

FIDUCIARY DUTIES OF MANAGERS IN RETAIL ESG FUNDS

TAN WANTING MEGAN*

This article examines whether the fiduciary obligations imposed on managers of retail ESG funds constituted as unit trusts in Singapore are a meaningful constrain on managerial discretion. While fund managers market dual objectives: financial return and environmental and social (“ES”) goals, the separation of ownership and control and the diluted trustee’s duty to supervise seemingly allows managers to subordinate ES commitments, leaving a remedial gap for investors. This article proposes a typology of deeds and presents nuances in the “purpose duty” which varies depending on objective constraints in the deed. It argues that managers are either trustees or, at minimum, owe a fact-based fiduciary duty to act in line with the trust’s purposes. It further argues that knowing deviation from articulated purposes is not excludable for professional fiduciaries. The unit-trust form offers a calibrated pathway preserving flexibility while enabling retail investors to enforce ES aligned governance through fiduciary remedies.

I. INTRODUCTION AND MOTIVATION

Environmental, social and governance (“ESG”) has been a buzzword at the centre of global dialogue on corporate governance, management and investment, rising from an obscure concept to a widely used term around the world in the past two decades. ESG assets under management (“AUM”) have been projected to surpass US\$40tn by 2030,¹ almost double of its US\$22.8tn valuation in 2016.² Despite the outflow of US\$8.6bn from sustainable funds in early 2025,³ global ESG assets still

* Faculty of Law, National University of Singapore, Singapore, megantanwantingg@gmail.com
Megan Tan is a Singapore-based researcher focused on corporate governance, securities and funds. She received her LL.B. from the National University in Singapore, graduating with first class honours. She plans to further her research efforts at Harvard University where she is pursuing an LL.M. I would like to sincerely thank Assistant Professor Kenneth Khoo for his invaluable guidance throughout the process of writing this article. I also want to extend my thanks to Professor Tan Cheng Han, SC, Joel Wei En Tan, Aaron Cheuk and Jotham Ng for their invaluable comments and suggestions.

¹ Bloomberg Intelligence, “ESG AUM set to top \$40 trillion by 2030, anchor capital markets” <<https://www.bloomberg.com/professional/insights/sustainable-finance/esg-aum-set-to-top-40-trillion-by-2030-anchor-capital-markets/>> (22 February 2024).

² Bloomberg Intelligence, “ESG May Surpass \$41 Trillion Assets in 2022, But Not Without Challenges, Finds Bloomberg Intelligence” <<https://www.bloomberg.com/company/press/esg-may-surpass-41-trillion-assets-in-2022-but-not-without-challenges-finds-bloomberg-intelligence/>> (24 January 2022).

³ Hortense Bioy, “Investors Turn Away from ESG Funds in Record Numbers in Q1 2025”, *Morningstar* <<https://global.morningstar.com/en-gb/sustainable-investing/investors-turn-away-esg-funds-record-numbers-q1-2025>> (6 May 2025).

rose 8% year on year,⁴ proving its resilience despite uncertainty. Furthermore, the AUM of sustainability-focused funds has also ballooned, growing from US\$125bn in 2017⁵ to US\$2.9tn in 2024.⁶

Detractors have argued that ESG issues are extraneous to the firm and should be protected by other areas of law, such as environmental or human rights law.⁷ However, as external pressures from climate change take on heightened urgency, there is growing consensus that state action alone cannot promote ESG issues effectively; hence, commercial entities must step up.⁸ Aggravating the situation, the rise of corporate power has enabled profit-driven companies to lobby and shape policy – evident in climate regulations that ironically favour fossil fuel interests over renewable energy.⁹ Traditional environmental regulations struggled to reduce pollution levels due to a failure to address systemic issues such as commercial consumption patterns and overreliance on fossil fuels.¹⁰ Empirically, there was an approximately 50% decrease in enforcement actions against major polluters across the board by the US Environmental Protection Agency which was attributed to resource constraints and shifts in enforcement priorities.¹¹ Rigid disclosure-based regulatory mechanisms have also proven ineffective. A few years after the introduction of the lofty EU Sustainable Finance Disclosures Regulation (“SFDR”), it has been criticised for being too pedantic, paradoxically leading to a rise of greenwashing as managers use regulation as *de facto* labels for marketing purposes, creating investor confusion.¹² Furthermore, the Corporate Sustainability Reporting Directive has led to superficial compliance, with companies meeting reporting standards without

⁴ Elisa Battaglia Trovato, “Sustainable Investing at the Crossroads”, *Professional Wealth Management* <<https://www.pwmnet.com/content/00612900-740e-5046-84ae-a1ba2c116fd1>> (17 June 2025).

⁵ Pippa Stevens, “ESG Index Funds Hit \$250 billion as Pandemic Accelerates Impact Investing Boom”, *CNBC* <<https://www.cnbc.com/2020/09/02/esg-index-funds-hit-250-billion-as-us-investor-role-in-boom-grows.html>> (2 September 2020).

⁶ Morningstar Manager Research, “Global Sustainable Fund Flows: Q1 2024 in Review” <https://esgnews.com/wp-content/uploads/2024/04/Global_ESG_Q1_2024_Flows_Report.pdf> (25 April 2024).

⁷ Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3d ed (Oxford: Oxford University Press, 2017) at 140 [Kraakman *et al*].

⁸ Jonathan R Macey, “ESG Investing: Why Here? Why Now?” (2022) 19(2) *Berkeley Business Law Journal* 258 at 258.

⁹ Emily Grubert, “Why the IRA’s Carbon Capture Tax Credit Could Increase Greenhouse Emissions”, *Kleinman Centre for Energy Policy* <<https://kleinmanenergy.upenn.edu/commentary/podcast/why-the-iras-carbon-capture-tax-credit-could-increase-greenhouse-emissions/>> (5 December 2023). For example, the Inflation Reduction Act (IRA), while designed with the motivation to reduce emissions and support clean energy, includes provisions of carbon capture and storage (“CCS”) technologies which critics argue are essentially subsidies that benefit fossil fuel companies. These subsidies allow fossil fuel companies to continue operating while using CCS as a mitigation strategy, delaying meaningful transition to renewables.

¹⁰ *Ibid*. For example, critics have argued that the US Clean Air Act’s effectiveness has plateaued since the late 2010s due to the reality of having to deal with frequent lawsuits and budget constraints, which limit the Environmental Protection Agency’s capacity to enforce environmental standards.

¹¹ US Environmental Protection Agency, “Resource Constraints, Leadership Decisions, and Workforce Culture Led to a Decline in Federal Enforcement” <https://www.epa.gov/sites/default/files/2021-05/documents/_epaog_20210513-21-p-0132_0.pdf> (13 May 2021).

¹² Verena Ross, Chair, European Securities and Markets Authority, “Key Priorities for EU Retail Fund Investors”, speech at Irish Funds Annual Global Funds Conference 2022 (31 May 2022) <https://www.esma.europa.eu/sites/default/files/library/esma34-466-284_verena_ross_speech_-_irish_funds_2022.pdf> (accessed 16 February 2026).

making substantive changes.¹³ Such lacklustre state action may be contrasted with that of actions undertaken by private actors, like activist groups ClientEarth¹⁴ and Greenpeace,¹⁵ which have greater innate motivation to enforce ESG promises, evidenced by their adoption of larger roles within the ESG movement.

While retail unitholders may have weaker incentives to monitor their investments due to collective action problems,¹⁶ empirical studies have shown non-zero turnouts for voting even for shareholders that have low stakes and lack apparent civic duty to vote.¹⁷ Indeed, researchers have found that retail shareholders with small stakes support ES proposals more often than institutions. This is aligned with the growing consensus that investors derive non-pecuniary utility¹⁸ by investing in line with their altruistic preferences,¹⁹ reflecting the reality that investor welfare is no longer equivalent to market value. Furthermore, several commentators have found that investors may be willing to sacrifice pecuniary returns to pursue social goals.²⁰ Yet, the current literature highlights that there is neither a market actor nor institution that can effectively promote ES goals due to want of competence and motivation.²¹ Most concerningly, studies show that there is no consistent evidence that funds promoted as ESG funds²² always hold assets with more ES friendly policies.

The core issue is as follows. Managers of retail funds which market themselves as having an ES purpose (“retail ES funds”)²³ generally commit to pursuing an ES purpose while balancing it against other purposes of the trust (typically wealth or financial maximisation objectives). However, it is unclear whether enumerated ES purposes pose any real limits on the manager given the separation of ownership

¹³ Elizabeth Robertson, Scott Hopkins & Simon Toms, “Sustainability and ESG: The Governance Factor and What It Means for Businesses”, *Harvard Law School Forum on Corporate Governance* <<https://corpgov.law.harvard.edu/2021/01/31/sustainability-and-esg-the-governance-factor-and-what-it-means-for-businesses/>> (31 January 2021).

¹⁴ *ClientEarth v Shell Plc* [2023] EWHC 1137 (Ch) [ClientEarth v Shell Plc].

¹⁵ *Greenpeace Limited v The Advocate General* [2021] CSIH 53; [2021] SLT 1303.

