-charterparty at the material time".[126] It has always been the case that the "precise nature of the interest held by a lender with security over future property before the property has been acquired has never been defined but some of the consequences of *Re Lind* are reasonably clear".[127] Those consequences include the fact that the fixed charge over future property is not caught by section 259 of the *Companies Act* as a disposition of property made after commencement of winding and its status as secured creditor and not being required to submit proof of debt. More importantly, the priority dates from the agreement and not the later date when collateral is acquired. But much of this applies to the floating charge as well.[128] *Gough* therefore sees both as mere equities rather than equitable

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123 *Ibid* at para 13.

124 [2012] EWHC 2997 at para 43.

125 See Tan Kah Wai, "Whither the Equitable Maxim? A brief comment on BTB v BTD [2018] SGHC 203" Singapore Law Watch Commentaries, Issue 2, October 2018 at para 15.

126 *Supra* note 103 at para 4.

127 Ferran, *supra* note 106 at 361.

128 It was thought that this showed that the floating charge had to be immediately proprietary. In *Re Margart Properties Ltd* (1984) 9 ACLR 269 it was held that a floating charge created earlier which involved the collection of assets in a winding up did not contravene their equivalent of section 259 (now section 469 of the *Corporations Act 2001* (Cth)). *Margart* was followed in *QCD (M) Sdn Bhd v Wah Nam Plastic Industry Pte Ltd* [1997] 1 SLR(R) 270 (HC) where it was held that the beneficial interest in the company's property resided with the floating chargeholder and was not covered by the section 259 prohibition as the disposition of property occurred when the floating charge was created. The UK Supreme Court in *Akers v Samba Financial Group*, *supra* note 24, recently confirmed that their equivalent of section 259 (section 127 of the *Insolvency Act 1986*) focuses on the location of beneficial interest. WJ Gough, *Company Charges* (Butterworths, 2nd ed, 1996) ("Gough") simply sees *Margart* as "wrong" (at 356). But it may be that the decision can be justified on the basis that disposition usually means the transfer of an interest, although it is wide enough to include a promise to release made by the company under a settlement agreement not to sue a former director: *Re Officeserve Technologies* [2017] EWHC 1920 (Ch). The mischief that the section guards against is the reduction of company assets available to pay its

interests.[129] He argued that immediate proprietary rights can only exist with respect to present property. With respect to future property, *Holroyd v Marshall*[130] only determined that no fresh act was needed to transfer the property when it came into existence.

Lim JC at first instance in *Diablo HC*[131] and Clarke J in the *Western Moscow*[132] explained, however, that a lien clause over sub-freights amounts to an agreement to assign future debts by way of security, which gives rise to immediate rights in equity. They see equity as operating automatically in this context.[133] Whereas *Gough* thought that there cannot be anything more than an "incomplete assignment"[134] where the floating charge is involved, here the assumption seems to be that there is always an immediate assignment because equity deems it. The recent *Jurong Aromatics* decision suggests that it is better to leave aside the language of assignment given its links with complex property transfers and it is better to see all charges as encumbrances on the underlying collateral creating security and not necessarily proprietary interests. This avoids the point made by Lopucki, Abraham and Delahaye that the "necessary implication of the property conveyance theory is that encumbered property has multiple owners".[135] If pushed, these may be "inchoate property rights" as *Bank of Montreal v Innovation Credit Union*[136] labelled Canadian security interests partly because of the future property problem. This seems to be how all agreements to create security in the future are treated if they are to work at all in Singapore.

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debts. It was held in *Akers* that the company property there, a beneficial interest under a trust, already had a limitation in that the trustee with the legal title could always do something to extinguish that beneficial interest. Here the encumbrance created by the floating charge over the underlying collateral already means that there is an inherent limitation so that the company is not reducing its assets to pay its debts after presentation of the winding up petition.

129 Gough, *ibid* at 332.

130 (1862) 10 HL Cas 191; 11 ER 999.

