

# From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore

Tang Hang Wu\*

*ABSTRACT: This Article explores the historical use of the trust in Singapore from the early colonial days to modern times as a means of wealth transfer. English trust law which travelled to Singapore by reason of its colonial past had to be adapted and negotiated by the colonial judges in light of cultural and religious norms worlds away from that found in England. This essay traces three major uses of the trust as a means of wealth transfer in Singapore's history. First, the trust was used by rich Chinese families for succession purposes which included the promotion of ancestor worship and burial grounds. However, the custom of perpetual ancestor worship ultimately proved to be incompatible with the English law against perpetuities. This irreconcilability, coupled with the fact that the practice of ancestor worship is becoming less common, has meant that such trusts are virtually unheard of these days. Second, the trust was used by wealthy Arab merchants who controlled much of the business and land holdings in Singapore to further succession planning and religious purposes. The popularity of the use of the trust by these Arab traders may be due to the fact that the trust was not an alien concept to them because Muslim law utilizes the concept of the waqf, which is similar to the trust. However, Islamic concepts inherent in the waqf proved to be too discordant with English trust law doctrines for the sustained use of the trust in this context. This incompatibility together with concerns of proper governance of the waqf led to statutory reforms. Such reforms resulted*

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\* Professor and Director of Centre for Cross-Border Commercial Law in Asia, School of Law, Singapore Management University. Earlier versions of this paper were presented at various conferences in Harvard, Leeds, Singapore, and Iowa. I am grateful to Thomas Gallanis, Masayuki Tamuraya, Richard Nolan, Kelvin Low, Yip Man, Zinian Zhang, Gerard McCormack, Jingchen Zhao, Ahmad Nizam, Raymond Gwee, George Zhou, Nick Piska, Lim Ping Ping and Robert Sitkoff for their helpful comments on earlier drafts. Thanks are also due to Elizabeth Naumczyk and Chai Yee Xin from the Singapore Management University Law Library and Carolyn Wee from NUS Law Library for their help in procuring some of the historical sources used in this article. The usual disclaimers apply.

*in the waqf being compulsorily managed by the Islamic Council of Singapore. Finally, the modern contemporary use of the trust coincided with the arrival of what I term as a form of global trust to Singapore. Rooted in doctrinal developments in English law, inspired by developments in offshore financial centers, and created by ingenious draftpersons, the quintessential global trust is a form of a highly discretionary trust. Such discretionary trusts are used by the financial industry in Singapore and elsewhere as one of the principal means of modern wealth management. This final wave reflects the emergence of Singapore as a major wealth management center in Asia. This Article traces this development and highlights the challenges on the horizon—especially in the context of international pressures for transparency. Ultimately, this case study on the historical and contemporary use of the trust in Singapore demonstrates the flexibility of the trust concept in facilitating wealth transfer through the ages.*

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## I. INTRODUCTION

Due to its colonial past, the laws of Singapore are essentially derived from English law.<sup>1</sup> In the early days, the legal application of English law to a multicultural society like Singapore, with very different customs, norms and social context, created embarrassing problems. For instance, as Andrew Harding points out,<sup>2</sup> early colonial judges had to decide awkward questions

1. See ANDREW PHANG BOON LEONG, THE DEVELOPMENT OF SINGAPORE LAW 34–51 (1990).

2. Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT'L & COMP. L.Q. 35, 35 (2002).

such as the intestate succession of a rich Chinese businessman with six wives in a case widely known as *The Six Widows Case*.<sup>3</sup> This issue posed to be embarrassing, because English matrimonial law did not recognize polygamous marriages. Obviously, for English law to work in a local context, it had to undergo the process of being adapted to local culture and conditions. Therefore, an autonomous sphere in the testamentary and family context had to be created for Muslim, Chinese, and Hindu law and customs to apply.

This Article focuses on the migration of English trust law to Singapore and its past and present uses in relation to wealth transfer through the ages. In Singapore, trust law arrived together with the corpus of English law. Unlike criminal law, which was influenced by Indian codes promulgated by the English in British India, trust law was received into Singapore directly from England.<sup>4</sup> Its arrival and application to the local context has not been uncontentious. As Adam Hofri-Winogradow perceptively points out in the context of Zionist settlers and the English private trust, “[t]he complexity of the transplantation story” in relation to trust law “reflects the trust’s nature as a particularly complex and conflicted legal site . . . [found] at a crossroads of family law, the law of succession and the law of commerce.”<sup>5</sup>

Another complicating factor is trust law’s inevitable relationship with real property law. By the time when it arrived in Singapore, English law had developed a strong hostility to tying up land for long periods of time.<sup>6</sup> This prevailing economic philosophy is manifested in the *Rule Against Perpetuities*, which essentially mandates that property must vest within the period of a person’s life in being at the creation of the trust plus 21 years.<sup>7</sup> Case law will reveal that the *Rule Against Perpetuities* invalidated many early attempts to use the trust in a local context.<sup>8</sup>

In writing this Article, I resist looking at Singapore trust law from the lens of legal transplant,<sup>9</sup> a term which carries substantial baggage. Instead, I view this example of law as a travelling phenomenon using the perceptive words of Dr. Iza Hussin who writes:

3. *In re Choo Eng Choon* (1908) 12 SSLR 120 (Sing.).

4. Yip Man, *Trusts and Equity: Dreaming and Building a Singapore Equitable Jurisdiction*, in SINGAPORE LAW 50 YEARS IN THE MAKING 668, 670–74 (Goh Yihan & Paul Tan eds., 2015).

5. Adam Hofri-Winogradow, *Zionist Settlers and the English Private Trust in Mandate Palestine*, in THE WORLDS OF THE TRUST 203, 253–54 (Lionel Smith ed., 2013).

6. HANBURY & MARTIN: MODERN EQUITY 337 (Jamie Glistler & James Lee eds., 2015).

7. *See id.*

8. *See, e.g.*, *Choa Choon Neoh v. Spottiswoode* (1869) 1 Kyshe 216, 218–22 (Sing.).

9. The literature on legal transplant is voluminous. *See generally* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993) (outlining the transplant of law through the movement of rules); Pierre Legrand, *The Impossibility of ‘Legal Transplants,’* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997) (disagreeing with the idea of legal transplants because rules do not travel).

[The] analytic project . . . is not simply *that* law travels, but with whom; not just that it is carried, but alongside what other commodities and baggage; not just that it moves, but that it is transformed by its passage across borders and among localities.<sup>10</sup>

Therefore, the emphasis of this Article is to discover the manner in which English trust law travelled to Singapore and how this law was articulated, used and adapted to a local context. This case study reveals part of the topology of the people living in colonial Singapore—its wealthy migrants, their religious and cultural practices and their desires in relation to managing their wealth for their descendants.

Finally, the modern contemporary use of the trust in Singapore presents a different facet to laws' itineraries. The use of the plural form in relation to law in the preceding sentence is a deliberate choice, because the modern contemporary use of trusts for wealth management purposes involves not just Singapore or English laws but laws from other major trust jurisdictions. Again, Dr. Iza Hussin says, “[C]irculation sees the movement of law through the world not as seamless and uniform, but as critically intertwined with the movement of people, goods, and ideas, and, therefore, as deeply implicated in networks of economy, politics, and society . . . .”<sup>11</sup>

Hussin's idea of circulation is apposite in the present context. The arrival of different laws to Singapore has less to do with a previous linear travel of trust law from England to Singapore and more to do with a circulation of similar ideas and trust structures within major financial centers and a network of international trust companies and banks. These international entities set up offices in Singapore in an attempt to capture the burgeoning Asian wealth management market.<sup>12</sup> In doing so, the institutions acted as agents of foreign trust laws.<sup>13</sup> Thus, the governing law of modern trust structures is now treated as a settlors' choice to cater to their differing needs.<sup>14</sup> The latest trust laws to arrive in Singapore are a form of “global trust.” At their heart, these new trust laws originated from the imagination of ingenious draftspersons drawing from doctrinal developments in English law and inspired by developments in offshore financial centers. Although these trust laws claim to have vernacular

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10. Iza Hussin, *Circulations of Law: Cosmopolitan Elites, Global Repertoires, Local Vernaculars*, 32 LAW & HIST. REV. 773, 774–75 (2014).

11. *Id.* at 776.

12. See Jek Aun Long & Danny Tan, *The Growth of the Private Wealth Management Industry in Singapore and Hong Kong*, 6 CAP. MARKETS L.J. 104, 107 (2010); Wayne Arnold, *Singapore Makes a Pitch to Draw the Wealthy*, N.Y. TIMES (Apr. 26, 2007), <http://www.nytimes.com/2007/04/26/business/worldbusiness/26singapore.html?pagewanted=all>.

13. See Chan Sek Keong, Chief Justice, Keynote Address at the Society of Trust & Estate Practitioners Asia Conference: Trusts: The Legal Environment in Singapore [14]–[16] (2007), <https://www.supremecourt.gov.sg/news/speeches/society-of-trust-and-estate-practitioners-asia-conference—keynote-address-by-chief-justice-chan-sek-keong>.

14. *Id.*

accents and may differ in some aspects, the central quintessential idea behind such a global trust is a form of a highly discretionary trust. Such highly discretionary trusts have hitherto escaped sustained analysis by trust scholars.