¹⁶ Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, “The New Titans of Wall Street: A Theoretical Framework for Passive Investors” (2020) 168 U Pa L Rev 17 at 35.

¹⁷ Alon Brav, Matthew Cain & Jonathon Zytznick, “Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting” (2022) 144(2) *Journal of Financial Economics* at 49.

¹⁸ James Andreoni, “Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving” (1990) 100(401) *The Economic Journal* 464 at 473.

¹⁹ Oliver Hart & Luigi Zingales, “The New Corporate Governance” (2022) 1(1) *The University of Chicago Business Law Review* 195 at 197 [Hart & Zingales, “The New Corporate Governance”].

²⁰ John Morgan & Justin Tumlison, “Corporate Provision of Public Goods” (2019) 65(10) *Management Science* 4489 at 4489; see also Brad M Barber, Adair Morse & Ayako Yasuda, “Impact Investing” (2021) 139(1) *Journal of Financial Economics* at 162–185.

²¹ Sharon Hannes, Adi Libson & Gideon Parchomovsky, “The ESG Gap” (2023) 23-22 *University of Pennsylvania Institute for Law & Economics* at 3.

²² Quinn Curtis, Jill Fisch & Adriana Z Robertson, “Do ESG Mutual Funds Deliver on Their Promises?” (2021) 120(3) *Mich L Rev* 393 at 429. This is defined as funds that incorporate ESG criteria into their selection and management processes.

²³ Alex Edmans, “Applying Economics – Not Gut Feel – To ESG” (2023) 79(4) *Financial Analysts Journal* at 16–29. Despite the significant traction that the term “ESG” has gained, there remains confusion and misinformation about its exact meaning and scope. Commentators have pointed out the inherent conflicts between environmental and social (“ES”) and governance (“G”) goals. Hence, in line with Professor Edmans’ nomenclature, this article will use the terminology of ES in reference to actions taken to improve stakeholder value regardless of its impact on shareholder value.

and control between managers and investors.²⁴ Practically, this separation insulates managers from direct investor control, allowing them to retain broad latitude to interpret the ES purpose of the fund. This gives rise to a real possibility that managers might exploit this discretion to subvert the enumerated ES purpose in favour of pecuniary interests. From a law and economics perspective, agency costs will arise when managers fail to act in line with the interests of the unitholders although they may, among other mechanisms, be curbed by a threat of litigation against errant managers.²⁵ Hence, this article aims to investigate whether managers have a duty to act in a way that is in line with the purpose of the trust (“the purpose duty”).

We have yet to close the ES chasm in Singapore. Although large hopes were once pinned on corporations involved in industries that drive the larger economy,²⁶ as company law stands, it continues to refer primarily to the interests of a company’s shareholders when defining the company’s interests.²⁷ Ultimately, the law accords wide deference to the discretion of directors, ascribing the high watermark of whether directors act in what they in good faith believe to be in the interests of the company.²⁸ At its core, director duties are owed to the company; hence, it is difficult for directorial liability to arise with respect to third parties or outside causes as there is no assumption of responsibility to these extraneous parties.²⁹ Based on the current state of the law, the outcome in *ClientEarth v Shell Plc* is appropriate. A corporate strategy which fails to put in place policies to become a net-zero business by 2050, which has been approved by the majority of shareholders, does not amount to an action made in bad faith.³⁰

This article proposes a new perspective. It taps on what might ostensibly seem like an outdated fund structure, the unit trust, and critically considers how private actions by investors can facilitate the promotion of ES purposes. It investigates the use of the unit trust in Singapore, where it is still the most common legal structure for retail ES funds.³¹ Retail ES funds are defined as those purporting to consider ES

²⁴ John Morley, “The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation” (2014) 123 Yale LJ 1228 at 1238 [Morley].

²⁵ Kraakman *et al*, *supra* note 7 at 61. Agency costs are described as a general concept capturing the frictions or inefficiencies that arise in the relationship between principals and agents (such as shareholders and corporate managers). The costs cover a range of issues, such as monitoring expenses incurred by shareholders to oversee management, bonding expenses by managers to align their actions with shareholders and residual losses from diverging interests that cannot be fully reconciled.

²⁶ United Nations, “Who Cares Wins: Connecting Financial Markets to a Changing World” (2004). Such as pressuring energy companies like ExxonMobile and Chevron to reduce carbon emissions and invest in renewable energy or automotive companies like General Motors and Volkswagen to push toward sustainable transportation.

²⁷ Lan Luh Luh & Walter Wan, “ESG and Director’s Duties: Defining and Advancing the Interests of the Company” (2023) 23(2) Journal of Corporate Law Studies 537 at 539 [Lan & Wan].

²⁸ *Ibid* at 550.

²⁹ Hans Tjio, “Sustainable Directors’ Duties and Reasonable Shareholders” (2024) 25 European Business Organization Law Review at 336.

³⁰ *ClientEarth v Shell Plc*, *supra* note 14 at [66], [95]–[98].

³¹ Monetary Authority of Singapore, “MAS OPERA Public Portal” <<https://eservices.mas.gov.sg/opera/>>. Based on the listed prospectus on the MAS Offers and Prospectuses Electronic Repository and Access (OPERA) portal, Unit Trusts consist of the majority of retail funds in Singapore. This has also been corroborated by interviews with retail fund legal practitioners.

factors whether in its strategy or name.³² Although less common, the unit trust structure is still available in many other Commonwealth jurisdictions;³³ hence, findings in this article will be relevant in understanding the implications of using this legal structure generally.

Although much has been written about ES funds in other jurisdictions, Singapore is in a unique position. The Monetary Authority of Singapore (“MAS”) has actively taken steps to position Singapore as a leading green finance hub, pursuing initiatives like the Green Finance Action Plan³⁴ to prompt investments into environmentally sustainable projects. In 2024, MAS reported that 48% or S\$2.6tn of assets were managed with an ESG overlay.³⁵ Additionally, Singapore does not face political backlash against ESG funds which has led to a pull back from global climate coalitions.³⁶ Furthermore, unlike the EU which has a statutory framework to regulate ESG funds,³⁷ Singapore does not, foregrounding the significance of Singaporean private law with respect to ESG funds.

Ultimately, I posit that the unit trust effectively imposes the purpose duty on managers, and such fiduciary liability will ensure that managers can be given discretion whilst being constrained by substantial legal constraints. Hence, the unit trust achieves a balance of restriction and flexibility suited for retail ES funds.

II. UNIT TRUST STRUCTURE FOR RETAIL ES FUNDS IN SINGAPORE

A. Unit Trust

Unlike most jurisdictions that have moved away from the unit trust to investment companies³⁸ or incorporated corporations,³⁹ it remains the most used legal structure of retail funds as part of the collective investment scheme (“CIS”) regulatory regime

³² Aligned with the definition of retail ESG fund in MAS Circular regarding the Disclosure and Reporting Guidelines for Retail ESG Funds. Monetary Authority of Singapore, “CFC 02/2022 Disclosure and Reporting Guidelines for Retail ESG Funds” <<https://www.mas.gov.sg/regulation/circulars/cfc-02-2022---disclosure-and-reporting-guidelines-for-retail-esg-funds>> (28 July 2022).

³³ Farrer & Co, “A Guide to UK FCA Authorised Funds” <<https://www.farrer.co.uk/news-and-insights/a-guide-to-uk-fca-authorised-funds/>> (14 November 2024); see also Managed Investments Act 1998 (Cth, Aust).

³⁴ Monetary Authority of Singapore, “Green Finance Action Plan” <https://www.mas.gov.sg/-/media/MAS-Media-Library/development/sustainable-finance/without-retail-ESG-funds-GFAP-Infographic_June-2022.pdf?la=en&hash=B49713D36266B8D8EF3CA8EEBD0FEFFD9ACBDAA0> (30 June 2022).

³⁵ Monetary Authority of Singapore, “Singapore Asset Management Survey 2024” <<https://www.mas.gov.sg/-/media/mas-media-library/publications/singapore-asset-management-survey/asset-management-survey-report-2024.pdf>>.

³⁶ Simon Jessop and Ross Kerber, “JPMorgan, State Street quit climate group, BlackRock steps back”, *Reuters* <<https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15/>> (16 February 2024).

³⁷ Including the aforementioned SFDR.

³⁸ Hans Tjio, “The Regulation of Unit Trusts and Trustees’ Powers to Invest in Them” (1999) Sing JLS 148 at 154 [Tjio, “The Regulation of Unit Trusts and Trustees’ Powers to Invest in Them”].

