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MAKING AND REMAKING EQUITY AND TRUSTS IN THE LAW SCHOOL

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In the 60 years of the Law School's existence, the value of teaching the distinction between law and equity has sometimes been questioned but never marginalised. Different emphases are discernible. In the foundational years, equity and trusts was presented as a kind of flexible real property or as land management rights. The land context was the institutional focus. Little by little that has given way to more varied contractarian and commercial contexts and applications of equity. This short note traces the shifts in institutional focus in both teaching and research in equity and trusts. Observing that there was little concerted planning in ensuring that the teaching and research in equity and trusts would remain responsive and relevant to the needs of the legal profession, it concludes with the proposition that equity and trusts is still relevantly taught as a distinct and separate subject.

I. THE PIONEERING YEARS AND EQUITY'S PROPERTY ORIENTATION

It is difficult to assess the exact national influence of the National University of Singapore Faculty of Law ("the Law School") in the development of local equity and trusts jurisprudence. It must in any case have been a large one if only the numbers are considered. After all, the Law School for much of the 60 years of its existence was the only 'accredited' local law school educating lawyers for the profession and the legal service. Those who could afford an English training duly embarked on acquiring one while those selected to do so under sponsorship rarely hesitated to do so. But an English training was expensive and few could benefit from it. From those numbers alone it can be conjectured that such equity and trusts law as found its way into local practice and the courts was very likely that taught and imbibed in the Law School. If so, it is to the credit of the teachers of equity and trusts in the Law School that they succeeded in imparting an appreciation for the solutions of equity despite biases typical of the times.

This claim needs substantiation and elaboration. The logical legal mind does not take kindly to equity and trusts jurisprudence. It is apt to perplex the law student who comes to the subject after, as is still usual, extended immersion in the common law subjects of contract, tort, and land law. (I do not forget that land law is heavily modulated by statute in Singapore.) Even in these days, initial encounters with equity and trusts can produce an impression of anarchy comparing unfavourably with the apparent rule superiority and touted certainty of the law of contract and

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land law. Equity and trusts if not well taught does not impress with its fluidity. If taught uncritically and unholistically, it is confounding in its seemingly elusive and haphazard character. It is all very well to say in the words of Baroness Hale (in *Stack v Dowden*), that in equity, "context is everything".[1] The newcomer finds neither comfort nor enlightenment in these words. If his or her prejudices against equity and trusts are to be overcome, the teaching of equity and trusts has to be effectively holistic and suitably analytic without losing its contextuality. The equity and trusts teacher has to be something of a juggler of multi-coloured balls. To VK Rajah JA, as he then was, one ball is precedent, another policy, another principle, and another pragmatism (see *Lau Siew Kim v Yeo Guan Chye Terence*[2]). This is a tough balancing act, by any standard.

So the successful imparting of equity and trusts to law students should not be understated. It was probably helpful that right from the beginning equity and trusts was packaged as a kind of advanced property course, taught to year three and four students alongside movable property, succession and administration of estates, and conveyancing. In fact up until the 1990s, howsoever the course changed in form or content, it was not to lose this property orientation. Kevin Tan, the Law School's unofficial historian, tells me that in 1964, equity and trusts received autonomous and independent recognition as distinct and separate year three subjects following the first curriculum review under Dean Harry Groves. It is unlikely however that the property orientation of trust was altered as a result. More cosmetic changes were to be in store. Four years on until the 1980s, equity ceased to be taught as an autonomous subject and only trusts with equity submerged in it remained. This was the form in which I first encountered the subject in the 1980s which was in due course renamed 'Property II'.