The arrival of such global trust structures has also influenced Singapore trust law. It was inevitable that local trust practitioners would begin to mimic, within the limits of domestic law, the features of the global trust. Ideas, such as the trust protectors and letters of wishes which are usually found in offshore trusts, are now commonplace in trusts governed by Singapore law.<sup>15</sup>

## II. ENGLISH TRUST LAW ARRIVES IN SINGAPORE

Due to Singapore's colonial past, English trust law traveled to Singapore as part of British rule. The founding of modern Singapore dates from 1819 by Sir Thomas Stamford Raffles, who obtained the settlement of Singapore from the Sultan of Johore.<sup>16</sup> In 1826, Singapore was grouped with Penang and Malacca under the East India Company to form the Colony of the Straits Settlement.<sup>17</sup> English law in Singapore can be traced to the Second Charter of Justice of 1826.<sup>18</sup> Prior to this, it was unsettled what law governed in Singapore, and "legal chaos" ensued.<sup>19</sup> The question of the relevant law to be administered in colonial Singapore puzzled the administrators of the new Colony.<sup>20</sup> Singapore consisted of multi-ethnic groups, both local and migrant, during this time of legal uncertainty. The society functioned through "[a] system of self-government or . . . 'indirect rule'" under the British, where each community would govern itself through its own norms, enforced by local heads.<sup>21</sup>

Obviously, the system of self-government through local communities was not an ideal situation. This changed with "the introduction of the Second Charter of Justice . . . [on] November [27,] 1826."<sup>22</sup> First-year law students are regularly taught that the Second Charter of Justice introduced English law into Singapore. In reality, the position was not so clear. The Second Charter of Justice was couched in archaic language and did not explicitly state that English law was introduced into Singapore. The relevant part of the Second Charter of Justice read as follows: "And We do further give to the said Court

15. See *infra* note 184 and accompanying text.

16. REGINALD HUGH HICKLING, *ESSAYS IN SINGAPORE LAW* 11, 68 (1992).

17. CONSTANCE MARY TURNBULL, *A HISTORY OF MODERN SINGAPORE: 1819–2005*, 53 (2009).

18. See W. Napier, *An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements*, 16 *MALAYA L. REV.* 4, 22–24 (1974) (providing a historical introduction of how English law was introduced to Singapore).

19. *Id.* at 13; see ANDREW PHANG BOON LEONG, *FROM FOUNDATION TO LEGACY: THE SECOND CHARTER OF JUSTICE* 3 (2006).

20. HICKLING, *supra* note 16, at 74.

21. ANDREW PHANG BOON LEONG, *THE DEVELOPMENT OF SINGAPORE LAW: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES* 35 (1990).

22. *Id.* at 37; see TURNBULL, *supra* note 17, at 53 (discussing "The Royal Charter of Justice").

of Judicature of Prince of Wales' Island, Singapore and Malacca, full Power and Authority . . . to give and pass Judgment and Sentence according to Justice and Right."<sup>23</sup>

In other words, a new Charter was granted by the Crown which created courts in Penang (otherwise known as Prince of Wales Island at that time), Singapore and Malacca. But the Charter does not explicitly address the pressing question: What law applied in these courts? It was the interpretation of Sir Peter Benson Maxwell in the decision of *Regina v. Willans*<sup>24</sup> in 1858 that caused English law to travel to the Straits Settlement. Maxwell, R., (as he then was) seized on the words "justice and right" in the Charter and said that these are not abstract notions but "plainly a direction to decide according to the law of England."<sup>25</sup> This interpretation has never been seriously challenged since, and English law has been assumed to apply in Singapore. In a sense, the application of English law was a foregone conclusion—one could have hardly expected English judges sitting in colonial courts to have discarded their English law training.

From the perspective of trade, it was advantageous to have English law apply because it provided certainty to commercial transactions. Singapore served as a free-trade port for Southeast Asia and the strategic shipping routes between China and India.<sup>26</sup> Hence, Singapore has since its earliest days sought to retain the purest form of English commercial law.<sup>27</sup> As Justice Voules explained in *Seng Djit Hin v. Nagurdas Purshotumdas & Co.*,<sup>28</sup> this pragmatic policy was "to inspire confidence amongst merchants by assuring them that any question arising in regard to their commercial transactions will be decided as it would be decided in the like case at the corresponding period in England."<sup>29</sup> Although the formal reception of English commercial law was discontinued in 1993, English contract and commercial decisions remain invariably cited by counsel in court, often accepted as persuasive and routinely applied by the Singapore courts.<sup>30</sup> In other words, while English decisions are

23. See PHANG BOON LEONG, *supra* note 19, at 8.

24. *Regina v. Willans* (1858) 3 Kyshe 16, 40-42 (Sing.).

25. *Id.* at 26.

26. Wong Lin Ken, *Singapore: Its Growth as an Entrepot Port, 1819-1941*, 9 J. SOUTHEAST ASIAN STUD. 50, 51-52 (1978).

27. This was formalized by section 5 of the Civil Law Act 1985, c.43 (Sing.), which provides questions and issues with respect to mercantile law generally shall be the same as that would be administered in England. This section was repealed in 1993. See Andrew Phang Boon Leong, *Reception of English Law in Singapore: Problems and Proposed Solutions*, 2 SING. ACAD. L.J. 20, 25-26 (1990).

28. *Seng Djit Hin v. Nagurdas Purshotumdas* (1919) 14 SSLR 181 (Sing.).

29. *Id.* at 209.

30. Goh Yihan & Paul Tan, *The Development of Local Jurisprudence, in SINGAPORE LAW 50 YEARS IN THE MAKING*, *supra* note 4, at 195, 216-21.

not binding in a *stare decisis* sense on the Singapore courts, they are nevertheless regarded as highly persuasive authority.<sup>31</sup>

It was assumed by the legal community from the decision in *Willans* that the arrival of English law to Singapore included the law of equity, although there was no explicit mention in that case. Unlike the sphere of criminal law in Singapore, trust law was not affected by the codification projects in India.<sup>32</sup> Therefore, on the backs of the Second Charter of Justice and *Regina v. Willans*, English trust law crept into Singapore.

### III. EARLY USES OF TRUST LAW IN COLONIAL SINGAPORE

In order to make sense of the early uses of trust law in colonial Singapore, it is important to understand the population mix at that time. When Raffles arrived, Singapore was said to be inhabited predominantly by a small group of *Orang Laut* (Sea Gypsies) who worked as fishermen and pirates.<sup>33</sup> The initial population numbered about 150.<sup>34</sup> Under the British, Singapore started to attract a large migrant population especially from China and India.<sup>35</sup> Singapore's multi-racial population is categorized under Chinese, Malays, Indians, and "Others."<sup>36</sup> The Malays are Muslims and include both people of Malay and Indonesian descent, whereas Indians and Pakistanis were grouped under Indians, and "Others" included, among others, Europeans, Arabs, and Eurasians.<sup>37</sup> By 1931, Singapore's population comprised 75.1% Chinese, 11.7% Malays, 9.1% Indians and 4.2% "Others."<sup>38</sup> The case law during the colonial times reveals that the early uses of trust law in Singapore were by wealthy migrants from China and Arab countries to accommodate their respective cultural and religious practices.

#### A. THE USE OF THE TRUST FOR THE PERFORMANCE OF SINCHIEW RITES (CHINESE ANCESTRAL WORSHIP)

The earliest reported case law in colonial Singapore involved wealthy Chinese using trust law to promote *Sin Chew* (*shénzhǔ*) rites (ancestor worship) and the provision of burial grounds. One of the most well-known and earliest reported trust cases in the Straits Settlement was the decision of *Choa Choon*

31. Although in recent times, the Singapore courts are increasingly developing their own jurisprudence. See generally Sundaresh Menon, *The Somewhat Uncommon Law of Commerce*, 26 SING. ACAD. L.J. 23 (2014) (tracing the development of Singapore's jurisprudence on implied terms in contract).

32. For a discussion on the codification of trust law in India, see generally Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 J. LEGAL HIST. 299 (2015).

33. Saw Swee-Hock, *Population Trends in Singapore, 1819-1967*, 10 J. SOUTHEAST ASIAN HIST. 36, 37 (1969).

34. *Id.*

35. *Id.* at 37-38.

36. *Id.* at 41.

37. *Id.* at 37, 41.

38. *Id.* at 41.

*Neoh v. Spottiswoode*.<sup>39</sup> This is an extremely significant decision for two reasons. First, this was the first decision to apply the English *Rule Against Perpetuities* in the Straits Settlement<sup>40</sup> As will be demonstrated below, the *Rule Against Perpetuities* invalidated many purported trusts used by the early Chinese and Arab settlers. Second, this case illustrated an attempt to use the trust to accommodate the Chinese practice of ancestor worship.<sup>41</sup>

*Choa Choon Neoh v. Spottiswoode* involved the will of Mr. Choa Chong Long who was born in 1788 in Malacca.<sup>42</sup> He went to China for business and was unfortunately murdered in Macao.<sup>43</sup> Mr. Choa made a will in the English language.<sup>44</sup> The relevant part of the will contained a bequest of certain houses and land in Singapore and Malacca, and also his residuary estate, to his trustees, upon trust “in the performance of such *Sin-Chew* or Charity, in and to the names of myself and my said wives . . . to be performed four times in each and every year.”<sup>45</sup> The land was required to be held in trust forever.<sup>46</sup> By the time the challenge was made in 1869, the testator had already died about thirty years prior, and the trust fund had accumulated to \$33,500.<sup>47</sup> Mr. Choa’s children applied to court to declare the devise for *Sincheu* purposes to be void.<sup>48</sup> If this application was successful, then the testator would be deemed to have died intestate, and his property would be distributed to his next of kin.<sup>49</sup>

Sir Peter Benson Maxwell, C.J., took expert evidence from Chinese men of learning in examining the practice and custom of *Sincheu*.<sup>50</sup> In an elaborate description of *Sincheu* rites, C.J. Maxwell wrote:

The word *Sin-Chew* is composed of *Sin*, which means spirit, soul or ghost; and *Chew*, which means ruler; and the composite word means the spirit ruler or spiritual head of the house. When a man dies, his name, with the dates of his birth and death, is engraved on a tablet; this is enclosed in an outer casing, on which a new name, which is now for the first time given to him, and the names of his children, are engraved. This tablet is kept either in the house of the

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39. *Choa Choon Neoh v. Spottiswoode* (1869) 1 Kyshe 216 (Sing.).