³⁹ *Ibid* at 170.

in Singapore.⁴⁰ It is noted that some funds are now structured as Variable Capital Companies; however, this is generally observed only for private funds that serve institutional or accredited investors which is a result of the vehicle's more flexible nature.⁴¹

The unit trust is first and foremost a trust.⁴² It is created pursuant to a contract between a manager (the management company) and a trustee (the trust company) over a fund denominated in units which is contributed by unitholders and which is deployed in investments based on the trust deed.⁴³ The property of the trust is held by the custodian trustee on trust for unit holders *pari passu* according to the number of units held.⁴⁴ However, unlike a traditional trust, the trustee roles are split: the manager is responsible for promoting and managing the trust investment while the custodian trustee holds legal title to the trust assets.⁴⁵ The split roles and obligations are governed by the trust deed, which is also a contract between the trustee and manager.⁴⁶ Most glaringly, the manager serves a function closer to that of a traditional trustee, many of his duties and powers related to the making of investments,⁴⁷ while the unit trust trustee has been described as more of a trust protector.⁴⁸ This leads to difficulties when apportioning liability since their duties are not always clearly defined or distinct.⁴⁹

However, the motivation to use the unit trust structure is similar to other vehicles used for retail funds. Trust managers hope to profit from fees by effectively managing the pooled money and investors hope that the manager's skill, combined with the potential for investment diversification and economies of scale, will net for them either greater income or capital growth profits.⁵⁰ In the context of retail ES funds, investors also seek non-pecuniary utility from acting in a prosocial fashion in line with their altruistic preferences.⁵¹

⁴⁰ Sam Kay, *Investment Funds: International Series*, 3d ed (Thomas Reuters Sweet & Maxwell, 2016) <<https://www.cnplaw.com/wp-content/uploads/2017/12/Investment-Funds-International-Series-CNP-Singapore-Chapter-March-2016.pdf>>. As of 19 October 2024, of the 122 records of CIS on the MAS Offers and Prospectus Electronic Repository and Access portal, less than 5 feature non-unit trust structures.

⁴¹ Monetary Authority of Singapore, "Singapore Asset Management Survey 2024", *supra* note 35. Based on the MAS Survey on Asset Management 2024, 40% of VCCs are PEs funds, 22% are EAMs or MFOs and 19% are Hedge Funds, the remaining proportion are other private funds.

⁴² See definition of unit trust in Securities and Futures Act 2001 (Cap 289, 2020 Rev Ed), s 283 [SFA].

⁴³ LexisNexis, *Halsbury's Laws of Singapore* (Singapore: LexisNexis, 2023) vol 9(3) and 9(4) at [110.613] [LexisNexis, *Halsbury's Laws of Singapore*]. This is contrasted to funds constituted as trust companies where directors are often given wide discretion to define the best interests of the company.

⁴⁴ *Ibid.*

⁴⁵ Sarah Worthington, "Public Unit Trusts: Principles, Policy, and Reform of the Trustee and Manager Roles" (1991) 14(1) UNSWLJ at 260 [Worthington].

⁴⁶ Kam Fan Sin, *The Legal Nature of the Unit Trust* (Oxford: Clarendon Press, 1997) at 93 [Sin].

⁴⁷ *Ibid.*

⁴⁸ Yee Kwok Hon, Wan Wai Yee & Hans Tjio, *Principles and Practice of Securities Regulations in Singapore*, "Governance of Unit Trusts", 3d ed (Singapore: LexisNexis, 2017) at [3.22] [Yee, Wan & Tjio].

⁴⁹ Sin, *supra* note 46 at 231–233.

⁵⁰ Worthington, *supra* note 45 at 250.

⁵¹ Kenneth Khoo & Roberto Tallarita, "Expanding Shareholder Voice: The Impact of SEC Guidance on Environmental and Social Proposals" (2024) Law Working Paper No 822/2025, forthcoming in Journal of Law and Economics <<https://ssrn.com/abstract=4913660>>.

B. Comparison with Other Fund Structures

It has been proposed that the separation of funds and managers is a key feature of the legal structure of funds by substituting investors' legal rights against managers with strong exit rights.⁵² This is achieved by employing separate entities to hold investment and management assets and each entity having separate ownership. Professor Morley proposes that fund investors benefit from limits on control since placing control in the manager's hands allows funds to offer lower fees and better returns.⁵³

In the context of retail ES funds, any renunciation of control by ES fund investors must be balanced by robust rights for investors to meaningfully curtail the manager's acts to align with ES objectives. This is best analysed from a law and economics perspective where a dissatisfied unitholder has a choice between *exit* and *voice*. Based on Professor Hirschman's definition,⁵⁴ *exit* refers to a unitholder who redeems the investment. As the number of unitholders drops, the manager is compelled to search for ways to correct its faults. Unitholders can also use their *voice* by expressing dissatisfaction directly to the manager who will search for cures to it. While voice is generally considered as a costlier alternative than exiting the firm,⁵⁵ it has been found to be more effective in achieving prosocial outcomes in a competitive world.⁵⁶ The importance of voice is heightened given the inseparability of profit-making activities from other damage-inducing corporate acts, which require nuance that the blunt instrument of exit cannot provide.⁵⁷ For example, Costco uses antibiotics to raise chickens which is profitable but is a major cause of antibiotic resistance, costing human lives and high healthcare costs.

Furthermore, the full separation of funds and managers does not comport with the unit trust structure in Singapore. In the US, the setting up of a new entity distinct from the manager creates a clear separation where the manager is in a contractual relationship with a separate legal entity and shareholders have no beneficial interest in the property owned by the entity.⁵⁸ It has been observed that the Investment Company Act effectively forces mutual funds to adopt the corporate form.⁵⁹ This trend is also observed in the UK where funds are increasingly using the Open-ended Investment Company vehicle. In contrast, unitholders are beneficiaries of fiduciary obligations (of both the custodian trustee and the manager) and are beneficial owners of the property held by the trust.⁶⁰ An example of a covenant by the custodian trustee in a trust deed is as follows:

⁵² Morley, *supra* note 24 at 1245.

⁵³ *Ibid.*

⁵⁴ Analogue to description in Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard: Harvard University Press, 1970).

⁵⁵ Anat R Admati & Paul Pfleiderer, "The 'Wall Street Walk' and Shareholder Activism: Exit as a Form of Voice" (2009) 22(7) *The Review of Financial Studies* 2645 at 2646.

⁵⁶ Eleonora Broccardo, Oliver Hart & Luigi Zingales, "Exit versus Voice" (2022) 130(12) *J Pol Econ* at 3144.

⁵⁷ Hart & Zingales, "The New Corporate Governance", *supra* note 19 at 202.

⁵⁸ Morley, *supra* note 24 at 1238–1240.

⁵⁹ Tjio, "The Regulation of Unit Trusts and Trustees' Power to Invest in Them", *supra* note 38 at 155.

⁶⁰ *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited* [2014] JRC 102D at [42] (Royal Court of Jersey, Jersey) [*Barclays Wealth v Equity Trust*].

The Trustee hereby covenants ... that it will exercise all due diligence and vigilance in carrying out its functions and duties and in *safeguarding the rights and interests of Holders* [emphasis added].⁶¹

Figure 1 illustrates the lack of a direct duty owed to investors in Professor Morley’s theory which is contrasted with the direct duties owed by managers and trustees to unitholders in a unit trust. In essence, the lack of a separate legal entity in the unit trust structure allows for a direct legal relationship between the manager and unitholders.

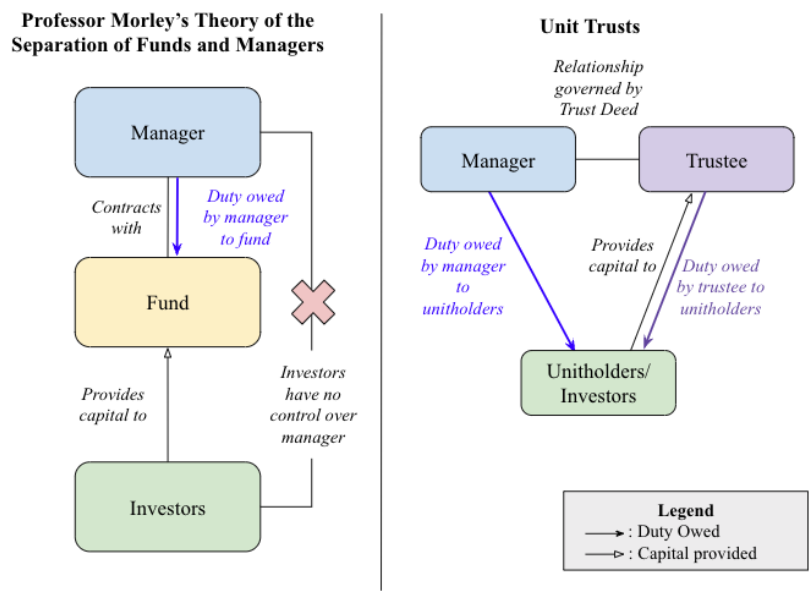


Figure 1: Professor Morley’s structure vs unit trusts

III. FIDUCIARY LIABILITY OF THE MANAGER

A. Overview of Private Actions Open to Unit Trust Beneficiaries

I submit that the most meaningful cause of private action available to unitholders are breaches of fiduciary duties owed to them by the manager. As an antecedent issue, I demonstrate that the other private actions are unlikely to effectively curb managers from acting against the ES purpose of the fund and might not allow unitholders to attain the remedies they seek.

⁶¹ This clause is reproduced from an anonymised proprietary trust deed template shared with the author on a confidential basis. No identifying details as to the originating firm, client or fund are provided, and the excerpt is used solely as a representative illustration of market drafting. The excerpt will be referred to as the “Trust Deed Template” throughout this article.