131 *Supra* note 114, at para 62.

132 *Supra* note 108, at para 49.

133 Which is similar to what the High Court of Australia thought in *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 16, where according to Latham CJ:

> The principle that is applied is not a principle depending on the possibility of a court of equity decreeing specific performance, as had been stated by Lord Westbury LC in *Holroyd v Marshall*. The relevant principle is that equity considers as done that which ought to be done.

134 A description recently used by Arden LJ (as she then was) in *Saw (SW) 2010 Ltd v Wilson* [2017] EWCA Civ 1001 at para 51.

135 Lynn M LoPucki, Arvin I Abraham & Bernd P Delahaye, "Optimizing English and American Security Interests" (2013) 88 Notre Dame Law Rev 1785 at 1788.

136 [2010] 3 SCR 3 at para 47. This involved a priority fight over agricultural implements owned at the time as well as after-acquired property between an unregistered provincial perfection based interest under its *Personal Property Securities Act* and a later charge perfected under the property based Bank Act without notice of the prior interest. The Supreme Court fell back on property maxims and the bank was seen to acquire its legal title subject to the prior interest as its security was only over the borrower's equity of redemption in the property. The PPSA interest did not have priority only from registration perfection as that would render it something like the floating charge which had been rejected in *Royal Bank of Canada v Sparrow* [1997] 1 SCR 411, see *supra* note 107. Rather, registration only granted priority but validity was still separate and so the lack of registration did not invalidate the earlier security: see also *Diablo*, *supra* note 103, at para 68. *Montreal* was reversed by the *Financial Systems Review Act* which received royal assent on March 29, 2012 and became law on May 24, 2012. It expressly provides that section 427 security will have priority over the rights of "any person who had a security interest in that property that was unperfected at the time the bank acquired its security in the property."

The Court of Appeal in *Diablo* said that while registration of the lien over sub-freights as a floating charge was usually needed to give notice to creditors, it "may not be necessary in the present context since all parties who deal with charterers are aware that such liens are standard in charterparties.… Ultimately, it boils down to the proper characterisation of the legal nature of the lien on subfreights. Once that inquiry is complete, the legal consequences would flow from that determination."[137]

It would appear that the court was not influenced by the disclosure strategy suggested by Merrill and Smith to deal with intermediate situations, and instead adopted a neutral method of characterization. Lord Millett in *Agnew v Commissioner of Inland Revenue and Official Assignee*[138] summarized the modern way of determining security interests, and this was applied in *Jurong Data Centre Development Pte Ltd v M+W Singapore Pte Ltd*.[139] This is to first ascertain the rights and obligations created between the contracting parties, and then to categorize them in light of extant law, which quite often is dependent on an applicable statutory provision that provides consequences for different characterization. Very often, the fit is not perfect and so the goal is to find the best categorization of the rights and obligations that have been created.[140] It will be seen below that there is, however, a protective element underlying the court's decision to characterize more novel forms of security as a floating charge as this is inherently weaker than a fixed charge and loses out in priority to certain unsecured preferential creditors under section 328 of the *Companies Act*. Not being proprietary as a thing, it does not ask other creditors to avoid the collateral entirely, only to know it is encumbered in a certain standardized manner. So registration of the lien as a floating charge is less important than the fact that it is a floating charge at all.

V. Characterizing Most Agreements to Create Security in the Future as Floating Charges

It may be that seeing the lien over sub-freight as a floating charge which is not a proprietary interest helps explain the other important point arising from *Diablo*, which is that almost all agreements to grant a charge in the future are registrable as floating charges. The Court of Appeal made important qualifications to the agreement to grant a charge upon a contingency that had been recognised in *Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd.*[141] There, it was held that no registrable

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137 *Supra* note 103 at para 4, referring to AL Diamond, *A Review of Security Interests in Property* (DTI, 1989) at 23.4.15 who stated that "(t)he case against registration is that although sub-freights are indeed assets of the charterer, it is unlikely that persons extending credit to the charterer rely on that income, or would be unaware of the presence of a lien which is a standard clause in many charterparties".