40. *Id.* at 220.

41. *Id.* at 216.

42. Stephanie Po-yin Chung, *Western Law vs. Asian Customs: Legal Disputes on Business Practices in India, British Malaya and Hong Kong, 1850s–1930s*, 1 ASIA EUR. J. 527, 531 (2003).

43. *Id.*; see also SONG ONG SIANG, ONE HUNDRED YEARS’ HISTORY OF THE CHINESE IN SINGAPORE 30 (1923).

44. *Choa Choon Neoh*, 1 Kyshe at 216.

45. *Id.*

46. *Id.*

47. *Id.* at 217.

48. *Id.*

49. *Id.*

50. *Id.*



worshipper, or in that which has been set apart for the *Sin-Chew*. It is sacred, and can be touched only by the male descendants or nearest male relatives of the deceased, who alone may look upon the name on the enclosed tablet. It is the representation of the deceased. At certain periods, *viz.*, on the anniversary of his death, and once in each of the four seasons, his son or sons, or if he has none, his nearest male relative, but never his daughters or other females, go to the place where the tablet is, and lay on a table in front of it a quantity of food, such as pigs, goats, ducks, fowl, fish, sweetmeats, fruit, tea and arrack. They light joss-sticks, fire crackers, burn small squares of thin brown paper in the centre of each of which is about a square inch of gold or silver tinsel, they bow their hands three times, kneel, touch the ground with their foreheads, and call on the *Sin-Chew* by his new name to appear and partake of the food provided for him. The food remains on the table for one or two or even three hours, during which time the spirit feeds on its ethereal savour; and to ascertain whether it is satiated or satisfied, two *pitis* [Chinese coins] or two pieces of bamboo are thrown on the table or on the ground in front of it, and if they both turn up with the same face, the offering is considered insufficient, and more food is laid on the table. After the lapse of a sufficient time to allow the spirit to partake of it, the same test is again resorted to, and so, until the coins or bamboos, by turning up different faces, shew that the spirit has had enough. The food is then removed, and eaten or otherwise disposed of by the relatives, but there is no distribution of it in charity or among the poor. Indeed the Chinese have a repugnance to food which has been offered in this way, except when they are members of the family. The papers which are burnt supply the spirit with money and clothing, the gold and silver tinsel turning into precious metal. No prayers are offered to the spirit; the person who makes the offering of food asks for nothing whatever. The primary object of the ceremony is to show respect and reverence to the deceased, to preserve his memory in this world, and to supply his wants in the other. Its performance is agreeable to God, the supreme all-seeing, all-knowing, and invisible being, who assists and prospers those who are regular in this duty; and its neglect entails disgrace on him whose duty it is to perform it, and poverty and starvation on the neglected spirit, which then leaves its abode [either the grave or the house where the tablet rests] and wanders about, an outcast, begging of the more fortunate spirits, and haunting and tormenting his negligent descendant, and mankind generally. To avert the latter evil, the wealthier Chinese make, in the seventh month, every year,

a general public offering, or sacrifice, called *Kee-too* or *Poh-toh* for the benefit of all poor spirits.<sup>51</sup>

Chief Justice Maxwell held that the bequest was not a charity, as this was not a bequest to advance or promote religion.<sup>52</sup> The learned Chief Justice said that if he was deciding “the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or for setting up or adorning an idol” this would be done “with the widest regard to the religious opinions and feeling of the various eastern races established here.”<sup>53</sup> But *Sin Chew* ceremony was, in Chief Justice Maxwell’s opinion, not to advance religion—its object was solely to benefit the testator himself in the afterlife, although his descendants would benefit incidentally by “pleasing God and escaping the danger of being haunted.”<sup>54</sup>

The crucial legal issue at hand was whether the bequest attempted to create a perpetual non-charitable trust.<sup>55</sup> This led to the question of whether the *Rule Against Perpetuities* applied in the Straits Settlement.<sup>56</sup> If so, then this bequest to further *Sin Chew* purpose was invalid. Ultimately, the learned judge held that the *Rule Against Perpetuities* did apply in the Straits Settlement.<sup>57</sup> As a general rule, Chief Justice Maxwell held that the law in England applied to the Straits Settlement as “adapted to the condition and wants of the inhabitants.”<sup>58</sup> In other words, the application of English law to various races living here was modified as necessary to prevent the law from operating unjustly and oppressively to them. The judge had to decide whether the *Rule Against Perpetuities* was suitable for local application. Coming down on the side of universality and holding the bequest to be void, the Chief Justice held that the rationale of rule of against perpetuity is

of great economical importance, and as well fitted for a young and small community of a great state, for both are interested in keeping property, whether real or personal, as completely as possible an object of commerce, and a productive instrument of the community at large. I am, therefore, of opinion that in this Colony it is not lawful to tie up property and take it out of circulation for all ages, for any purpose . . . .”<sup>59</sup>

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51. *Id.* at 217–18.

52. *Id.* at 218–19.

53. *Id.* at 219.

54. *Id.*

55. *Id.* at 220.

56. *Id.* at 221.

57. *Id.*

58. *Id.*

59. *Id.*

Thus, with this decision, the English *Rule Against Perpetuities* arrived in Singapore.<sup>60</sup> As will be demonstrated below, the *Rule Against Perpetuities* posed as a stumbling block to many early trust settlements by the Arabs in Singapore.

*Choa Choon Neoh v. Spottiswoode* is also interesting, because it demonstrates that since at least 1838, there were some Chinese people using English law to govern their succession matters in Singapore. The testator, Choa Chong Long, was described in a history book as a very influential, intelligent and wealthy man who sometimes entertained in European style.<sup>61</sup> Another unusual aspect of this case is that the children challenged the Will as being invalid. This could be explained by the fact that, as Chief Justice Maxwell observed, the testator had given the bulk of his estate not to his children but “provid[ed] for the supposed benefit and comfort of his own soul, while he left his sons and daughters almost wholly unprovided for.”<sup>62</sup> Also, the court filed its decision 30 years after the death of the testator.<sup>63</sup> Therefore, this case was unique. It could be that there were informal arrangements mandating the performance of *Sinchew* rites existing in the shadows of English law which were not challenged by family members.<sup>64</sup>

The reasoning in *Choa Choon Neoh* was subsequently affirmed by the Privy Council in *Yeap Cheah Neo v. Ong Cheng Neo*.<sup>65</sup> Sir Montague E. Smith confirmed that the *Rule Against Perpetuities* applied in the Straits Settlement.<sup>66</sup> He was of the view that although the performance of these ceremonies was considered to be Chinese pious duties, they were not by any definition a charitable duty.<sup>67</sup> The dedication of a house for such ancestor worship “bears a close analogy to gifts to priests for masses of the dead.”<sup>68</sup> Such arrangements are void if they are tie up property in perpetuity.<sup>69</sup>

It was a matter of time before innovative drafters of wills attempted to get around the decision of *Choa Choon Neoh*. Since the main objection in that decision was that the disposition fell afoul of the *Rule Against Perpetuities*, the logical thing to do was to ensure that any bequest to perform *Sin Chew* rites

60. This case also resulted in the Rule Against Perpetuities being accepted in the Federated Malay States. *In Re the Will of Yap Kwan Seng, Deceased* (1924) 4 FMSLR 313 (Federated Malay States) (finding the rule against perpetuities a rule of good public policy).

61. See ONG SIANG, *supra* note 43, at 29–30.

62. *Choa Choon Neoh*, 1 Kyshe at 221–22.

63. *Id.* at 217.

64. Maurice Freedman, *Chinese Kinship and Marriage in Singapore*, 3 J. SOUTHEAST ASIAN HIST. 65, 69–70 (1962).

65. See *Yeap Cheah Neo v. Ong Cheng Neo* (1875) 1 Kyshe 337, 344 (appeal taken from Supreme Court of the Straits Settlements) (Sing.).

66. *Id.*

67. *Id.* at 345. On charities, see generally Rachel P.S. Leow, *The Evolution of Charity Law in Singapore: From Pre-Independence to the 21st Century*, 26 TR. L. INT’L 83 (2012) (discussing the evolution of Singapore charity law).

68. *Yeap Cheah Neo*, 1 Kyshe at 345.

69. See *id.* at 346.

did not offend the perpetuity period. This was done in *In re Estate of Khoo Cheng Teow*<sup>70</sup> by introducing the “royal lives” clause.<sup>71</sup> Such a clause pegged the period of the trust to the lives of the descendants of Queen Victoria in being plus a period of 21 years after death of such descendants.<sup>72</sup> Justice Terrell found “that gifts for *Sin Chew* purposes [were not considered to be] superstitious” and equated them to the English “gift[] for [m]asses for the repose of the soul[] of the donor.”<sup>73</sup> Since the latter was valid, gifts for *Sin Chew* purposes were similarly valid, as long as the gift was confined to the perpetuity period.<sup>74</sup>

A failed technique to validate a trust to perform *Sin Chew* rites was to couch the trust for the purposes of establishing a temple and permitting ancestral worship as one of the uses of the temple. Such a trust was considered by a Penang court in 1948 in the decision of *Lim Chooi Chuan v. Lim Chew Chee*.<sup>75</sup> In this case, the settlor declared a trust over certain land after his death to create a temple that permitted ancestral worship.<sup>76</sup> The trust also permitted the use of the land for “other purposes calculated or tending in the opinion of the Trustees to improve or benefit the moral, social or intellectual condition of the adherents of the Temple.”<sup>77</sup> There was evidence showing that ancestral worship honoring the settlor was carried out.<sup>78</sup> Unfortunately, the “premises were badly bombed during the war and . . . in urgent need of repair.”<sup>79</sup> A challenge was then made as to whether the trust was “a valid charitable gift.”<sup>80</sup> Justice Bostock Hill found that while it was undeniable that a trust for a building to be used as a temple for religious purposes would be a valid charitable trust, the current objects of the trust were not confined to charitable purposes.<sup>81</sup> He was troubled by the vagueness of the trust and the fact that the idea the land was used as a family house by the settlor and his descendants and thus invalidated the trust.<sup>82</sup>

Finally, in *Ng Eng Kiat v. Goh Lai Mui*, a Chinese testator directed his executors to apply part of his estate to purchase immoveable property in China and use the income from this property to be applied for ancestor

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70. *In re Estate of Khoo Cheng Teow* (1933) 2 MLJ 119 (Sing.).