1. *Trustee's duty to supervise*

Foremost, direct legal recourse against the trustee is limited. In principle, courts have found that the trustee of a unit trust has a duty to supervise the manager.⁶² Hence, the trustee should not be allowed to follow a manager's direction if it knows or ought to know that such direction is in breach of the trust deed.⁶³ This seemingly obliges trustees to check each proposal against the letter of the unit trust deed. However, this paradigm is fraught with both legal and practical issues.

Legally, the standard of knowledge required for a trustee is unsettled. It has been suggested that even if constructive knowledge is sufficient, it would be difficult to factually demonstrate that had the trustee diligently carried out its duties, there would be facts it would have known that should have prompted it to reject the manager's instructions.⁶⁴

Relatedly, any attempt to establish constructive knowledge is subject to the unresolved issue of the extent of investigation and enquiry a trustee must make in respect of the manager's directions.⁶⁵ Unfortunately, a trustee has no positive duty to actively investigate the manager absent express provisions in the trust deed since the manager occupies a central position in a unit trust and holds powers that cannot be delegated.⁶⁶ Although s 292(1) of the Securities and Futures Act ("SFA") states that the duty of care and diligence of the trustee cannot be excluded, this duty is practically watered-down and is satisfied as long as the trustee checks against specifically enumerated limits on authorised investments in the trust deed set out by the manager itself. Hence, the role of the trustee is toothless; it checks the manager's acts against the very standards set out by the manager themselves. This severely limits any viable claims unitholders of retail ESG funds have against trustees who do not actually evaluate the discretion exercised by managers in balancing financial and ES purposes.⁶⁷

Furthermore, given the flexibility of trusts which are apposite to the internal relationships between the settlor, trustee and beneficiary,⁶⁸ obligations of the trustee are subject to the trust deed. Concerningly, a perusal of the trust deeds of retail ES funds in Singapore show that most contain clauses to limit the liability of trustees when following the directions of the manager. For example, a trust deed may state:

The Trustee shall not be under any liability on account of anything done or suffered by the Trustee in good faith in accordance with or in pursuance of any request, instruction or advice of the Manager.⁶⁹

⁶² *The Application of Permanent Trustee Nominees (Canberra) Ltd*, No 4216 of 1985 (24 June 1985) (Supreme Court of New South Wales, Australia) [*The Application of Permanent Trustee Nominees (Canberra) Ltd*].

⁶³ Sin, *supra* note 46 at 233.

⁶⁴ *Barclays Wealth v Equity Trust*, *supra* note 60 at [68].

⁶⁵ Sin, *supra* note 46 at 233.

⁶⁶ *Ibid.*

⁶⁷ This is particularly so for Type 2, 3 or 4 trusts as dichotomised later at Section IV(B)(1) of this article.

⁶⁸ Hans Tjio, "Lending to a Trust" (2005) 19(2) *Trust L Intl* at 75 [Tjio, "Lending to a Trust"].

⁶⁹ Trust Deed Template.

Indeed, a similar clause was present in the trust deed in *Barclays Wealth v Equity Trust* which stated that the trustee was to “deal ... in accordance with ... the proper instructions of the manager and make payments in accordance with directions given by the manager [emphasis added]”.⁷⁰ Although the court was “prepared to accept that ... the trustee has a residual duty [to supervise],” it opined that it will be “difficult to demonstrate on the facts” that had the trustee “diligently carried out its duties ... there are facts which it would have known, and that if it had known those facts ... it ought to have refused to follow [the instructions of the management company]”.⁷¹

Such a clause was also present in the deed of *Parkes Management v Perpetual Trustee* (1977) 3 ACLR 303 (“*Parkes Management*”), where the powers of the trustee “were to be exercised only pursuant to proposals of the manager”.⁷² Similarly, although the court accepted that the manager was “subject to what might be regarded as supervision by the trustee”, the manager was “the source and the origin of the trust” and “in no sense to be regarded as an employee or agent ... [of] the trustee” – further cementing the diminished role of the trustee in manager-led ES funds.⁷³

Practically, trust companies in Singapore are also unlikely to be sufficiently equipped to investigate the discretion of managers. Trustees in Singapore are regulated by the Trust Companies Act and must be licensed for the purpose of carrying on the trust business.⁷⁴ They are not permitted to engage in any other functions.⁷⁵ Unlike management companies in the US which have the research capabilities to guide their decision making, trust companies are only in a position to check investment decisions against specifically enumerated standards set by the manager themselves (if any).⁷⁶

Additionally, it is unclear how the trustee will supervise control rights attached to ownership. These acts are not conveyed through the trustee and can be unilaterally exercised by the manager. For example, a trust deed of a retail ES fund may state that: “All rights of voting ... shall be exercised in such manner as the Manager may consider to be in the best interests of the Holders of Units.”⁷⁷

The duty to supervise is practically hollow in a unit trust where trustees are fully reliant on the manager’s discretion. A failure to consider other causes of actions could leave unitholders subject to the whim of managers who perform acts that are unauthorised by the trust deed.

2. Private claims

It should be noted that a breach of fiduciary duties is far from being the only viable claim and unitholders can also attempt to pursue claims in contract or tort. However,

⁷⁰ Clause 44 and 45 in the Trust Deed on the facts, *Barclays Wealth v Equity Trust*, *supra* note 60 at [11].

⁷¹ *Ibid* at [67]–[68].

⁷² Clause 19 in the Trust Deed on the facts, *Parkes Management Ltd v Perpetual Trustee Co Ltd & P T Ltd* (1977) 3 ACLR 303 at [309] [*Parkes Management*].

⁷³ *Ibid* at [310], [314].

⁷⁴ LexisNexis, *Halsbury’s Laws of Singapore*, *supra* note 43 at [110.717].

⁷⁵ *Ibid* at [110.719].

⁷⁶ As discussed later, such objective standards are not even always present in retail ES funds.

⁷⁷ Trust Deed Template.

the main difficulty lies in the available remedies. ES-motivated unitholders generally seek an injunction to restrain the manager from owning investments in conflict with the enumerated ES purpose as opposed to mere monetary damages.⁷⁸ For example, ClientEarth sought an injunction against the central bank of Belgium for climate failings to stop quantitative easing from European central banks flowing to fossil fuel companies and polluting firms.⁷⁹ Similarly, a consumer organisation in Germany sought an injunction against Deutsche Bank's DWS to stop misrepresenting its Climate Tech Fund's operational exclusions.⁸⁰

Briefly, there is good reason to believe that a contractual claim can arise from the trust deed of a unit trust. Professor Sin has argued that the trust obligations of the manager must primarily be contractual in nature since the unit trust deed vests in the manager the management functions which would otherwise be in the hand of a trustee.⁸¹ An express or implied term in the contract will hence form the underlying obligation for managers to abide by in the trust instrument.⁸² Hence, contractual claims can give rise to the threat of litigation that incentivises the manager to act according to the contract's ES objective. However, it is unlikely that injunctions will be granted to sanction investments unaligned with the ES objective. This is because injunctions are ultimately an exceptional discretionary remedy and there is precedent that injunctions for contracts are only awarded for a negative covenant.⁸³

Notably, there is little doubt that managers owe a tortious duty of care to unitholders for pure economic loss.⁸⁴ The manager will be liable under the principle in *Hedley Byrne v Heller*⁸⁵ if a statement in the scheme particulars is wrong or negligent. However, even this is dependent on finding a fiduciary relationship of trust and confidence and fails to directly address the key mischief where the manager does not act negligently but rather, deliberately ignores them in favour of the financial purpose of the unit trust.

In contrast, a proof of a breach of a fiduciary duty will present unitholders with a host of restitutionary equitable remedies such as an injunction, rescission of

⁷⁸ This is also generally the case for ES-motivated shareholders in companies that give ES-related promises. For example, ClientEarth sought a court order against Shell mandating the company's directors to strengthen their climate transition strategy to align with the Paris Agreement goals (see *ClientEarth v Shell Plc*, *supra* note 14). Similarly, in *In re Danimer Scientific, Inc. Securities Litigation*, No. 1:21-cv-02708-HG-SJB (30 September 2023) (E.D.N.Y.), investors sought equitable injunctive relief against a company that represented that their plastic substitute was 100% biodegradable and sustainable. In *Fagen et al v. Enviva Inc et al*, No. 8:22-cv-02844-DKC (3 July 2024) (D. Md.), investors in a company producing wood pellets as an alternative to coal sought an injunction to prevent the company from continuing its misleading practices.

⁷⁹ ClientEarth, "Why ClientEarth Is Suing the Central Bank of Belgium for Climate Failings" <<https://www.clientearth.org/latest/news/why-clientearth-is-suing-the-central-bank-of-belgium-for-climate-failings/>> (13 April 2021).

⁸⁰ Reuters, "Deutsche Bank's DWS Sued by Consumer Group Over Alleged Greenwashing" <<https://www.reuters.com/business/finance/deutsche-banks-dws-sued-by-consumer-group-over-alleged-greenwashing-2022-10-24/>> (24 October 2022).