In hindsight, the property orientation was bound to outlive its usefulness. It exaggerated the trust as a device for more flexible land rights and land management. It meant stressing the express trust and trustee's duties and presenting much of the law of constructive trusts beyond the express trustee as limited and perhaps anomalous exceptions to do justice. That gave the subject a semblance of rationality and coherence, which was not unhelpful pedagogically speaking. Under this management, however, the constructive trust was downplayed. In time, the prolonged marginalisation and eventual disappearance of equity in 'Trust' and then 'Property II' meant that the obligational or contractarian nature of a trust was lost sight of; and important aspects of equity were left to be covered in an *ad hoc* fashion by teachers of the law of contract and other advanced occasional and optional courses on remedies and procedure. Eventual neglect of equity was inevitable and the price that had to be paid.[3] A second price was incurred. Apart from the portrayal of a property-oriented equity and trusts law, the familiar path of least resistance was trod. Common law was portrayed as rigid and stiff, requiring equitable softening, tempering, and mitigation.

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1 [2007] 2 AC 432 at para 69 (HL).

2 [2008] 2 SLR (R) 108 at para 32 (CA) [*Lau Siew Kim*].

3 So specific performance was taught by contract teachers until dropped because the burgeoning mainstream case law could no longer accommodate it. Injunctions found their place seemingly in civil procedure where more likely than not, or at least until the *Mareva* injunction came of age, they had to be marginalised to accommodate a multiplicity of details and to avert curriculum overload.

This outmoded conceptualisation of equity and trusts law might have been discarded earlier if not for the persistent property orientation.[4]

II. The Invaluable Foundational Work of Sheridan and Tan Sook Yee

The property orientation was of course the framework of the times when equity and trusts began to be taught but it would be wrong to suppose nothing more than this was disseminated. Two notable members of the Law School, Lionel or 'Lee' Sheridan and Tan Sook Yee who joined a year after he left, left a deep and lasting imprint of equity and trusts as principled, relevant, and contextual, in spite of the property bias of the time.[5] Sheridan was above all an eminent equity and trusts law academic who understood both its limitations and capacities. An interesting recollection was related to me by Kevin Tan who made small talk with Sheridan about some of the cases which Sheridan had just discussed in a special guest lecture in 1985. Responding to Kevin's lament about equity's confusing ways, Sheridan quipped that "to reform the English law of equity, you would need a Scotsman... like Lord Mansfield." He was being modest. Sheridan of course was nothing like a Scotsman but everything of an Irishman. But to his students of which the future Chief Justice Chan Sek Keong was one, he must have seemed like a reforming Scotsman of equity and trusts.

I have taken a liberty in the narrative for which I may be forgiven. Although I have likened him to a reformer, there is actually little on written record as to how Sheridan taught equity and trusts in the Law School of which he was 'founding father'.[6] But we can always get glimpses of how leading academics teach and what academic habits and predispositions they seek to instil or inculcate from their writings; the more so when academic and scholarly evaluation and development are habits peculiarly suited to materials such as the equity and trusts case law.[7] A survey of his works on equity and trusts reveals his penchant for comparative treatment. Significantly, his first contributions at the invitation of George Keeton, who had been his mentor at University College London and author of the highly

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4 *Cf* RP Meagher, WMC Gummow & JRF Lehane, *Equity: Doctrines and Remedies*, 1st ed (Sydney: Butterworths, 1975). Its lively, fresh, and rigorous treatment of equity stood against the fusion of equity and common law and showcased the distinctness and coherence of principles of equity in terms of standards of conscience, fairness, equality, protection of relationships of trust and confidence, and discretionary remedies. For many perhaps, the vitality of Australian equity is testimony to its influence in Australia.

5 As founding father, Sheridan's opportunities were great and with his genius for talent spotting he missed very few. His notable biographer Andrew Phang JA has warmly charted his heavy responsibilities, admirable leadership, brilliant career, and enduring achievements and has told us of Sheridan's astonishing scholarship covering many legal fields: Andrew Phang, "Founding Father and Legal Scholar: The Life and Work of Professor LA Sheridan" [1999] Sing JLS 335 [Phang, "Founding"].