71. *Id.* at 119.

72. *Id.*

73. *Id.* at 121.

74. *Id.*

75. *Lim Chooi Chuan v. Lim Chew Chee* (1948) supp. MLJ 66 (Sing.).

76. *Id.* ¶ 2.

77. *Id.*

78. *Id.* ¶ 3.

79. *Id.* ¶ 4.

80. *Id.* ¶ 5.

81. *Id.* ¶¶ 10–13.

82. *Id.* ¶ 14.

worship.<sup>83</sup> Chief Justice Murison had no problem holding that such a direction was valid, because the property to be acquired is situated in China—as such, the trust would, in theory, be governed by the law of China.<sup>84</sup> There was no dispute before the court that the limitations in question were invalidated by Chinese law.<sup>85</sup> Similarly, in *Tan Chin Ngoh v. Tan Chin Teat*, Justice Worley upheld a trust to apply income from properties within the perpetuity period for the maintenance and upkeep of a temple in China and for the performance of *Sin chew* rites.<sup>86</sup>

#### B. USE OF THE TRUST BY THE CHINESE FOR BURIAL GROUNDS

Besides ancestor worship, the case law suggests that the early Chinese settlers in the Straits Settlement were concerned with ring-fencing land for the purpose of providing burial grounds for their immediate family members and clan.<sup>87</sup> Obviously, this concern is not easily accommodated within orthodox trust law because non-charitable purpose trusts are *prima facie* void under English law.<sup>88</sup> Therefore, a trust which is stated for the explicit purpose of being used as burial grounds may not be valid. In order for such a trust to be valid, it must be construed as a charitable trust. The difficulty with construing such a trust as a charitable trust is that the purpose must promote a public benefit.<sup>89</sup> It is extremely hard to argue that a trust providing burial grounds for a wealthy individual's family members is regarded as promoting a public benefit.

However, a trust to provide land for burial ground for a particular clan may be regarded as charitable. Indeed, this was the issue before the court in *Cheang Tew Muey v. Cheang Cheow Lean Neo*.<sup>90</sup> In this case there were three trusts which were declared in the 1870s: the first trust was for land to be held on trust for the use as a private burial ground for the remains of Mr. Gan; the second trust provided for the land to be used for the private burial ground of “persons belonging to the Seh or Tribe called ‘Cheang’” without any fee; and the third trust provided that the land was dedicated to be used as private burial grounds for Mr. Cheang, his family, and their descendants.<sup>91</sup> Chief Justice Murison held that the first and third trusts were invalid, because there was no question of public benefit, and these trusts contravened the *Rule*

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83. *Ng Eng Kiat v. Goh Lai Mui* (1940) SSLR 78, 79 (Sing.).

84. *Id.* at 80.

85. *Id.*

86. *Tan Chin Ngoh v. Tan Chin Teat* (1946) 1 MLJ 159, 159–62 (Sing.).

87. *See, e.g., Cheang Tew Muey v. Cheang Cheow Lean Neo* (1930) SSLR 58, 60–61 (Sing.).

88. *Morice v. Bishop of Durham* [1805] 32 Eng. Rep. 947 (Eng.) (discussing a number of cases where the trust's validity centers on whether the court construes the trust as charitable or not).

89. *Nat'l Anti-Vivisection Soc'y v. Comm'rs of Inland Revenue* [1948] AC 31 (HL) (appeal taken from Eng.) (discussing previous court analysis on whether certain trusts provide a public benefit).

90. *Cheang Tew Muey v. Cheang Cheow Lean Neo* (1930) SSLR 58 (Sing.).

91. *Id.* at 61.

*Against Perpetuities*.<sup>92</sup> The second trust may be regarded as a charity as there is a benefit to either the public at large or some considerable portion of the public.<sup>93</sup> However, all the trusts were defeated due to planning restrictions which stipulated that no new burial places were allowed in the vicinity.<sup>94</sup> Hence, we see the interplay of urban planning law defeating trusts set up for burial grounds.

The cases on trusts for Chinese burial grounds are not entirely consistent. *Lee Poh Lian Neo v. Chinese Bankers Trust Co.*<sup>95</sup> upheld a trust for the purposes for “the said land to be used as a burial ground for the family of the said Wee Siang Tat deceased who according to Chinese custom are entitled to be buried in the family burial ground.”<sup>96</sup> As a matter of orthodox trust law, it is difficult to rationalize this case within established trust principles. Non-charitable purpose trusts are *prima facie* void under English law. Thus, for this trust to be valid, it must be construed as an exception to the general rule.

One way is to construe the present trust as a charitable trust. Indeed, Professor M.B. Hooker explains this case as standing for the following proposition, “[a]fter some hesitation the courts in Malaya and Singapore have held that a trust for the purchase of burial ground is a valid charitable trust.”<sup>97</sup> With respect, this is a misreading of *Chinese Bankers Trust Co.* The judge did not allude to the trust as a charitable trust in his judgement. Furthermore, this was not a trust for the purchase of burial grounds. Instead, this trust was for land to be settled as the burial grounds for a private class, i.e. the relatives of Mr. Wee.<sup>98</sup> It is hard to see how this trust may be considered to be charitable under English law. In contrast, the court stated unequivocally in *In Re the Will of Yap Kwan Seng, Deceased* that a trust for “family burial ground” is not charitable and hence void.<sup>99</sup> Be that as it may, it could be such trusts over land for burial grounds existed and were not challenged in court by the settlors’ relatives due to familial and cultural norms. An illustration of this is the trust in *Attorney-General v. Lim Poh Neo*.<sup>100</sup> In this case, Madam Tan Goek Hup conveyed 115 acres of land in 1882 to her trustees to forever hold them in trusts for the purposes of the use of the land “as a burial ground for all persons bearing the surname or clan name “Yeo” and who are of the Hokkien tribe.”<sup>101</sup>

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92. *Id.* at 61–62.

93. *Id.* at 62–63.

94. *Id.* at 63.

95. *Lee Poh Lian Neo v. Chinese Bankers Tr. Co. Ltd.* (1941) SSLR 28 (Sing.).

96. *Id.* at 29.

97. M.B. Hooker, *The Relationship Between Chinese Law and Common Law in Malaysia, Singapore, and Hong Kong*, 28 J. ASIAN STUD. 723, 737 (1969).

98. *Lee Poh Lian Neo*, SSLR at 29.

99. *In re the Will of Yap Kwan Seng, Deceased* (1924) 4 FMSLR 313, 322 (Federated Malay States).

100. *Attorney-General v. Lim Poh Neo* (1974) SLR(R) 782 (Sing.).

101. *Id.* at 783.

The land was compulsorily acquired by the government in 1969 and a sum of \$1,599,190 was paid.<sup>102</sup> Thus, the issue arose as to whether the original trust was a charitable trust or not. If it was charitable, then the money would be applied *cy-près* for other charitable purposes. On the other hand, if the original trust was not charitable it would revert to the settlor's estate by way of resulting trust. The learned judge, Kulasekaram, J., found that the gift was a good charitable trust and directed the trustees to formulate a scheme of *cy-près*.<sup>103</sup> Thus, there did not appear to be a challenge on the validity of the trust between 1882 and 1969 until the land was compulsorily acquired by the government.

### C. ARABS USING TRUST LAW TO ESTABLISH WAQF

Aside from the Chinese, Arab merchants also used English trust law to arrange their affairs. By way of background, the Arabs who arrived in Singapore were Hadhrami merchants from the Hadhramaut region, which is now part of Yemen.<sup>104</sup> These Arab merchants arrived from Indonesia and were already steeped in local Malay custom.<sup>105</sup> Some of them married local royal families in Indonesia and Malaya.<sup>106</sup> By most accounts these Arab families were extremely wealthy and held substantial landholding in Singapore.<sup>107</sup> In Singapore, the important and wealthy Arab families included the Aljunied, Alkaff, and Alsagoff families.<sup>108</sup> To this day there are many buildings and streets in Singapore named after them. Being Muslims, it was unsurprising that they would structure their landholdings under the Islamic concept of *waqf*.<sup>109</sup> Nurfadzilah Yahaya has recently described the *waqf* as follows:

The establishment of a *waqf* was comparable to establishing a trust in England. In order to establish a *waqf*, the settlor would sequester

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102. *Id.* at 784.

103. *Id.* at 792.

104. See Stephanie Po-yin Chung, *Transcending Borders: The Story of The Arab Community in Singapore, 1820–1980s*, in MERCHANT COMMUNITIES IN ASIA, 1600–1980 109, 109 (Lin Yu-Ju & Madeleine Zelin eds., 2016); Ameen Ali Talib, *Hadramis in Singapore*, 17 J. MUSLIM MINORITY AFF. 89, 89 (1997).