⁸¹ Sin, *supra* note 46 at 94.

⁸² *Barclays Wealth v Equity Trust*, *supra* note 60 at [23].

⁸³ *Warner Brothers Pictures Incorporated v Nelson* [1937] 1 KB 209.

⁸⁴ Worthington, *supra* note 45 at 261.

⁸⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

transactions, account for profits and enforcement of a constructive trust over assets acquired in breach of duty.⁸⁶

IV. FIDUCIARY DUTY TO ACT WITHIN THE PURPOSE OF THE TRUST

A. *Establishing the Fiduciary Duty to Act Within Purposes of the Trust*

Although managers are not an established category of fiduciaries, it is argued that managers should be deemed as trustees. Alternatively, they owe a fact-based fiduciary duty to act for the purpose of the trust.

It is well established that a fiduciary is not subject to fiduciary obligations because he is a fiduciary; instead, it is because he is subject to such obligations that he is a fiduciary for those purposes.⁸⁷ In determining if a fiduciary duty arises, the court will first determine if the relationship falls within a settled category. If so, a strong rebuttable presumption that fiduciary duties are owed will arise. In any case, the court will determine if there had been a fiduciary obligation based on multiple factors such as mutual trust and confidence, legitimate expectation to only promote the beneficiary's interest and assumption of responsibility.⁸⁸

Preliminarily, since the test focuses on a specific obligation, the absence of a statutorily imposed fiduciary duty on managers is not conclusive on whether a fiduciary duty is owed.⁸⁹ Additionally, inherent in the test is that not all powers vested are by their nature fiduciary.⁹⁰ Hence, the fact that the manager concurrently holds non-fiduciary powers would not undermine the finding of the fiduciary purpose duty.

First, though still an open question in Singapore, I submit that managers can and should be classified as trustees. On the one hand, it has been argued that despite the great deal of responsibility that resides with the manager, it cannot be considered a trustee which attracts onerous duties.⁹¹ Furthermore, s 292(1) of the SFA, in contrast to s 253 of the Financial Services and Markets Act in the UK,⁹² does not explicitly mention managers with regard to the limits of exemptions of liability. In this respect, managers are seemingly not intended to be trustees. Additionally, Singapore has not unified the roles of trustee and manager like in Australia⁹³ or conclusively determined that all managers are trustees like in New Zealand⁹⁴. While this might

⁸⁶ *The Application of Permanent Trustee Nominees (Canberra) Ltd*, *supra* note 62; *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049.

⁸⁷ *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] SGCA 79 at [42].

⁸⁸ LexisNexis, *Halsbury's Laws of Singapore*, *supra* note 43 at [110.190].

⁸⁹ Tjio, "The Regulation of Unit Trusts and Trustees' Power to Invest in Them", *supra* note 38 at 163. Compare Singapore to the current status of the US where s 36(b) of the US Investment Company Act states that the advisor has a fiduciary duty with regards to the advisory fees.

⁹⁰ Yee, Wan & Tjio, *supra* note 48 at [3.23]; see also *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698.

⁹¹ Yee, Wan & Tjio, *supra* note 48 at [3.23].

⁹² Tjio, "The Regulation of Unit Trusts and Trustees' Power to Invest in Them", *supra* note 38 at 163; SFA, *supra* note 42, s 292(1); Financial Services and Markets Act 2000 (UK), s 253.

⁹³ Tjio, "Lending to a Trust", *supra* note 68 at 6; Managed Investments Act 1998 (Cth, Aust), *supra* note 33; Corporations Act 2001 (Cth) ch 5C (Aust).

⁹⁴ Tjio, "Lending to a Trust", *supra* note 68 at 6; Unit Trusts Act 1960 (NZ), s 3(2)(c).

suggest that Singapore had decidedly rejected the overwhelming trend of foreign jurisdictions in imposing trustee-like obligations onto managers, the current regime may have been designed to preserve flexibility in determining if a specific manager qualifies as a trustee. Importantly, due to the trust-specific nature of the managers' duties,⁹⁵ applying all trustee obligations indiscriminately to managers, regardless of their specific obligations, could be an undue expansion of their responsibilities.

Given the ambiguity surrounding legislature's apparent hesitance to classify the manager as a trustee, I submit that compelling reasons exist to recognise managers as trustees when they exercise practical control over trustees themselves. In principle, the party who has the specific task of making investment decisions should be the party subject to general trusts law obligations of investments.⁹⁶

Indeed, unit trust deeds are drafted such that the manager's role is closer to the traditional trustee given its powers to bind the property in the hands of the trustee.⁹⁷ An inspection of trust deeds reveals that even if the manager falls short of legally controlling the trustee,⁹⁸ managers of retail ES funds wield practical control akin to legal control. This practical control is achieved due to (a) the diluted trustees' duty to supervise,⁹⁹ and (b) the wide discretion awarded to managers. In *Barclays Wealth v Equity Trust*,¹⁰⁰ the clauses of the trust deed reflected both aspects of this control, akin to the retail ESG fund trust deeds inspected. First, the trust stated that the "[t]rustee shall not be concerned as to whether the investment restrictions contained in the relevant Fund Rules ... are complied with". Second, the deed stated that the "[m]anager shall manage and administer the Trust ... and the Trustee shall in no way be concerned with or responsible or liable to any person for the same". Although the case was for a striking out application, the court found it was arguable that the manager was liable as a trustee. It was held that if trust deeds delegate full discretion to managers and enable trustees to fully rely on their directions, it would be "stultifying for the court not to hold the manager responsible for the way in which it executes its duties and exercises its powers". Such clauses are common and in *Parkes Management*, the deed stated that the manager had "absolute and uncontrolled" discretion for the exercise of the power.¹⁰¹

Furthermore, the holding in *Citibank NA and MBIA Assurance SA v QVT Financial LP* ("*Citibank v QVT*")¹⁰² should not apply to most ES retail funds and can be distinguished on the facts. In *Citibank v QVT*, the court rejected the argument that the manager was a trustee, finding that the trustee had residual discretion which arose when the third party ceased to give directions, upholding the trust regime. Critics of the decision argue that there was no meaningful trust since the residual discretion of the trustee was miniscule compared to the powers subject to the control of the third party.¹⁰³ In any case, the trust in *Citibank v QVT* is distinguishable from

⁹⁵ Tjio, "Lending to a Trust", *supra* note 68 at 6.

⁹⁶ *Barclays Wealth v Equity Trust*, *supra* note 60 at [51].

⁹⁷ Geraint Thomas & Alastair Hudson, *The Law of Trusts*, 2d ed (Oxford: Oxford University Press, 2010) at 53.14B.

⁹⁸ Yee, Wan & Tjio, *supra* note 48 at [3.23].

⁹⁹ As discussed in Section III(A)(1) of this article.

¹⁰⁰ *Barclays Wealth v Equity Trust*, *supra* note 60 at [13]–[14], [73].

¹⁰¹ In Clause 19(9) of the Trust Deed, *Parkes Management*, *supra* note 72 at [309].

¹⁰² *Citibank NA and MBIA Assurance SA v QVT Financial LP* [2007] EWCA Civ 11 at [28].

¹⁰³ Yevgeny Trukhtanov, "The Irreducible Core of Trust Obligations" (2007) 123 Law Q Rev at 345–346.

retail ES funds which often give the manager “uncontrolled discretion” and shield the trustee from liability without any clause granting residual discretion. Hence, managers in effect hold trustee powers and should be liable for an unauthorised use of these powers.

It is proposed that a fact-based fiduciary duty to act in line with a purpose of a power can be imposed on managers of unit trusts. Foremost, there is great inequality of bargaining power¹⁰⁴ since investors merely accept the terms presented to them by managers and most do not even realise that key terms, such as managers’ fees, greatly impact their returns.¹⁰⁵ Investors fail to consider these terms even if they are transparent and salient, undermining the disclosure-based approach in securities law. Additionally, the manager essentially has full unilateral discretion¹⁰⁶ especially given the watered-down trustee duty to supervise. The issue is heightened for voting and engagement in which the trustee’s supervision is not involved. Ultimately, the investors’ legal and practical interests are directly affected by the manager’s discretion.

Given the lack of Singaporean judicial precedent directly considering whether the purpose duty is a fact-based fiduciary duty, I consider two approaches that have been proposed. Notably, the purpose duty is principally similar to the duty to act for proper purposes in company law as they both address the singular mischief of a want of authority.¹⁰⁷

The first approach is based on the fraud on a power doctrine and argues that the core question is whether the specific power (for example, the power to direct investments) is of a fiduciary nature¹⁰⁸ based on the test in *Mettoy Pension Trustees v Evan*¹⁰⁹. First, one must determine whether the manager’s power is a fiduciary power or a beneficial power for its own benefit.¹¹⁰ If it is a fiduciary power, the appointer must have an entire and single view to the real object of the power and not any object beyond that purpose.¹¹¹ However, this approach has been criticised as over encompassing as it wrongly implies that every breach of the power would be a fiduciary breach.¹¹² Hence, Professor Flannigan proposed a second approach based on whether the power holder has *knowingly* exercised the power for a different purpose or whether they had merely *misconstrued* the power.¹¹³ Underlying this approach is the principle that the fraud on the power doctrine regulates authority as opposed to fiduciary accountability which regulates opportunism.