138 [2001] UKPC 28 (appeal from New Zealand).

139 [2011] 3 SLR 337 (HC) at para 72.

140 For example, the English Court of Appeal in *National Westminster Bank plc v Spectrum Plus Ltd* [2004] EWCA Civ 670 at para 4 clearly thought that a floating charge with certain immediate restrictions lay somewhere between a floating charge and a fixed charge. Yet its characterization as a floating charge had enormous consequences in terms of priority with respect to unsecured preferential creditors (under the UK *Insolvency Act 1986*).

141 [1999] SLR(R) 976 (CA). The decision was criticized by Tan Cheng Han, "Charges, Contingencies and Registration" (2002) 2 JCLS 191; Lee Eng Beng, "Invisible and Springing Security Interests in Corporate Insolvency Law" (2000) 12 Sing Ac LJ 210; Victor C S Yeo, "No Security for the Unsecured Creditor" (2000) 12 Sing Ac LJ 218.

charge arose immediately because no security was created when the agreement was entered into. While the bank failed in its claims for security in that case, the Court of Appeal in *Asiatic* thought that where a mechanism facilitated it, an agreement to grant security could automatically take effect at the later time when the contingent event occurred.

The Court of Appeal in *Diablo* distinguished *Asiatic* on the basis that the security there would only spring into existence on the occurrence of a contingent event and not before. In any case, however, the Court of Appeal in *Diablo* thought that such agreements would usually be construed as registrable charges since the definition of a "charge" in the Companies Act includes an agreement to give or grant a charge and this did not have to be specifically enforceable for it to be seen as such. This further reinforces a mandatory rule as a protective strategy. Whereas *Asiatic* may have allowed an affirmative negative pledge to take effect at the planned moment with registration only from that point onwards,[142] *Diablo* states that if it were to work at all, it would have to be registered as a floating charge once the agreement is entered into.

The Court of Appeal in *Diablo*[143] approved the analysis of Tay JC (as he then was) at first instance in *Asiatic*[144] whose view that the agreement to create a charge there was a floating charge was reversed on appeal. It also referred to two speeches by Lord Scott in the House of Lords subsequent to *Asiatic Enterprises* supporting such an interpretation. In the latter case of *In Re Spectrum Plus*,[145] Lord Scott thought that:

> … [t]here can, in my opinion, be no difference in categorization between the grant of a fixed charge expressed to come into existence on a future event in relation to specified class of assets owned by the chargor at that time and the grant of a floating charge over the specified class of assets with crystallization taking place on the occurrence of that event.

Goode and Gullifer[146] criticized Lord Scott for his failure to refer to previous decisions including the House of Lords in *Williams v Burlington Investments Ltd*[147] that had seen differences in the two situations. The former existed in contractual form only and did not give rise to a registrable charge. *Goode and Gullifer's* now less vigorous objection (since the 4th ed, 2008) to such agreements working subsequently was the lack of consideration,[148] which the Court of Appeal in *Asiatic* did not see as a problem. Steyn J in *G & N Angelakis Shipping Co SA v Compagnie National Algerienne de Navigation*[149] ("*The Attika Hope*"), also saw forbearance to sue on a debt as valid consideration in the context of competing assignments of sub-freights.

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142 See further Jonathan Stone, "The Affirmative Negative Pledge" (1991) 9 JIBL 364, who points out that the standalone affirmative negative pledge is unlikely to give priority, especially if it is not drafted properly.

143 *Supra* note 103 at para 64.

144 [1999] 2 SLR(R) 671 (HC). Tay JA was part of the 5-judge Coram in the Court of Appeal in *Diablo, ibid*.

145 [2005] 2 AC 680 (HL) at para 107.

146 *Supra* note 109 at 2-15, discussing Lord Scott's earlier, similar, speech in *Smith v Bridgend Borough County Council* [2000] 1 AC 336 (HL) at paras 61 and 63.