6 Phang, "Founding", *ibid.*

7 Roscoe Pound, "The Place of Judge Story in the Making of American Law" (1914) 48:5 American L Rev 676. This last-mentioned point is convincingly made in Roscoe Pound's assessment of Story J's place in the making of American equity. It is an insightful account of the great judge's influence in redirecting American lawyers and courts away from recourse to alternative civilian systems to the law of equity. At a time when equity was distrusted and codification rife, his treatise on equity jurisprudence was a magnificent work of systematisation removing America's deep-seated distrust of rules associated with the exercise of personal discretion.

regarded *The Law of Trusts*,[8] were the *Irish Supplement* to Keeton's 7th edition and the *Irish Supplement* to Keeton's parallel account of *An Introduction to Equity*.[9] Sheridan's subsequent encyclopaedic work with Keeton, *The Comparative Law of Trusts in the Commonwealth and the Irish Republic*[10] ("a veritable *tour-de-force*" in Andrew Phang JA's words[11]), which contains a chapter on trusts in Malaysia and Singapore, points in the same direction, demonstrating his rare ability for seeking out principles through comparative treatment. A profound understanding of inter-disciplinary perspectives was another distinctive characteristic of his scholarship. This comes across unmistakably from contact with his published works including public lectures on the law of charities which for Sheridan was a special and abiding interest.[12] Being the man that he was, he could not have taught a merely rule-based law sounding of judicial empiricism to his students, adopting a method of procedure so alien to his way of thinking. He would have faced strong pedagogical constraints to be sure. The newly minted Law School with its supply-driven brief to produce lawyers for the country was bound to constrain lesser teachers to focus on detail in order to equip the law graduate for equity and trusts practice. It would have been quite in order for teaching to have been detailed and empirical. This kind of teaching was perceived to be suited to the nature of judicial empiricism, which then was even more rife in equity and trusts than in cognate disciplines. Yet in recorded interviews the former Solicitor-General Koh Eng Tian and Mr TPB Menon, doyen of the trust practitioners, fondly recollected Sheridan introducing the case discussion class and the Socratic method of teaching.[13]

Dr Thio Su Mien must have found his open-book and take-home examinations in land law and equity and trusts a marvel. This was so well ahead of his time that one cannot imagine Sheridan making judicial empiricism a hallmark of his teaching and legacy.

Tan Sook Yee's impact was probably equal to or possibly surpassed Sheridan's for different reasons. Trained at Trinity College Dublin, she like Sheridan was Dean. But her tenure was longer (seven years), and she led 'Property I' and 'Property II' for almost as long a time. After Sheridan left, Chua Boon Lan (an equity practitioner and successor Dean) was in charge of the advanced property course for a short

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8 George W Keeton, *The Law of Trusts: A Statement of the Rules of Law and Equity Applicable to Trusts of Real and Personal Property*, 7th ed (London: Sir Isaac Pitman & Sons, 1957).

9 GW Keeton, *An Introduction to Equity*, 3d ed (London: Sir Isaac Pitman & Sons, 1952).

10 George W Keeton & LA Sheridan, *The Comparative Law of Trusts in the Commonwealth and the Irish Republic* (Chichester: Barry Rose, 1976).

11 Phang, "Founding", *supra* note 5 at 387.

12 It will suffice to name a few which were published locally: Professor LA Sheridan, "The Movement for Charity Reform" (1976) 2 MLJ lii; LA Sheridan, "The Political Muddle: A Charitable View" (1977) 19:1 Mal L Rev 42.

13 See interview of Koh Eng Tian by David Lee, "Development of Singapore Legal System, Accession Number E000321" (17 February 2009) on Singapore Academy of Law, Oral History Interviews @ Archives Online (Reel/Disc 5 of 13) at 01m:00s-03m:42s, online: National Archives of Singapore <http://www.nas.gov.sg/archivesonline/oral_history_interviews/record-details/798c49bf-1162-11e3-83d5-0050568939ad>; interview of Menon, TPB by Foo Kim Leng, "Development of Singapore Legal System, Accession Number E000320" (19 January 2009) on Singapore Academy of Law, Oral History Interviews @ Archives Online (Reel/Disc 2 of 10) at 37m:14s-42m:11s, online: National Archives of Singapore <http://www.nas.gov.sg/archivesonline/oral_history_interviews/record-details/ffaad6c2-1161-11e3-83d5-0050568939ad>.