¹⁰⁴ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at [32] [*Hospital Products v United States Surgical Corporation*].

¹⁰⁵ James J Choi, David Laibson & Brigitte C Madrian, “Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds” (2010) 23(4) *The Review of Financial Studies* at 1405.

¹⁰⁶ *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 [*Clearlab SG v Ting Chong Chai*].

¹⁰⁷ Robert Flannigan, “Fraud on a Power, Improper Purpose and Fiduciary Accountability” (2007) 123 *Can Bus LJ* at 135 [Flannigan, “Fraud on a Power, Improper Purpose and Fiduciary Accountability”].

¹⁰⁸ Tsun Hang Tey, “Trust Protector” (2008) 20 *Sing Ac LJ* at [57].

¹⁰⁹ *Mettoy Pension Trustees Ltd v Evans and others* [1990] 1 WLR 1587.

¹¹⁰ Sin, *supra* note 46 at 225.

¹¹¹ *The Duke of Portland and others v Lady Mary E Topham and others* (1864) 11 H.L.C. 32; see also *Eliza F. T. Higgs Vatcher and others v Henry Paull and others* [1915] A.C. 372.

¹¹² Robert Flannigan, “The End of Fiduciary Accountability” (2020) 39(2) *UQLJ* 157 at 181 [Flannigan, “The End of Fiduciary Accountability”].

¹¹³ Flannigan, “Fraud on a Power, Improper Purpose and Fiduciary Accountability”, *supra* note 107 at 135.

I submit that in either formulation, a fiduciary duty arises to constrain the managers' power. Under the first approach, applying the test in *Mettoy Pension Trustees*, the full discretion that the manager has on the composition of the portfolio's assets and exercising control rights attached to the portfolio's assets will lead to the finding that it is a "trustee of the power itself". This finding is supported by express obligations that the manager is to exercise both investment direction¹¹⁴ and control rights¹¹⁵ in the best interest of unitholders. Under the second approach, Professor Flannigan proposes a two-step test for there to be a breach of fiduciary duty. Applying the first step, powers of the managers of retail ES funds are "limited by an other-regarding purpose", in this case the dual ES and financial purposes, and are clearly "part of [a] service".¹¹⁶ Second, it must be determined if there was an unauthorised conflict or benefit. To reiterate, the central problem at stake here is whether managers can choose to disregard the ES purpose of the trust to pursue financial goals even if they deem it to be in the best interest of unitholders. Even if there is no explicit personal conflict and the act was to advance the interest of the unitholders, unduly favouring the financial purposes over the ES purposes of the unit trust, deviating from the enumerated purpose of the unit trust, is in itself a conflict.¹¹⁷ In any case, it is not hard to see why managers that generally charge management fees as a percentage of the Net Asset Value would have a conflicted incentive to maintain the fund's asset value at a level that maximises their management fees, prioritising the financial purpose of the fund over the ES purpose in most circumstances. Lastly, although proof of an unauthorised purpose is usually a more difficult way to satisfy the conventional test of an unauthorised conflict or benefit in companies, in the context of unit trusts where purposes are expressly enumerated, this is less of a concern.¹¹⁸

B. Limits of the Wording of the Trust

1. Categorisation of trust deeds

However, one issue in the examination of fiduciary duties arising out of the trust is whether the wording of the trust deed accommodates these duties. It is well established in Singapore courts that the content of a fiduciary duty that arises out of a contract must accommodate itself to the terms of the contract so that it is consistent with and conforms to them.¹¹⁹ Importantly, the fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

¹¹⁴ Sin, *supra* note 46 at 93.

¹¹⁵ An example of a typical clause in the trust deed of a retail ESG fund states that votes shall be exercised in such a manner that is "in the best interests of Holders of Units in a Sub-Fund and shall in writing direct".

¹¹⁶ Flannigan, "The End of Fiduciary Accountability", *supra* note 112 at 168.

¹¹⁷ Flannigan, "Fraud on a Power, Improper Purpose and Fiduciary Accountability", *supra* note 107 at 139.

¹¹⁸ Further discussed in the next section when considering the express wording of the unit trust deed in contrast to the herculean task in companies.

¹¹⁹ This principle was held in *Hospital Products v United States Surgical Corporation*, *supra* note 104 and applied in *Clearlab SG v Ting Chong Chai*, *supra* note 106.

In the following Table 1, the trust deeds of retail ES funds have been dichotomised into four types based on the managers’ power to invest. These are not mutually exclusive types, and several trust deeds fall into at least two categories. This categorisation is based on the level of discretion given to the manager in implementing ES objectives and the presence of objective, verifiable limits to the discretion in the trust deed. Type 1 features the most rigid type of trust deed and Type 4 the most flexible.

Type of Trust Deed	Examples
Type 1: Mandate to invest ethically with specific, externally verifiable, investment strategy	Positive obligation: “Fund will invest at least 85% of its net asset value in investments which fall within the scope of ‘sustainable investments’ as defined under the European Union’s Sustainable Finance Disclosure Regulation.”¹²⁰ Negative obligation: “The Fund will not invest in companies that generate 10% or more of their turnover from the production of weapons including banned weapons according to The Convention of the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines.”¹²¹
Type 2: Mandate to invest ethically with benchmarks but no externally verifiable strategy	Assignment of ESG score: Manager will “favour companies with higher ESG scores and exclude issues based on their controversial behaviour or products”. This is generally accompanied by an explanation of the ESG score; for example, “ESG score is assessed by comparing the average performance of a security against the security issuer’s industry.”¹²² General guideline: Not invest in “companies with insufficient progress made in relation to ESG issues based on research and analysis on whether the companies’ management aligns with UN Sustainable Development Goals”.¹²³
Type 3: Trust deed with an explicit, enumerated ES purpose	Stating ES purpose: “The sustainable objective of the Fund is to invest in companies which both contribute to, and benefit from, sustainable development, achieving positive social and environmental outcomes.”¹²⁴ Dual purposes: “Aims to deliver performance while at the same time pursuing environmental, social and governance objectives”.¹²⁵
Type 4: Trust deed giving full discretion to manager to determine what would contribute to the ES objective	“The manager will invest primarily in companies <i>it believes</i> contribute to, and benefit from, sustainable development [emphasis added].”¹²⁶ Manager will invest in “equities that <i>in [its] opinion</i> contribute positively to environmental and social objectives through their current or future products and/or services [emphasis added].”¹²⁷

Table 1: 4 types of retail ES fund trust deeds

¹²⁰ Found in trust deed of Nordea 1 – Global Impact Fund.

¹²¹ Found in trust deed of Clearbridge Global Sustainability Improvers Fund.

¹²² Found in trust deed of Amundi Funds Asia Income ESG Bond.

¹²³ Found in trust deed of First Sentier Responsible Listed Infrastructure Fund.

¹²⁴ Found in trust deed of Steward Investors APAC Leaders Sustainability Fund.

¹²⁵ Found in trust deed of Nikko AM Global Green Bond Fund.

¹²⁶ Found in trust deed of BNY Mellon Sustainable Global Dynamic Bond Fund.

¹²⁷ Found in trust deed of Capital Group Sustainable Global Opportunities Fund.

I suggest that two conceptions of the purpose duty arise based on the type of trust deed and the manager's power investigated.

2. Conception 1: Type 1–3 purpose duty

For funds falling in Types 1–3, the wording of the trust is likely to support the establishment of the fiduciary duty to act in line with the purpose of the trust. This is later referred to as Type 1–3 purpose duty. The CIS Code states that the first function and responsibility of the manager is to “act in accordance with the constituent document of a scheme and in the best interests of participants”.¹²⁸ Based on the wording of Type 1–3 trust deeds above, it is evident that managers see their power to direct investments to be of the most importance and several deeds specifically state that investments will be directed in accordance with the purpose of the fund. Additionally, many trust deeds make the corresponding declaration for managers' control of voting and engagement.

In companies, director duties are owed to “the company as a whole” which refers not to the company as a commercial entity but the shareholders as a general body. The implication of shareholder primacy is that directors are entitled but not obliged to consider ES interests¹²⁹ when defining the best interest of the company. In contrast, most trust deeds of retail ES funds explicitly state dual trust purposes to act in the best financial interests of unitholders and to pursue the ES objective. Hence, ES-fund managers cannot independently define the interest of the beneficiaries but rather must act with respect to the enumerated objectives of the trust, including ES purposes. It is widely accepted that the best interest of the beneficiaries does not “inevitably and solely [mean] their financial benefit” since “beneficiaries might well consider that it was far better to receive less than to receive more money from what they consider to be evil and tainted sources”.¹³⁰ Furthermore, investors may be willing to sacrifice pecuniary returns in order to pursue ES objectives.¹³¹

Hence, for funds with Types 1–3 trust deeds, the issue is whether on the facts, the manager has committed an act (or series of acts) that is not aligned with the purposes of the trust. This presents a viable claim for unitholders. Although detractors might argue that inherent difficulties in finding that there is a breach of the purpose of the trust will arise, such concerns are likely exaggerated. While there are generally no explicit statements which sets out the purpose of a power conferred on directors in companies,¹³² this is not the case for funds especially when considering key powers like investment, voting and engagement. Although it is accepted that there remains much confusion about the meaning and effect of ESG which are accentuated by

¹²⁸ Monetary Authority of Singapore, “Code on Collective Investment Schemes” <<https://www.mas.gov.sg/-/media/mas/regulations-and-financial-stability/regulations-guidance-and-licensing/securities-futures-and-fund-management/regulations-guidance-and-licensing/codes/cis-code-last-revised-28-nov-2025.pdf>> (28 November 2025) at 9 [Code on Collective Investment Schemes].