147 (1977) 121 SJ 424.

148 *Supra* note 109 at 1-81.

149 [1988] 1 Lloyd's Rep 439.

Goode and Gullifer instead viewed the floating charge as a "special case" standing "midway between a mere contract for future security and an attached security interest as it is present security in a "shifting fund of assets" that has its own separate personality.[150] In Singapore, that special case now appears to be the starting position as a protective measure for all novel forms of security. It is also consistent with the reification of the trust fund as a separate entity that we examined above.

Diablo has moved the Singapore system closer to that in the US, Canada and Australia where under a first to file system, all agreements to grant security have to (and will) be registered. Indeed, the definition of security that Merrill and Smith proposed at the start of the previous part is based on an initial agreement. It can be said that a present fixed charge itself is just an agreement to convey property on a future contingency, *ie* the non-payment of debt.[151] In the US, Article 9 security is created by a security agreement and the agreement must be in writing unless the secured party has taken possession of the collateral. In addition, value must be given, and the debtor must have rights in the collateral.[152] Floating liens are also recognized by the *Uniform Commercial Code* and, although there may be slight differences in that the lien attaches to each and every item of collateral when perfected, the practical effects are largely similar to the Singapore floating charge (except for variations such as the loss of priority with the latter to subsequent fixed charges and certain unsecured preferential creditors).[153]

But in the US, registration usually confers priority whereas registration in Singapore does not since it is attachment that often does. *Diablo*[154] also said that registration would protect the security being avoided for non-registration but would not validate it. It may be that it only comes into being later on, although that could be seen to be retrospective if part of "all one transaction",[155] which is a technique used to levy stamp duty on master factoring arrangements that are set up to work in the future in order to avoid duty payable on the transfer of debts. Even more remote are those situations where the agreement does not attempt to create a charge automatically in the future, such as where parties agree that upon a future event, the borrower will then take action (or further agree) to give the lender a charge (as opposed to the lender unilaterally obtaining it). Here it is still arguable that there is no agreement to give a charge that is caught by the definition of a charge in section 2 of the *Companies Act*. However, again, the safest course might be to register the putative charge agreement from inception since the Court of Appeal feared the possibility that a creditor could "steal a march"[156] on other creditors. The point is that an agreement to agree will almost never work as it is too uncertain given the absence of

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150 *Supra* note 109 at 2-15. This has also been used to explain the US floating lien: Legislation, "Article IX of the Uniform Commercial Code: The 'Floating' Lien" (1963) 37 St John's LR 392 at 401.

151 But it may be that the present charge is itself just an agreement to convey property on a future contingency *ie* the non-payment of debt: James S Rogers, "The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause" (1983) 96 Harvard LR 973.

152 See Uniform Commercial Code, §9-203; §9-203(1)(a) and §9-203(l)(b)-(c) respectively.

153 Lopucki, Abraham & Delahaye, *supra* note 135 at 1841 & 1856.

154 *Supra* note 103 at para 68.

155 EG Sergeant, *Sergeant & Sims on Stamp Duties and Capital Duty and Stamp Duty Reserve Tax* (Butterworths, 10th ed, 1992) at 29.

156 *Supra* note 103 at para 65.

a doctrine of good faith that could help bring the later agreement into existence.[157] For it to be enforceable at all, it will have to be characterized as a registrable floating charge from inception.

We have seen this game played out in the debate over fixed and floating charge over book debts where a floating charge is created no matter how much the documentation tries to create a fixed charge: see *In Re Spectrum Plus Ltd*.[158] A logical fallacy might have been previously read into Romer LJ's third *probanda* of a floating charge,[159] which contract writers tried to avoid simply by arguing that the company did not have complete freedom to carry on its business in the ordinary way due to some minimal restrictions (usually provided in a purported fixed charge agreement) imposed on the debtor.[160] In other words, the residual or default category of charge should be the floating charge, and it is for the creditor to show sufficient control such that it has a fixed charge. Party autonomy is circumscribed to a large extent.