105. Ali Talib, *supra* note 104, at 90.

106. *Id.*

107. *Id.* at 90–91. The explanation for their substantial landholding is that the Arabs had both the capital and knowledge to invest in properties when the British started to formally alienate land in 1826. See Rajeswary Ampalavanar Brown, *Islamic Endowments and the Land Economy in Singapore: The Genesis of an Ethical Capitalism, 1830–2007*, 16 SOUTH EAST ASIA RES. 343, 370–72 (2008); Lim Lu Sia, *The Arabs of Singapore: A Sociographic Study of Their Place in the Muslim and Malay World of Singapore 23* (1986/1987) (unpublished B.S. thesis, National University of Singapore) (on file with the National University of Singapore library).

108. Syed Muhd Khairudin Aljunied, *The Role of Hadramis in Post-Second World War Singapore—A Reinterpretation*, 25 IMMIGRANTS & MINORITIES 163, 163 (2007).

109. The usual spelling used in the law reports and in Singapore and Malaysia is *wakaf*. See *Attorney-General v. Shaik Ali bin Awath* (1928) SSLR 101 (Sing.).

the property such that it became perpetually inalienable, and appoint a trustee to manage the property. According to *sharī'a*, the act was deemed legally irrevocable as it entailed the complete transfer of the right to ownership from the hands of the founder (also known as *wāqif*) to those of God. In this way, the *waqf* was a thoroughly religious and pious concept and a material institution that was a charitable act of the first order.<sup>110</sup>

Lim Lu Sia described why the Arabs settled many *awaqf*:<sup>111</sup>

[A]lthough it is an act of charity . . . it incidentally also increases the social standing of the family surname, especially . . . the family's . . . wealth, benevolence and piety. Against this background, the Arabs thus came to rank higher in subethnic ranking hierarchy of the Muslims. Furthermore, as representatives of the metropolitan Middle East Arab cultures, the Singapore Arabs were particularly revered in the past in their capacity as learned men in Islam. The Alsagoff, Aljunied and Alkaff families for instance, gained considerable social and religious recognition based upon their forefather's wakafs.<sup>112</sup>

Quite apart from increasing their social status, Stephanie Po-yin Chung argues that the *waqf* was a way in which the Arabs in the Straits Settlement attempted to preserve their family wealth.<sup>113</sup> This argument is consistent with Timur Kuran's work, which suggests that "[t]he sacredness of the *waqf* [in the Middle East] gave it considerable protection against confiscation, for rulers were loathe to develop a reputation of impiety."<sup>114</sup> As we will see in the section below, this attempt failed in Singapore, where both the colonial government and subsequently independent government had no reservations about using rent control and eminent domain legislation to break up the substantial landholdings of a *waqf*. The early *waqf* were presumably managed in the hands of private trustees (*mutawallis*) without any interference from the State.<sup>115</sup>

However, the case law reveals that the descendants of the settlors would use the power of colonial law and courts to invalidate these *awaqf* many years after they were settled. An early example of this phenomenon is *Syed Ali Bin Mohamed Alsagoff v. Syed Omar Bin Mohamed Alsagoff*.<sup>116</sup> The testator, Syed

110. Nurfadzilah Yahaya, *British Colonial Law and the Establishment of Family Waqfs by Arabs in the Straits Settlements, 1860–1941*, in *THE WORLDS OF THE TRUST*, *supra* note 5, at 167, 171.

111. This is the plural of *waqf*. Chung, *supra* note 104, at 110.

112. Lim Lu Sia, *supra* note 107, at 43.

113. Chung, *supra* note 104, at 111.

114. Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 *LAW & SOC'Y REV.* 841, 847 (2001).

115. Chung, *supra* note 104, at 118–19.

116. *Syed Ali Bin Mohamed Alsagoff v. Syed Omar Bin Mohamed Alsagoff* (1918) SSLR 103 (Sing.).



Ahmed bin Abdul Rahman Alsagoff died on March 27, 1875.<sup>117</sup> His will was made in English and annexed a lengthy document in Arabic. The testator bequeathed his money to his wife and children according to Islamic law.<sup>118</sup> With regard to his land, the testator directed that all his real property be held on trust and let out.<sup>119</sup> The testator directed his trustee to use the income from these properties to distribute \$1,000 annually at the discretion of the trustee for charitable purposes according to Mohammedan customs and uses and to divide the residue of rents and profits annually among the testator's wife and children and their descendants according to shares prescribed by Mohammedan law.<sup>120</sup> The drafter of the Will was acutely aware of the possibility that this bequest may be contrary to the English *Rule Against Perpetuities*.<sup>121</sup> Therefore, the will specifically introduced an alternative bequest which was limited within the perpetuity period.<sup>122</sup> Under this alternative bequest, the property would be sold and divided among the testator's heirs according to Mohammedan law after the perpetuity period.<sup>123</sup>

A challenge to the will was made in 1918, more than 40 years after the death of the testator, on the ground that the original bequest violated the *Rule Against Perpetuities*.<sup>124</sup> After an extensive discussion of the English *Rule Against Perpetuities*, the court affirmed that the rule applied in the Straits Settlement.<sup>125</sup> Hence, the original bequest was invalid; however, the alternative bequest was valid since it was limited within the perpetuity period.<sup>126</sup> In reviewing this case, it is not difficult to discern the motivation for the challenge to the original bequest. If the original bequest was valid, then the testator's properties would have been inextricably bound to the stated purposes in perpetuity. With the successful challenge, the trustees would have to sell and distribute the property to the testator's next of kin under Islamic law after the perpetuity period. Another example of a case in which the descendants applied to the courts to invalidate a *waqf* many years later is the decision of *Attorney-General v. Shaik Ali bin Awath*.<sup>127</sup> There were two wills—English and Arabic. The *waqf* was found in the Arabic Will.<sup>128</sup> However, the Arabic Will specifically provided that it did not make the English Will invalid.<sup>129</sup> Therefore, as a matter of

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117. *Id.* at 104.

118. *Id.* at 104–05.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 107.

125. *Id.* at 114.

126. *Id.*

127. *Attorney-General v. Shaik Ali bin Awath* (1928) SSLR 101 (Sing.).

128. *Id.* at 102.

129. *Id.*

construction, the court held that the English Will prevailed over the Arabic Will.<sup>130</sup> It follows that the *waqf* was held to be invalid, since it was not found in the English Will.<sup>131</sup>

Besides the English *Rule Against Perpetuities*, *waqf* may also be invalidated under English charity law.<sup>132</sup> This is because the English law of charitable purposes are often incompatible with Islamic charitable purposes. Also, English charity law takes the very strict position that in order to be considered to be a charity, all the stated purposes must be exclusively charitable.<sup>133</sup>

The case law reveals that this was not how the Arab settlors drafted their *awaqf*. Often, the permitted purposes of the *waqf* was a mixture of charitable purposes and private purposes meant to benefit the settlor's family and relatives. An example of this conflict between English charity law and *waqf* is the case of *Re Syed Shaik Alkaff v. Attorney General*.<sup>134</sup> The testator directed his executors to use part of his estate to purchase immoveable property in Singapore or Indonesia to set up a *waqf* for *amur-al-khaira* ("good works"). The testator died in 1910, and the next of kin challenged this bequest in 1923.<sup>135</sup> The court held that it was a fallacy to assume that a purpose which is religious in the eyes of a devout Muslim is considered to be a religious purpose under charity law.<sup>136</sup> The learned judge said for a trust to qualify under charity law, the purpose must promote religion, not merely to secure the approval of the Almighty.<sup>137</sup> In contrast to the English notion of charity law, the Islamic concept of religious purposes is to seek the approval of the Almighty.<sup>138</sup> Hence, the learned judge held that the *waqf* for the purposes of *amur-al-khaira* is too general to be considered to be a valid charity.<sup>139</sup> Since the bequest failed, the property went to the next of kin.<sup>140</sup>

Another case which fell afoul of the English conception of charity law is *Hadjee Esmail bin Kasim v. Hussain Beebee Binte Shaik Ali Bey*.<sup>141</sup> The testator directed

that the income and profits arising from such one-third share should from time to time be applied by his trustee in payment of the monthly, yearly and other ceremonies in the testator's memory, alms

130. *Id.* at 112.

131. *Id.*

132. See AHMAD IBRAHIM, THE LEGAL STATUS OF MUSLIMS IN SINGAPORE 34-40 (1965).

133. See *Chichester Diocesan Fund & Bd. of Fin. (Inc.) v. Simpson* [1944] AC 341 (HL) 368 (appeal taken from Eng.).

134. *Re Syed Shaik Alkaff v. Attorney-General* (1923) 2 MC 38 (Sing.).

135. *Id.* at 40, 43.

136. *Id.* at 40.

137. *Id.* at 44.

138. *Id.*

139. *Id.*

140. *Id.* at 46.