¹²⁹ Lan & Wan, *supra* note 27 at 543.

¹³⁰ *Cowan and others v Scargill and others* [1985] 1 Ch 270.

¹³¹ Oliver Hart, David Thesmar & Luigi Zingales, “Private Sanctions” (2024) 39(117) *Economic Policy* at 203–268.

¹³² Hans Tjio, “The Proper Purpose Rule” [2016] *LMCLQ* at 4.

the inherent tensions amongst various components of ESG,¹³³ these concerns are overstated. Courts are used to adjudicating the exercise of discretion even where the entity endowed with this discretion is to consider goals that conflict with each other. For example, in *Butler-Sloss v The Charity Commission*,¹³⁴ the exact issue of the balance between pecuniary and non-pecuniary interests arose in the context of a charitable trust with the purpose of environmental protection. The court found that to formulate an appropriate investment policy, the trustees had to engage in a “balancing exercise [considering what was] a *reasonable* and *proportionate* investment [emphasis added]”.¹³⁵ Albeit in the context of a charitable trust, the purpose of the trust is manifestly akin to the ES purpose of a unit trust where the manager is tasked to engage in a balancing exercise between financial and ES purposes. Hence, if the issue of whether the manager had acted in accordance with the trust’s purpose does arise, this test should be applied. In principle, unlike full subjective discretion, the test imposes an important objective test on whether the acts of the manager can objectively be deemed to have been *reasonably* and *proportionately* balancing the dual financial and ES objectives.

Moreover, the approach to determine if a manager has breached its duty to act in line with the purpose of the unit trust differs from that of company law’s duty for directors to act *bona fide* based on what they subjectively consider is in the best interests of the company.¹³⁶ Unlike company law where the judiciary is acutely concerned with overly-prescriptive limits on how companies should be run, prompting deference to be shown to directors when it comes to “defining the ‘interests of the company’”,¹³⁷ managers of a unit trust are not given the same latitude of discretion to define the interests of their beneficiaries. Instead, the interests of the beneficiaries and limits of the manager’s discretion is a question of interpretation and construction of the unit trust deed.¹³⁸ Furthermore, in companies, the *Foss v Harbottle*¹³⁹ rule constrains the dangers of administrative suits by beneficiaries to prevent a multiplicity of actions. In contrast, unitholders are entitled to a bundle of contractual rights enforceable against the manager and are beneficiaries of fiduciary obligations having effect under the trust.¹⁴⁰

The difference of the tests can be illustrated using the following hypothetical. A manager allocates 80% of funds to companies in the Tobacco or Gambling industry despite the trust deed stating that the fund “[a]ims to deliver performance while at the same time pursuing environmental, social and governance objectives”. These investments are financially prudent and allows the fund to achieve a 10% IRR.

¹³³ Alperen A Gözlügöl, “The Clash of ‘E’ and ‘S’ of ESG: Just Transition on the Path to Net Zero and the Implication for Sustainable Corporate Governance and Finance” (2022) 15(1) Journal of World Energy Law and Business at 3.

¹³⁴ *Butler-Sloss and others v The Charity Commission for England and Wales and another* [2022] EWHC 974.

¹³⁵ *Ibid* at [78].

¹³⁶ *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 at [543]; see specifically the judgment of Lord Greene MR.

¹³⁷ Lan & Wan, *supra* note 27 at 11.

¹³⁸ Sin, *supra* note 46 at 208.

¹³⁹ *Foss v Harbottle* (1843) 67 ER 189.

¹⁴⁰ *Barclays Wealth v Equity Trust*, *supra* note 60 at [42]; see also Arthur Underhill *et al*, *Underhill and Hayton’s Law of Trusts and Trustees*, 19 ed (Cambridge: LexisNexis, 2016) at [1.125].

Taking the approach in company law where directors are given broad discretion to manage the business of the company and “defin[e] the interests of the company”,¹⁴¹ short of bad faith, the manager will not be held liable since the decision is in the best interest of the unitholders – especially considering the attractive financial returns. In contrast, applying the *Butler-Sloss* test, a *reasonable* manager would be aware that such industries typically contradict ES objectives based on market expectations. Additionally, since the trust deed accords equal weight to both purposes, it is not *proportionate* for 80% of investments to neglect the ES purpose.

3. Conception 2: Type 4 purpose duty

However, Type 4 trust deeds are problematic since they seemingly accord full discretion to the manager to determine what acts would be in line with the ES objective of the fund. Hence, the proper purpose duty as discussed for Type 1 to 3 trusts is unlikely to arise for Type 4 trusts since there is no actual breach of trust. I propose that the manager can still breach the purpose duty if it breaches the MAS Circular regarding the Disclosure and Reporting Guidelines for Retail ESG Funds (“the Circular”) which will form a factual basis for finding a breach of the proper purpose duty (later referred to as the “Type 4 purpose duty”).

The Circular sets out expectations for how existing requirements under the Code on Collective Investment Schemes (“CIS Code”) would apply to retail ESG funds.¹⁴² Based on the Circular, it would be a breach of the CIS Code for a scheme’s name to be inappropriate or misleading. Where a scheme’s name uses ESG related terms, the scheme’s investment portfolio or strategy should reflect an ESG focus. Notably, the Circular does not address the issues relating to exercising control rights attached to the portfolio’s assets (*ie*, voting and engagement) and can only impose liability for the power to direct investments. A breach of the CIS Code will not give rise to criminal proceedings although it can be considered in determining whether to revoke a CIS.¹⁴³ Since there is no private right of action under the CIS Code, I suggest that the manager’s breach of the Code will subject unitholders to risks, forming the factual basis for giving rise to the purpose duty.

The Singapore Court of Appeal in *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22 (“*Ho Kang Peng*”)¹⁴⁴ suggests, albeit in the company law context, that a director breaches a duty to act in accordance with the proper purpose of a power when he runs the unjustified risk of subjecting the company to criminal liability. Hence, *Ho Kang Peng* can be relevant in understanding whether liability arising from a breach of statutory provisions will be a breach of the purpose duty. In the context of a Type 4 retail ES fund, a manager’s failure to follow an investment

¹⁴¹ Lan & Wan, *supra* note 27 at 4.

¹⁴² See s 321 of SFA, *supra* note 42. The Circular is created by way of MAS’ power in s 321 of the SFA to issue codes to provide guidance.

¹⁴³ Code on Collective Investment Schemes, *supra* note 128 at 1.

¹⁴⁴ *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] SGCA 22 [*Ho Kang Peng*].

strategy that aligns with the name of the retail ES fund will unduly subject the CIS to a risk of revocation.

Although a breach of the CIS Code is not a criminal offence¹⁴⁵ it could lead to a revocation of a scheme – in effect leading to a similar risk as the one posed to a shareholder in a company subject to criminal investigations. Investors of a revoked scheme will face challenges accessing their funds and especially if the scheme holds illiquid assets. Hence, the dichotomy of criminal and non-criminal acts should not be exaggerated especially when investors are likely to face similar practical impacts.

Therefore, it is likely that the court will find that subjecting investors to such risks cannot be in their best interest. Notably, if this justification for imposing a duty to act within the purposes of the trust is accepted, it would equally apply to not just Type 4 funds but also Type 1–3 funds if there is a breach of the Circular.

4. *Summary of different duties*

Generally, it seems unlikely for the wording of the deed to pose a real restriction on the imposition of the fiduciary purpose duty for most powers within unit trusts.

For Type 1–3 funds, the manager's power to direct investments is restrained by the fiduciary breach of acting out of line with the purpose of the trust deed or by placing the unitholders' investment at risk due to a breach of the Circular. The power to vote or engage on behalf of beneficiaries can be meaningfully restrained by the fiduciary breach of acting out of line with the purpose of the trust deed. Notably, the Circular does not place obligations for a manager's engagement.

For Type 4 funds, the manager's power to direct investments is restrained by placing the unitholders' investment at risk due to a breach of the Circular. Since the wording of the trust accords full discretion to the manager to determine what would be in line with the ES objective, Type 1–3 purpose duty does not arise. However, difficulties arise when restraining the power to exercise control rights (*ie*, voting and engagement) in Type 4 trust funds since neither (a) the general duty to make a *reasonable* and *proportionate* investment (since the deed endows the manager with full subjective control), nor (b) the duty arising in relation to the Circular (since the Circular only governs ownership issues) seems to apply.