Even in the UK today, however, the issue is not as clear as it should be. It is arguable that the actual *ratio* of *In Spectrum Plus*[161] was that it concerned only the construction given to a charge document which conferred discretion on the debtor as to the type of account into which the proceeds of a book debt had to be paid, and how that account was to be operated. The House of Lords thought that, because the debtor retained discretion on this matter, and could therefore use the proceeds in the ordinary course of business, this was *indicia* of a floating charge. On this view, reference to post-contractual actions in determining whether a fixed charge had in fact been created in the case of a stipulated blocked account that is not operated as such was strictly *obiter*. Put differently, it remains a question of contractual construction as to whether a fixed charge has been created, even with its attendant advantages in terms of priority (and not registration since most fixed charges are also registrable).

Such similar arguments are unlikely to succeed in Singapore given the number of decisions there have been in the past involving letters of hypothecation used in share financing schemes in the Pan El crisis and subsequent stockbroking collapse in the mid-1980s. In every case,[162] all excellently reasoned at first instance[163] as well as by the Court of Appeal,[164] the banks failed to persuade the court that they had a fixed rather than floating security over uncollected share certificates left in the custody of stockbroking firms. These firms were entitled to restricted use of the certificates in the course of their business. It was held that labels were irrelevant and enforcement paramount. Due largely to the subsequent conduct of the parties, what may have appeared to be fixed charges in the documentation were characterized by courts as floating charges. Such charges are inherently weaker than fixed charges

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157 *Walford v Miles* [1992] 2 AC 128 (HL) (as opposed to one to negotiate exclusively).

158 [2005] 2 AC 680 (HL).

159 This was observed by Chao J (as he then was) in *Re Lin Securities* [1988] 1 SLR(R) 220 (HC) at para 57. In the English case of *Re Cimex Tissues Ltd* (1994) BCC 626 (Ch), the court also thought that the existence of some restrictions on the company's ability to deal with charged property was not inconsistent with a floating charge.

160 This may also have happened in *The Russell-Cooke Trust Company v Elliott* [2007] EWHC 1443 (Ch).

161 [2005] 2 AC 680 (HL).

162 *Cf Re TXU Europe Group plc* [2004] 1 BCLC 519.

163 *Re Lin Securities* [1988] 1 SLR(R) 220 (HC) followed by *Re City Securities* [1990] 1 SLR(R) 413 (CA).

164 *Chase Manhattan Bank NA v Wong Tui Sun* [1992] 3 SLR(R) 436 (CA). See also *Dresdner Bank AG v Ho Mun-Tuke Don* [1992] 3 SLR(R) 307 (CA).

and lose out in priority to certain unsecured preferential creditors under section 328 of the *Companies Act*.

Here the line has to be drawn at the other end of the spectrum, *ie* between a mere agreement and a floating charge. Given *Diablo*, the default position is also that a floating charge is created. You can contract all you want, but these recent cases suggest that while that is true, it has the legal consequences that the law chooses to give it. And, for that to even happen, the security has to adopt or be categorized into a certain form that requires statutory disclosure (and more importantly is inherently weaker priority-wise as *Diablo* thought that it is widely known that there would invariably be a lien over sub-freights) in order to protect third parties (since most forms of asset partitioning are about third party consequences).

How should the floating charge be viewed if it covers such a large middle ground? Until it becomes specifically enforceable there is only a very weak equity, and some floating charges are clearly that, and that is why *Diablo* did not see them as proprietary. But we have seen that even the archetypal floating charge and fixed charge over future property have also been described by *Gough* as a mere equity or personal equity. In slight contrast, Heydon, Leeming and Turner[165] distinguish these two equities. They also point out that there is no hierarchy of equitable proprietary interests, equitable interests and personal or mere equities that "is a sufficient guide for all purposes and at all times".[166]