141. *Hadjee Esmail bin Kassim v. Hussain Beebee Binte Shaik Ali Bey* (1911) 12 SSLR 74 (Sing.).

to the poor, pilgrimages to Mecca, yearly remittance of such sums of money as his trustee should think proper to the testator's brother and sister who were then in India, and for providing for the maintenance of any of the testator's children and their descendants and other relatives who might be in indigent circumstances.<sup>142</sup>

Relying on the earlier decisions on Chinese ancestral worship, Chief Justice Hyndman-Jones held that "gifts for the provision of ceremonies and pilgrimages are not charitable."<sup>143</sup> Displaying a lack of awareness of the significance of pilgrimages to Mecca for Muslims, the learned judge said tersely that this purpose was not charitable as there was "no evidence . . . [or] any suggestion that these pilgrimages do anything more than merely solace the pilgrim, and possibly his family."<sup>144</sup>

#### IV. EARLY USES OF THE TRUST BECOMING SUPERSEDED IN MODERN TIMES

Over time some of the early uses of the trust became redundant especially with evolving cultural and social practices and religious beliefs in Singapore. For example, trusts to promote *Sinchew* rites are virtually unheard of these days. In fact, the case of *Bermuda Trust (Singapore) Ltd. v. Wee Richard*<sup>145</sup> is an illustration of how imprudent it is to facilitate the dead hand to direct unwilling descendants. The testator died in 1925 and declared a trust which was confined within the perpetuity period for a house to be selected and used for the performance of *Sinchew* rites and the deposit of ashes and memorial tablets for the testator, his parents, his wife, and children.<sup>146</sup> Unfortunately, by the time the dispute came before the court in the late 1990s, the testator's ashes were missing, and no one knew whether memorial tablets were made for the testator, his parents, or his wife.<sup>147</sup> The judge had to wade into the thorny issue of whether it is permissible spiritually to make new tablets for the deceased.<sup>148</sup> To add to the list of woes, the roof of the house collapsed due to poor maintenance.<sup>149</sup> Besides the dilapidated roof, there was evidence that the house needed extensive renovation work.<sup>150</sup> However, the money in the trust fund was not sufficient to restore the house.<sup>151</sup> Furthermore, the testator's grandsons and granddaughters had all become Christians and did not want to perform the *Sinchew* rites.<sup>152</sup> In these circumstances, Judith

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142. *Id.* at 75.

143. *Id.* at 76.

144. *Id.* at 80.

145. *Bermuda Tr. (Singapore) Ltd. v. Wee Richard* (1998) 3 SLR(R) 938 (Sing.).

146. *Id.* at 939-40.

147. *Id.* at 944.

148. *Id.* at 948-49.

149. *Id.* at 944.

150. *Id.*

151. *Id.* at 944-45.

152. *Id.* at 945.

Prakash, J., (as she then was) held that the trust failed because it was impossible and impracticable to perform the purpose of the trust.<sup>153</sup> Perhaps, *Bermuda Trust* is the best cautionary tale for testators who wish to tie up real estate for a long period of time by way of a trust.

The creation of new *awaqf* is very rare in Singapore these days. This has to do with the State intervention into the management of *awaqf* which was previously a private domain of the settlor and his or her family. In 1905, the Colonial government passed The Mohammedan and Hindu Endowment Ordinance which “applied to ‘any endowment in land or money . . . given for the support of any Mohammedan Mosque or Hindu Temple or Mohammedan or Hindu Shrine or School or other Mohammedan or Hindu pious, religious, charitable or beneficial purpose.’”<sup>154</sup> A Board was set up with the power to administer religious trusts which included *awaqf*. The Board was comprised of three commissioners, one of whom was a government representative.<sup>155</sup> The other commissioners were presumably “wealthy, English-educated, cosmopolitan Hadhrami . . . elites.”<sup>156</sup> Other major developments such as aggressive compulsory acquisition by the State<sup>157</sup> for less than market value of *awaqf* land whittled down the wealth of the older *awaqf*.<sup>158</sup> This coupled with Rent Controls Act aimed at targeting absentee overseas landlords further led to the long-term decline of the wealth controlled by the *awaqf*.

In 1968, the Administration of Muslim Law Act created the Majlis Ugama Islam Singapura (Islamic Council of Singapore) (“MUIS”).<sup>159</sup> This legislation provided that all *awaqf* property would vest in MUIS and would be governed by Muslim law.<sup>160</sup> In other words, this meant that MUIS had overall control of all *awaqf* assets. With the formation of MUIS, *awaqf* were removed from the private domain of family management and would be centrally managed by this new body. Since its formation, MUIS has incorporated a private limited company and sought to professionalise its management to obtain higher yields from *awaqf* property.<sup>161</sup> Writing in 2010, Dr. Shamsiah Bte Abdul

153. *Id.* at 950.

154. See Khoo Salma Nasution, *Colonial Intervention and Transformation of Muslim Waqf Settlements in Urban Penang: The Role of the Endowments Board*, 22 J. MUSLIM MINORITY AFF. 299, 306 (2002) (quoting The Mohammedan and Hindu Endowment Ordinance 1905, (Ordinance No. XVII of 1905)); see also IBRAHIM, *supra* note 132, at 41.

155. Ampalavanar Brown, *supra* note 107, at 355.

156. *Id.* at 358.

157. On compulsory acquisition, see Tang Hang Wu, *The Legal Representation of the Singaporean Home and the Influence of the Common Law*, 37 H.K. L.J. 81, 91 (2007).

158. See Po-yin Chung, *supra* note 104, at 118.

159. See generally Ahmad Nizam bin Abbas, *The Islamic Legal System in Singapore*, 21 PAC. RIM L. & POL'Y J. 163 (2012) (discussing the use of Muslim law in Singapore from the time of British rule to the contemporary period).

160. Administration of Muslim Law Act 2009, c. 3, § 58 (Sing.).

161. See Ampalavanar Brown, *supra* note 107, at 374–78.

Karim, who had a background in *awaqf* management in MUIS, asserts that save for the *awaqf* which were created in the late 19<sup>th</sup> and early 20<sup>th</sup> century, no new *awaqf* have been created.<sup>162</sup> She postulated that the reasons for this include: (a) property prices being too high to be bequeathed to *awaqf* for most Muslim families; (b) a “lack of information on the creation of [aw]aqf”; (c) the existence of numerous other forms of Islamic philanthropic purposes aimed at Muslims; and (d) a preference for settlors “to manage their own [aw]aqf without any interference from” MUIS.<sup>163</sup> Thus, the use of English trust law to govern *awaqf* in Singapore has become a historical footnote due to legislative changes.

## V. THE GLOBAL TRUST ARRIVES IN SINGAPORE

The arrival of global trust laws coincided with Singapore’s ambition to become a major wealth management center. In the early 2000s, the Singapore government was concerned about Singapore’s future economic competitiveness in light of the remarkable rise of China in many sectors. The Singapore government convened an Economic Review Committee comprising distinguished individuals from the private and public sectors to explore new industries that Singapore could develop.<sup>164</sup> One of the recommendations of the Economic Review Committee was that Singapore should focus on the wealth management industry.<sup>165</sup> Thus, in order to encourage international trust companies to set up in Singapore and wealthy individuals to “park” their money in Singapore, the government instituted a slew of changes to tax and trust laws.<sup>166</sup>

Favorable laws governing trust companies, taxation rules with regard to foreign earned income, abolition of estate duty, and amendments to the Trustees Act soon followed.<sup>167</sup> Strict banking secrecy laws were also enacted.<sup>168</sup> These changes to the law were followed by an aggressive marketing effort by the private and public sectors to push Singapore as a wealth management center.<sup>169</sup> In order to make Singapore appealing to wealthy individuals, Singapore held events such as Formula One motor racing, approved the

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162. Shamsiah Bte Abdul Karim, *Contemporary Shari’a Compliance Structuring for the Development and Management of Waqf Assets in Singapore*, 3-2 KYOTO BULL. OF ISLAMIC AREA STUD. 143, 144 (2010).

163. *Id.*

164. William Case, *Singapore in 2002: Economic Lassitude and Threats to Security*, 43 ASIAN SURV. 167, 169 (2003).

165. See Elizabeth Wong, *Singapore: Financial Reforms*, 18 J. INT’L BANKING L. & REG. 16, 16 (2003).

166. See Long & Tan, *supra* note 12, at 108–13.

167. For an overview of the changes to the trust legislation, see Tang Hang Wu & Dilhan Pillay Sandrasegara, *Equity and Trusts*, in DEVELOPMENTS IN SINGAPORE LAW BETWEEN 2001 AND 2005, at 859, 892–94 (Teo Keang Sood ed., 2006).

168. See, e.g., Banking Act 2008, c. 19, §47 (Sing.) (stating that a breach of banking secrecy in Singapore may attract a fine of up to SGD 125,000 and/or three years imprisonment).

169. See Arnold, *supra* note 12.

opening of two casinos, and released the sale of seafront marina property.<sup>170</sup> The changes to the law, the safety and security of the country, together with the fact that Singapore is, generally speaking, an easy place to live, soon attracted the attention of the super-wealthy.<sup>171</sup> The results of these efforts have been nothing short of stunning; between the years 2000 to 2006, Singapore's fund management industry grew from SGD 280 billion to more than SGD 600 billion.<sup>172</sup>

The development of the wealth management space in Singapore resulted in many international trust companies and banks setting up operations in Singapore.<sup>173</sup> These institutions bring with them various laws including laws from other offshore financial centers to govern trust structures offered to the global wealthy elites to cater to their various needs.<sup>174</sup> While many trust companies and banks do offer the choice of trust structures governed by Singapore law, many of these entities also offer foreign trust law as the governing law.<sup>175</sup> As the Chief Justice of Singapore said in an extra-judicial speech:

Singapore law recognises the validity of (sic) and the courts will enforce foreign trusts, subject only to public policy considerations. For this reason, settlors are not affected by any limitations in Singapore trust law. They can establish their trusts under the law of any lawful jurisdiction. The global US and European banks have been here for a long time, discreetly managing the funds of their private clients under trust structures set up under the laws of offshore jurisdictions. Private banking has existed in Singapore for decades before it recently became fashionable to call it wealth management.<sup>176</sup>

Thus, unlike the use of the trust in earlier times, settlors are now not confined to the choice of local law for trusts structured in Singapore. Despite the professed difference of trust laws between various competing jurisdictions, the defining feature of the global trust is the rise of the highly discretionary trust. Such a discretionary trust became possible after the decision of *Re Manisty's Settlement*, which held that a power to add new beneficiaries to the

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170. See *id.*; Neil Chatterjee & John O'Donnell, *Singapore's Star Rises as Switzerland Stumbles*, REUTERS (Dec. 13, 2008, 6:26 PM), <https://www.reuters.com/article/businesspro-us-banking-secrecy-singapore/singapores-star-rises-as-switzerland-stumbles-idUSTRE4BD01520081214>; Neil Gough, *Singapore, a Rising Home for Quiet Money, Comes Under Pressure*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/business/singapore-bank-secrecy-1mdb.html>.