V. EXCLUSION OF THE FIDUCIARY DUTY

Even if a fact-based fiduciary duty for the manager to act in line with the purpose of the trust arises, there is an issue of whether liability can be excluded akin to an explicit waiver in company law. In company law, s 172(1) of the Companies Act¹⁴⁶ states that any provision that purports to exempt an officer of a company from liability in connection with negligence, breach of duty or breach of trust in relation to the company will be void.

¹⁴⁵ In contrast to the facts of *Ho Kang Peng* where the siphoning of funds from the company is clearly criminal.

¹⁴⁶ Companies Act 1967 (2020 Rev Ed), s 172(1).

As expected of commercial instruments, trust deeds often contain wide exclusion clauses. An example of an exclusionary clause is as follows:

In the absence of *fraud, wilful default or gross negligence* by the Manager or the Trustee respectively, neither of them shall incur any liability by reason of any reason of any error of law or any matter or thing done or suffered or omitted to be done by that party in *good faith* under the provisions of this Deed [emphasis added].¹⁴⁷

However, there are clear limits on what obligations can be excluded.¹⁴⁸ In principle, it is accepted that there is a point beyond which there is no purpose in calling an instrument a trust if all duties can be abrogated by contract.¹⁴⁹ The issue here is what that line is and whether the fiduciary purpose duty would fall on the right side of it.

For trustees, the position is set out in the seminal case of *Armitage v Nurse*¹⁵⁰ where Millett LJ famously concluded that the duty to perform the trust honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts. This draws a sharp distinction between negligence, which is not deemed to be part of the core duties, and fraud, bad faith and wilful misconduct.¹⁵¹

The position for fact-based fiduciaries is similar. Commentators have argued that fiduciary duties are (and should) be contractual, whether based on doctrinal¹⁵² or broader philosophical¹⁵³ perspectives. However, these views have been fervently countered. Most forcefully, Professor Conaglen argues that fiduciary duties only seem to be shaped by contract because they serve a protective function *vis-à-vis* voluntary non-fiduciary duties and are not actually in and of themselves voluntary.¹⁵⁴ It has also been argued that fiduciary obligations differ from contractual duties in terms of doctrine, ethical basis and purpose.¹⁵⁵ In any case, taking the contractual theory at its highest, even proponents accept that the duty to act honestly is imposed by law and exists independently of contract.¹⁵⁶

¹⁴⁷ Trust Deed Template.

¹⁴⁸ Tjio, "Lending to a Trust", *supra* note 68 at 14. It is generally accepted that the same principles are applied to both exclusionary and indemnification clauses. Hence, all clauses with this effect will be evaluated concurrently.

¹⁴⁹ Yee, Wan & Tjio, *supra* note 48 at [3.21].

¹⁵⁰ *Armitage v Nurse* [1998] Ch 241 (CA). The Singapore Court of Appeal has seemingly applied this same principle in *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1998] 2 SLR(R) 434 [Jumabhoy] where the court upheld a clause exempting fiduciaries from "loss not attributable to his own dishonesty or wilful commission or omission".

¹⁵¹ *Armitage v Nurse*, *supra* note 150 at [254].

¹⁵² James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 Law Q Rev at 303 [Edelman]; *F & C Alternative Investments (Holdings) Ltd v Barthelmy and another (No 2)* [2012] 3 WLR 10 (Ch).

¹⁵³ John Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114(5) Yale LJ.

¹⁵⁴ Matthew Conaglen, "Fiduciary Duties and Voluntary Undertakings" (2013) 129 Law Q Rev at 454–456 and 471–472.

¹⁵⁵ Scott Thomas Fitzgibbon, "Fiduciary Relationships Are Not Contracts" (1999) 82(2) Marq L Rev at 321–325; Deborah A DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" (1988) 1988(5) Duke LJ at 891–892.

¹⁵⁶ Edelman, *supra* note 152 at 304–305.

Since there seems to be little doubt that liability for dishonest breaches of fiduciary duties cannot be excluded,¹⁵⁷ the issue is whether a knowing breach of the proper purpose duty is considered dishonest based on the two different conceptions. First, I consider the excludability of a Type 4 purpose duty that arises from a potential contravention of the Circular. Since the manager risks the revocation of the scheme, leading to unitholders being unable to access their funds, it will likely be deemed as a state of affairs that no manager would have honestly believed would be in the interest of the unitholders.¹⁵⁸ Hence, a breach of the Type 4 purpose duty is likely to be deemed as dishonest – a core duty that cannot be excluded.

Next, I consider the excludability of Type 1–3 purpose duty. The excludability of such a duty has not yet been evaluated by the courts in Singapore. In *Rajabali Jumabhoy v Ameer Ali R Jumabhoy* [1999] 2 SLR(R) 434 (“*Jumabhoy*”),¹⁵⁹ the court approved of a clause shielding a trustee from liability if he did not know that the act was a breach of trust. Notably, *Jumabhoy* concerns a family trust, and the power investigated was the trustees’ power to perform a share swap. In contrast, an objective approach is applied to professional trustees, including the manager of a unit trust.¹⁶⁰ When a manager knowingly exercises a power that unduly favours the financial over the ES purpose of the trust, he objectively ought to know that this is a breach of trust. It is no defence for the manager to argue that they were acting in the best interest of the beneficiaries and even if they were, it is well accepted that they can still be found to be dishonest.¹⁶¹ This approach is supported by Professor Flannigan, who argues that any purpose that “is not an authorised end, must be a personal end”.¹⁶²

From a policy perspective, there is growing consensus that the scope in which professional fiduciaries can exclude their duties should be strictly circumscribed. This is reflected by the courts’ stricter interpretation of exemption clauses applying to professional trustees.¹⁶³ In other areas of law such as the Unfair Contract Terms Act,¹⁶⁴ a more restrictive approach also applies to professionals. This issue is even more acute in the context of exclusionary clauses as opposed to waivers where courts have required the fiduciary to show that the principal fully appreciated the effect of the exclusion clause.¹⁶⁵ In the context of retail ES funds, trust deeds are not easily available and it would be manifestly unfair for retail investors to purchase units without understanding the legal effect of the exclusionary clauses.

¹⁵⁷ LexisNexis, *Halsbury’s Laws of Singapore*, *supra* note 43 at [110.223].

¹⁵⁸ *Ho Kang Peng*, *supra* note 144 at [36].

¹⁵⁹ *Jumabhoy*, *supra* note 150.

¹⁶⁰ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 4.

¹⁶¹ *Walker and others v Stones and another* [2001] QB 902 (CA).

¹⁶² Flannigan, “Fraud on a Power, Improper Purpose and Fiduciary Accountability”, *supra* note 107 at 139.

¹⁶³ *Bogg and others v Raper and others* [1998] Ch 1 (Ch); *Wight and another v Olswang and another* [2000] 1 WLR 2395. In the former case, the Court of Appeal found that a solicitor could only rely on an exemption clause if he had drawn the testator’s attention to the clause and explained its effect. In the latter case, the court interpreted the exemption clause restrictively to give effect to the fiduciary duty to act in the best interest of beneficiaries.

¹⁶⁴ Unfair Contracts Terms Act 1977 (2020 Rev Ed).

¹⁶⁵ LexisNexis, *Halsbury’s Laws of Singapore*, *supra* note 43 at [110.223].

VI. CONCLUSION

Despite the dearth of case law, there is good reason to believe that the unit trust structure gives rise to viable private actions that effectively facilitate the expectations unitholders have of managers, balancing competing needs for granting discretion and its limits to accommodate the amorphous nature of ES objectives. However, a concerning lacuna seems to arise when it comes to legal restraints on a manager's discretion on exercising control rights attached to investments for Type 4 funds.

This article takes an optimistic view but there remain questions that warrant future research. Firstly, although this article advocates for the courts to assess managers' acts based on reasonableness and proportionality, it remains plausible, albeit unjust, that a more subjective approach similar to company law is adopted, as seemingly favoured in pension funds.¹⁶⁶ This enables managers to define the unitholders' interests, potentially sidelining the purposes enumerated in the trust deed. Second, it would be valuable to understand the practical feasibility of establishing a manager's knowing deviation from the purposes of the trust, in particular, evidential challenges for determining the manager's state of mind. Lastly, it is hoped that the categorisation of trust deeds set out can serve as a starting point for empirical research into the actual distribution of the different types of trust deeds. Naturally, more concerns arise if a greater proportion of funds have Type 4 deeds – seemingly endowing managers with unrestricted discretion.

If the purpose duty is no longer a tenable ground for retail unitholders, then other private actions such as in tort or contract must be sustained instead. Ultimately, as the preferences of retail investors evolve, legal vehicles created to facilitate such transactions can and should be flexible in accommodating and promoting them.

¹⁶⁶ *McGaughey v Universities Superannuation Scheme Limited* [2023] EWCA Civ 873. In this case, the court took a more deferent approach to managers of a pension fund. Notably, the court considers pension legislation, which is not applicable to most ES-retail funds, in constructing the purpose of the trust deed, tying it more intimately with pecuniary interests.