There is clearly a complex morass of context specific intermediate situations. Some equities can appear sufficiently proprietary.[167] Others closer to the contract end of the spectrum may not do so immediately, such as an agreement to grant a charge tomorrow and not today.[168] It is registrable because it is forced into a certain mould, for the reason provided by Merrill and Smith:

> The costs of uncovering and comprehending security interests will drop if all market participants can safely ignore the possibility that novel types of lending practices may be construed by courts as being valid.[169]

But everything is context specific and it may be better to use a neutral label like "intermediate" or "inchoate" rights to describe these interests. In contrast, a mere equity is what *Gough* says is true of not just the floating charge and the fixed charge over future book debts but also the negative pledge.[170] Yet, it is where there is

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[165] Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (Australia: LexisNexis Australia, 5th ed, 2015) at 4-175.

[166] *Ibid* at 4-005.

[167] See *eg* the right to rescind for fraud that is caveatable under section 115(3)(b) of the *Land Titles Act* (Cap 157, 2004 Rev Ed Sing) after having "obtained an injunction in respect of an estate or interest in land". Similarly, it is likely that a mere equity (such as a right to have a transaction set aside for fraud or mistake, and as such more than a personal equity) can be defeated by a subsequent purchaser of a legal or equitable interest for value and without notice: Meagher, Gummow & Lehane, *supra* note 165, at 4-165–4-210, discussing cases like *Phillips v Phillips* (1862) 4 DE G F & J 208; (1862) ER 1164 and *Latec Investments Ltd v. Hotel Terrigal Pty Ltd* (1965) 113 CLR 265. Framed in this way it appears weak, but David Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008) at 6.35 has pointed out its proprietary characteristics in that a mere equity can bind subsequent donees, as well as purchasers with notice, of the equitable interest.

[168] There must be both the intention and the necessary act to pass an interest.

[169] Merrill & Smith, *supra* note 16 at 842.

[170] Gough, *supra* 128 at 392 The Singapore Court of Appeal in *DBS Bank Ltd v Tam Chee Chong* [2011] 4 SLR 948 (CA) at para 50 held that a negative pledge that was given there to support the provision

a negative pledge attached to it that the proprietary characteristics of the floating charge become even clearer.[171] A subsequent fixed chargee, with notice of both the floating charge due to registration and the negative pledge through its own personal knowledge (given that it is an optional extra, notice is insufficient), would lose out to the prior floating charge.[172] *Gough* argues instead that it works based on a form of unconscionability on the part of the third party who is affected by a mere or personal equity.[173] But it does seem that a form of restrictive covenant has lent something to the floating charge to make it sufficiently proprietary to bind more third parties (so that it looks even closer to a US floating lien).[174]

As we have seen, the UK Supreme Court acknowledged in *Akers v Samba Financial Group*[175] that "property" is contextual when it struggled with the many disparate views supporting the trust as either contractual or proprietary. Both these labels are very strong as they invariably shift one's thinking towards one end of a spectrum in a seemingly binary way. For our present purposes, it is perhaps best to see the floating charge coupled with a negative pledge as a situation where two intermediate rights or equities have come together to form something more powerful that can bind more third parties when the starting position for each of them is nearer the middle.

VI. Conclusion

The promotion of the use of Singapore law started as a project of the Singapore Academy of Law in 2007. The continental drift away from English towards American law was, however, imperceptible until recently and may have been accelerated by the new Chapter 11 provisions introduced for corporate restructuring in May 2017. It is difficult to prove causation but many ancillary matters surrounding insolvency would invariably be affected as American bankruptcy cases are cited to and by the Singapore courts. The most obvious would be secured transactions where we have seen a move towards less contractarianism and more economic functionalism. Courts in Singapore are using the floating charge increasingly as the default characterization for security granted by companies and it is difficult to create something that escapes its strictures, namely charge registration for disclosure, regardless of the underlying collateral, and mandatory rules determining that it loses out in priority to certain unsecured preferential creditors. We still do not know if the taking of security is

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of unsecured loan facilities by the bank could bind a third party trying to obtain security. The latter act would amount to the tort of interfering with the contractual relations between the debtor and the negative pledgee. Grant Gilmore, *Security Interests in Personal Property* Vol II (Boston, Little Brown, 1965) at 1019 thought that a standalone negative pledge would only work "if God is against you".