171. See Arnold, *supra* note 12; Chatterjee & O'Donnell, *supra* note 170.

172. See Lorna Tan, *S'pore Needs Up to 1,000 More Wealth Managers Now*, STRAITS TIMES (June 30, 2006).

173. See Arnold, *supra* note 12.

174. Chan Sek Keong, *supra* note 13.

175. *Id.*

176. *Id.* at [19].

trust including anyone in the world is perfectly valid under English law.<sup>177</sup> Obviously, such a power is extremely flexible, and it was a matter of time before this was incorporated in many trust deeds. What then are the features of the global trust?<sup>178</sup> I suggest that the following are the common features of the global trust used in modern wealth management:

- (i) The beneficiaries of the trust are not fixed from the very start. Instead, there is a list of potential beneficiaries;
- (ii) The trustee is given a very wide power of appointment as to who should enjoy the capital and income of the trust. There is usually no mandatory direction to exhaust the trust fund during the trust period;
- (iii) The trustee is given a power to appoint new beneficiaries<sup>179</sup> or to exclude current persons in the potential list of beneficiaries. Drafted in this form, the settlor might even be a potential beneficiary through an exercise of the trustee's discretion;<sup>180</sup>
- (iv) If the trustee does not exhaust the trust fund during the trust period, the property will go to default or residuary beneficiaries. It is often made clear that the trustee does not have to consider the interests of the default or residuary beneficiaries in exercising the trustee's power of appointment;
- (v) There may or may not be an excluded list depending on settlor's familial circumstances—e.g., the presence of an estranged spouse or children;
- (vi) The settlor will issue a letter of wishes to the trustee. The letter of wishes is usually drafted as a non-binding expression of wishes. Over time, fresh letters of wishes may be issued;
- (vii) The trust is usually used in connection with a company vehicle. Typically, the trust will hold 100% of the shares in a company. Assets will be injected in the company and the settlor or settlor's family members may be named as directors of the company. In some cases, there might be two layers of companies in this structure, i.e., the trust will hold 100% of the shares in a holding company which in turn holds the shares of the company that controls the assets;

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177. *Re Manisty's Settlement* [1973] 2 All ER 1203 (Eng.).

178. *See, e.g.*, *United States v. All Assets Held in Account Number 80020796*, No. 13-1832 (JDB), 2018 WL 1158002, at \*4-5 (D.D.C. Mar. 5, 2018); *Kan Lai Kwan v. Poon Lok To Otto*, [2014] 17 H.K.C.F.A.R. 414, [61]-[65] (H.K.); *Charman v. Charman* [2007] EWCA 503, [30]-[32] (Eng.); *Fonu v. Merrill Lynch Bank & Tr. Co.* [2011] UKPC 17, [12] (appeal taken from Cayman Is.).

179. *See, e.g.*, *All Assets Held in Account Number 80020796*, 2018 WL 1158002 at \*5.

180. *See generally Charman*, EWCA 503 (presenting a case where the settlor was a potential beneficiary).

(viii) The investment powers of the trust may in some cases be reserved by the settlor; and

(ix) The trust might include a protector or a committee of protectors—i.e., a third party who will have a role in the administration of the trust.<sup>181</sup>

The attraction of the global trust is not difficult to appreciate—it affords maximum flexibility to cater to the settlor’s change of circumstances. New spouses or children may be appointed as new beneficiaries. Subsequent estrangement from loved ones may also be accommodated by designating them as excluded persons. Moreover, the global trust gives the settlor some influence over the trustee’s exercise of discretion in the appointment of the beneficiaries by way of the letter of wishes. The settlor may inform the trustee of his wishes from time to time through a letter of wishes regarding the settlor’s wish as to the appointment of the beneficiary.<sup>182</sup>

Also, these global trust structures allow the settlor to manage and invest the trust assets, because the settlor or the settlor’s family members may be directors of the company which holds the assets. These highly discretionary trusts appear to be increasingly the norm in modern wealth management.<sup>183</sup> I postulate that the popularity of these kind of global trusts has to do with the circulation of the basic idea of a highly discretionary trust which must have originated in the imagination of draftspersons. A possible explanation for the proliferation of these trusts is that they have become the standard form in the precedent banks of law firms or the off-the-shelf offerings of international trust companies.<sup>184</sup> This idea of the highly discretionary trust then eventually circulated and percolated to offshore trust centers which added various “bells and whistles” to the trust by way of legislation in order to compete for the highly competitive wealth management business.<sup>185</sup> While onshore and offshore trust lawyers might tweak the global trust to ensure compatibility with their national laws—e.g., to comply with perpetuity periods—I believe that the common features identified above endure.

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181. On trust protectors, see generally THE LAW OF TRUSTS ¶¶ 23.34–23.36 (Geraint Thomas & Alastair Hudson eds., 2d ed. 2010); Donovan W.M. Waters, *The Protector: New Wine in Old Bottles?*, in TRENDS IN CONTEMPORARY TRUST LAW 63 (Anthony Oakley ed., 1996); Paul Matthews, *Protectors: Two Cases, Twenty Questions*, 9 TR. L. INT’L 108 (1995).

182. See D.M. Fox, *Disclosure of a Settlor’s Wish Letter in a Discretionary Trust*, 67 CAMBRIDGE L.J. 252, 252–53 (2008); Gerwyn LL. H. Griffiths, *An Inevitable Tension?—The Disclosure of Letters of Wishes*, 4 CONV. & PROP. LAW. 322, 322–23 (2008) (discussing the background and purpose of *Breakspear v. Ackland* [2008] EWHC 220 (Eng.)).

183. See, e.g., J.D. Davies, *Integrity of Trusteeship*, 120 L.Q. REV. 1 (2004) (describing the approach used in *Schmidt v. Rosewood Tr. Ltd.* [2003] Pens. L.R. 145 (Isle of Man)).

184. See Paul Matthews, *The Black Hole Trust—Uses, Abuses and Possible Reforms: Part 1*, PRIV. CLIENT BUS. 42, 47–49 (2002).

185. See Adam Hofri-Winogradow, *Trust Proliferation: A View from the Field*, 31 TR. L. INT’L 152, 152 (2017); see also generally Lionel Smith, *Massively Discretionary Trusts*, 70 CURRENT LEGAL PROBS. 17 (2017) (examining the legal risks of the increase of dispositive trustee discretion).



Many of these global trust structures are fiercely guarded behind a veil of either banking or trust secrecy, and it is difficult to obtain empirical data about them.<sup>186</sup> However, occasionally we get a glimpse of these structures when disputes arise. *Wibawa v. Wibawa*<sup>187</sup> is a recent example from Singapore on the use of the global trust. The Wibawas are a wealthy Indonesian family.<sup>188</sup> The patriarch died in 2000, and the matriarch, Harianty, was appointed to be the sole executrix and trustee of the patriarch's will.<sup>189</sup> While the will provided for the patriarch's property to be distributed to Harianty and the sons and daughters, the distribution never took place.<sup>190</sup> Instead, Harianty settled a trust called the Pride Wise Trust.<sup>191</sup> The Pride Wise Trust was set up because the family received letters "from the Indonesian tax authorities inviting [the family] to attend at their offices in Jakarta to discuss their [United States] dollars denominated assets."<sup>192</sup> What is of interest is the structure of the Pride Wise Trust, which is shown in the diagram below:

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186. The exception is through the indefatigable efforts of Adam Hofri-Winogradow. Adam Hofri-Winogradow, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 HASTINGS L.J. 931, 961–78 (2017).

187. *Wibawa v. Wibawa* (2016) SGHC 109 (Sing.).

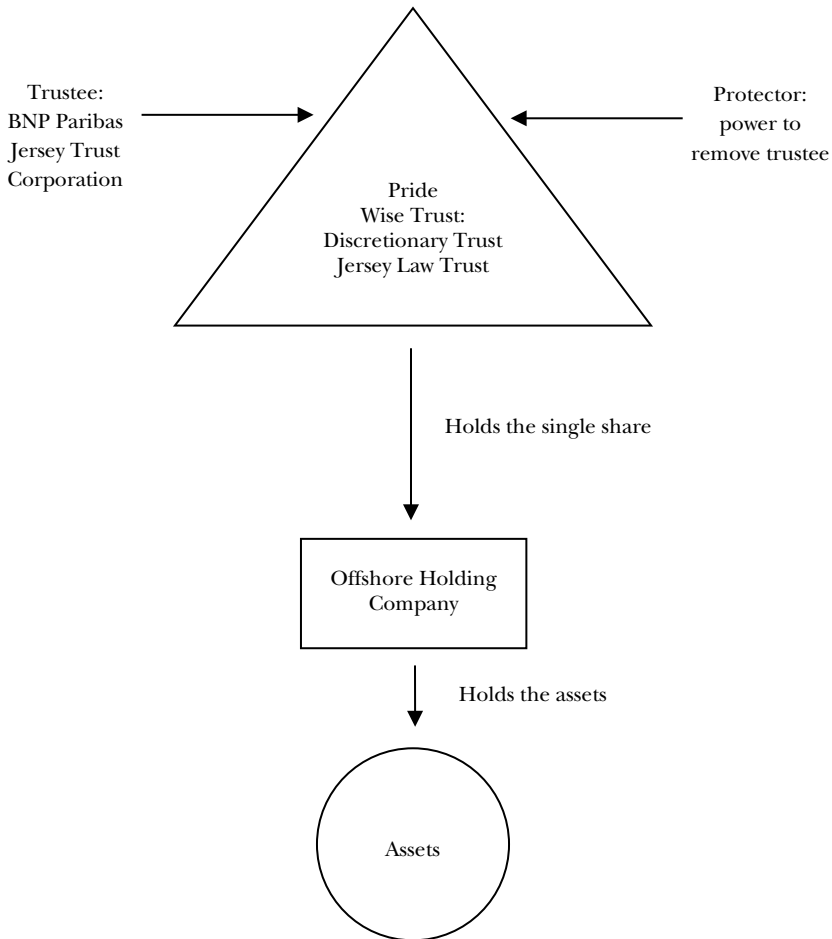
188. *See id.* ¶¶ 1, 9–12.

189. *Id.* ¶¶ 1, 4.

190. *Id.* ¶ 4.

191. *Id.*

192. *Id.* ¶ 42.

Figure 1<sup>193</sup>

The Pride Wise Trust is essentially a discretionary trust governed by Jersey law.<sup>194</sup> It had a total asset value of US \$33 million and the potential beneficiaries included members of the Wibawa family.<sup>195</sup> The plaintiff son, Kuntjoro Wibawa, was named the first protector and a potential beneficiary.<sup>196</sup> Harianty's planning objectives for setting up the trust were to facilitate a family succession plan, asset protection, privacy and avoid probate. Justice Belinda Ang explained the rationale of the trust succinctly as follows:

193. *Id.* ¶¶ 1, 33-41.

194. *Id.* ¶ 19.

195. *Id.* ¶¶ 11, 19.

196. *Id.* ¶¶ 35-38.

As is the usual way with an offshore discretionary trust, the beneficiaries would not be regarded as having any direct legal rights over any particular portion of the trust fund; they only had a right to be considered when the trustees exercised their discretion. In such trusts, the paramount desire and expectation is for financial information to be kept private and confidential. The use of a discretionary trust in conjunction with an underlying company was designed to protect assets in a tax haven. This combination would interpose an additional layer of confidentiality in the chain of ownership of the trust fund.<sup>197</sup>

Save for Professor Lionel Smith's recent valuable work in this area,<sup>198</sup> the global trust has escaped sustained academic analysis by trust scholars. Smith terms these trusts pejoratively as a form of "massively discretionary trust" and argues that onshore courts may not be accepting of such structures.<sup>199</sup> According to Smith, such trusts pose a number of legal risks, including the possibility that onshore courts may hold that a resulting trust can arise in favor of the settlor from the moment of the trust's inception and the chance that the beneficiaries may collapse the trust.<sup>200</sup> While Smith's doctrinal analysis has some basis, his claim "[o]nshore courts may not be as accepting of massively discretionary trusts as some drafters may wish"<sup>201</sup> cannot be applied to *all* onshore courts. Basically, Smith's thesis is that there are certain legal *risks* in drafting such highly discretionary trusts.<sup>202</sup> Thus, even on his own account, the doctrines do not lead us inexorably to the conclusion that such trusts would point to a resulting trust or may be collapsed by the beneficiaries. Given the fact that the judges have the interpretive space to make a decision based on the current state of trust law, what would their likely conclusion be?

Taking a more realist position, I speculate that judges in jurisdictions consisting of international wealth management centers would not take a strict view of trust law and reach the conclusions suggested by Smith. To do so would effectively destroy the *raison d'être* of these global trusts and damage the trust industry in that jurisdiction. We have seen that even in England and Wales; in the context of exemption clauses, the Law Commission has capitulated to the lobbying of the trust industry to adopt a so-called rule of

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197. *Id.* ¶ 40.

198. *See generally* Smith, *supra* note 185 (discussing the changes of trust that have happened with increased trustee discretion).

199. *Id.* at 17.

200. *Id.* at 18.

201. *Id.* *See, e.g.*, Chan Sek Keong, *Opening Address*, in *THE REGULATION OF WEALTH MANAGEMENT* xxiii, xxvi (Hans Tjio ed., 2008) (displaying a more accommodating attitude towards discretionary trust).

202. Smith, *supra* note 185, at 51.

practice instead of a bright line rule prohibiting certain kinds of exemption clauses in trust deeds.<sup>203</sup>

Furthermore, I would suggest that these global trusts are not an aberration in the trust industry but actually the norm in practice. Again, adopting a realist position, if such trusts are indeed the bread and butter of trust practitioners, it is likely that experienced judges in the field (who are usually drawn from distinguished practicing lawyers) would have been accustomed to dealing with these discretionary trusts in their previous incarnations in legal practice. Therefore, it is unlikely that they would interpret these trusts to reach Smith's conclusion. In other words, I believe that some judges would aim to accommodate such global trusts with a liberal interpretation of trust jurisprudence.

Indeed, we see a hint of this attitude in the extra-judicial speech of the former Chief Justice of Singapore, Chan Sek Keong, who said that “[g]iven the flexibility of the trust device . . . it may be that much more can be done in using Singapore law to meet client needs for wealth management and protection than has hitherto been the case here.”<sup>204</sup> Given the pragmatic nature of the Singapore courts, it is improbable that the Singapore court would issue a judgment which would effectively destroy its thriving wealth management industry. I suspect that a similar attitude may prevail in other financial centers, like Hong Kong. In contrast, a jurisdiction like New Zealand, which is increasingly seen as being hostile to international trusts may very well take trust positions mooted by Smith.<sup>205</sup>

In taking the realist position that the courts of some financial centers would likely uphold the highly discretionary trust, I am not defending such structures. Certainly, the wide manner in which these trusts have been drafted has raised justifiable disquiet in particular sectors. These trusts have been attacked heavily in the matrimonial courts<sup>206</sup> and, to a lesser extent, by creditors of the settlor.<sup>207</sup> For example, an English family judge, Mr. Justice Coleridge in *J v. V* expressed his disdain as follows: “these sophisticated offshore structures are very familiar nowadays to the judiciary who have to try them. They neither impress, intimidate, nor fool any one.”<sup>208</sup>

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203. Law Commission, *Trustee Exemption Clauses* 2006, Cm. 6874, ¶¶ 6.1–6.10 (UK). See Adam S. Hofri-Winogradow, *The Stripping of the Trust: A Study in Legal Evolution*, 65 U. Toronto L.J. 1, 6 (2015).

204. Chan Sek Keong, *supra* note 201, at xxvi.

205. See generally Michael Littlewood, *Foreign Trusts, the Panama Papers and the Shewan Report*, 2017 N.Z. L. REV. 59 (explaining New Zealand foreign trust rules and amendments that were added to avoid abuse).

206. See, e.g., *Charman v. Charman* [2007] EWCA 503 [47–58] (Eng.).

207. See *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2015] EWCA 139, [64], [2015] 2 All ER 816, [64] (Eng.); *Fonu v. Merrill Lynch Bank & Tr. Co.* [2011] UKPC 17, [54–64] (appeal taken from Cayman Is.).

208. *J v. V* [2004] 1 FLR 1042, 1067 (Eng.).

The pushback against such a highly discretionary trust may also come in the form of the Common Reporting Standards (“CRS”) promulgated by the Organisation for Economic Co-operation and Development (“OECD”).<sup>209</sup> The CRS is an international tax information gathering project whereby financial institutions in each participating jurisdiction must collate certain information of account holders and report the information to their tax authorities.<sup>210</sup> Their local tax authorities would then transmit the information on a confidential basis to tax authorities of other participating jurisdictions. Most major trust jurisdictions have or will become CRS compliant, and if CRS is implemented aggressively to include trust companies and the discretionary trusts, such trusts may not be effective as a means for foreign tax evasion. The CRS represents a successful effort by some quarters to promote a global norm that trusts may no longer be used as instruments for foreign tax evasion. The next battleground appears to be initiatives to set up a public register of beneficial interests.<sup>211</sup> No doubt a public register of beneficial interests will be resisted by the international trusts industry on grounds of privacy, human rights and data protection.

Nevertheless, I believe that international initiatives such as CRS do not necessarily spell the death knell of such global trust structures. There are other perfectly legitimate reasons quite apart from the evasion or avoidance of foreign tax for setting up such trusts—i.e. as a means of succession planning and asset protection from creditors and potential divorce. In a sense, the CRS project could be viewed in a positive light, because it flushes out and brings light to the darker aspects of international wealth planning. However, a fully public register of beneficial interests, if adopted as a global initiative, might signify the eventual decline of the popularity of such global trusts. There would be little incentive for ultra-high-net-worth individuals to set up trusts if the extent of their property holdings will be open for all to see. A register of beneficial interests which is only open to carefully defined categories of organizations such as interested government agencies may be more acceptable to potential settlors.

## VI. CONCLUSION

This Article has explored the historical use of the trust in Singapore from the early colonial days to modern times as a means of wealth transfer. The Singapore story has demonstrated the amazing versatility of the trust instrument as a means of wealth transfer and setting aside property to promote cultural and religious practices. As cultural and religious practices

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209. See Ed Devenport, *The Common Reporting Standard: Consequences for Private Client Trusts*, 2015 PRIV. CLIENT BUS. 231, 234–37 (2015); Tyler J. Winkelman, Note, *Automatic Information Exchange as a Multilateral Solution to Tax Havens*, 22 IND. INT’L & COMP. L. REV. 193, 194 (2012).

210. Devenport, *supra* note 209, at 231–34.

211. Jim Brunsten, *UK Faces EU Push on Transparency of Trusts*, FIN. TIMES (Feb. 27, 2017), <https://www.ft.com/content/0107db1a-fa92-11e6-9516-2d969e0d3b65>.

change and new legislation is enacted, the early uses of the trust have ebbed away in Singapore. In its place is the arrival of the global trust, which reflects the emergence of Singapore as an international wealth management center. Whether the global trust endures in Singapore and elsewhere as the prevalent form of wealth transmission depends on various developments such as CRS and the public register of beneficial interest.

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