171 Ford, Austin & Ramsay, *supra* note 116 at 19.321.12.

172 *Kay Hian & Co (Pte) v Phua Ooi Yong Jon* [1988] 2 SLR(R) 439 (HC) at para 32; *Wilson v Kelland* [1910] 2 Ch 306. The Singapore court followed the Canadian Supreme Court in *Union Bank of Halifax v Indian and General Investment Trust* (1908) 40 SCR 510 and held that actual knowledge can be inferred if a subsequent chargee cannot show that it "had made no search in the Registry of Companies or otherwise was not aware of the debenture and the registered particulars".

173 Gough, *supra* note 128 at 392. It can also be said that the subsequent fixed chargee is interfering with the prior floating chargee's contractual relations: *supra* note 170.

174 Lopucki, Abraham & Delahaye, *supra* note 135 at 1859.

175 *Supra* note 27.

efficient,[176] so making it a bit weaker is probably the right protective strategy and that, along with disclosure, reduces information costs surrounding its use.

Property and contractual rights are all impacted by the insolvency regime (see *eg* the new provisions restricting the enforcement of *ipso facto* clauses introduced in Singapore by the *Insolvency, Restructuring and Dissolution Bill 2018*[177]). Courts will need the flexibility to work out how to be preserve value in companies undergoing restructuring and having firm views of proprietary rights and obligations may impede that, particularly as Singapore transitions to Chapter 11 type reorganization without the benefit of all the US statutory provisions and experience.[178] The recognition that a beneficial interest under a trust is "a right against a right" helps in that regard, as it sees these as intermediate rights that may be sufficiently proprietary for the purposes of some situations and not others. This has allowed Singapore courts to weaken the beneficiary principle and at the same time recognize the separate legal personality of the trust fund in the case of REITs and business trusts so that they can be committed to creditors. At the same time, however, it allows courts to heed the warning, in the case of discretionary trusts, that "(m)assive discretions can sometimes be a smokescreen to try to make possible the impossible".[179] Being less bound by dogma allowed the Singapore High Court in *Pertamina* to be the first to break ranks in the Commonwealth and find a constructive trust over bribes in the face of the strongest academic arguments that that was to mix ownership and obligation.[180] The truth is that attempts to keep them separate have not succeeded, and that bankruptcy policy still has a part to play despite the labels. This may be because when a layperson thinks of property, it is about enjoyment. Theorists look at exclusion. Lawyers, however, are in that intermediate zone where property creates multiple images that capture both positive and negative rights. It is best to embrace these intermediate rights or equities and eschew labels that nudge us into extreme positions. Within this spectrum of intermediate interests, as more people are affected, there will be greater use of penalty defaults requiring disclosure and/or mandatory rules. We are seeing this being played out in Singapore trusts and secured transactions. Much of this is driven by pragmatism and the development of Singapore as a financial centre.

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176 Ferran, *supra* note 106 at 350.

177 Bill No 32/2018, which was passed by Parliament on 1 October 2018, but not in force yet. The *ipso facto* provisions are modelled after Canadian law with no carve-outs for bank loans.

178 MS Wee, "The Singapore Story of Injecting US Chapter 11 into the Commonwealth Scheme" (2018) 15 European Company and Financial LR 553, discussing the *Companies (Amendment) Act 2017*.

179 Lionel Smith, *supra* note 43 at 54.

180 Roy M Goode, "Ownership and obligation in commercial transactions" (1987) 103 LQR 433; Peter Birks, "Obligations and property in equity: Lister v Stubbs in the limelight: A-G for Hong Kong v Reid" (1993) LMCLQ 30.