while but he soon departed for the United Kingdom. In the interim void, non-equity teachers such as SP Khetarpal did their part to keep the ship afloat. Would equity and trusts have completely ship-wrecked if Sook Yee had not assumed the leadership in due course? In any case she did, not by choice but out of necessity.[14] She chose to continue to present equity and trusts as a law of flexible property management and customised property rights. But there was something else in her method of procedure that was more significant which mitigated the disadvantages of an excessive real property orientation. Perhaps it was that because of her other land law specialisation, she was very conscious that equity and trusts had to be relevant and suitable to the Singapore context. I can imagine that those schooled in Singapore's Torrens system in particular and land law in general will soon manifest a similar sensitivity to differences between English and local contexts. Wholesale and unreflective importation of English precedents will not do for them. Are they suitable, adaptable, appropriate? Do they respond to a different machinery and set of assumptions? These would be questions uppermost in their minds. Looking at her book on Singapore land law which first came into print in 1994,[15] one finds much that is confirmatory. Its virtues included the adoption of what would become the genre to focus sharply on local precedents where they could be found. This importantly necessitated situating the precedents in the framework of general principles. It also compelled close attention to the local statutory law. So there was a need to focus on principles rather than details and to discover and discard details that contradicted the indigenous statutory innovations. Thus though she tended to subsume equity under her greater ambition to systematise the land law of Singapore, she needed also to identify here and there the generalisations of equity that would survive beyond the details and specific English context, that would fit or adapt to the new statutory framework and the context of Singapore land law.

III. Of Textbooks or the Lack Thereof

A word about textbooks. Neither Sheridan nor Sook Yee wrote textbooks on equity and trusts specially for their students. Nor, so far as I can make out, was there any overwhelmingly preferred or endorsed textbook then or now. At a much later time (in 2010) a casebook, Tey Tsun Hang's *Trusts, Trustees and Equitable Remedies: Text and Materials*,[16] emerged. Some might suppose that it came too late well past the age where the casebook served as an excellent and paradigm pedagogical tool. When it was published, however, electronification of legal knowledge was in the offing. When that came into full bloom, students would easily construct their own cases and materials. The subject orientations were being redefined. The Commonwealth case law was swiftly building up as the idea of a monolithic common law gave way and new areas and perspectives opened up. It was not so easy anymore to identify the leading case or to select a leading article from the copious literature. In time, the so-called offshore trust could no longer be ignored; but how was justice to be

[14] Although only a tutor, she had no option but to assume course leadership when Khetarpal departed for Canada.

[15] Tan Sook Yee, *Principles of Singapore Land Law*, 1st ed (Singapore: Butterworths Asia, 1994).

[16] Tey Tsun Hang, *Trusts, Trustees and Equitable Remedies: Text and Materials* (Singapore: LexisNexis, 2010).

done to the topic of private purpose trusts in a casebook? Tsun Hang however not only brought out a casebook, he then authored a series of monographs where he dealt with the offshore trust, the trading trust, trust and forced heirship and trust and shared property. He had the foresight in my view to steer clear of writing a textbook which was well within his sweeping ken.

In hindsight, there was a pleasant fortuity and paradox in all this. A leading textbook in the circumstances would have done more damage than good. In view of the fast and furious changes that would befall the law of equity and trusts, it would have required much more energy and effort to have kept up the good work. It would at the least have been more precedential and doctrinal and thus have failed to capture the policy and pragmatism in equity to which the judiciary was to draw attention. In this connection, mention may be made of the *Halsbury's Laws of Singapore: Equity and Trusts*.[17] This was part of a different endeavour (a Butterworths/LexisNexis project) to place all the laws of Singapore in one accessible place. It did not have any distinctive form and content; if anything it was a way of adapting and disseminating the law. Its manual-like structure and eclectic propositional contents of course made it unsuitable for use as a student textbook and it was never so used.

IV. Overt Structural Changes

Academic leadership and textbooks aside, were there structural changes in the way equity and trusts was taught? I have hinted and speculated that the transition from Sheridan's comparative social and political consciousness to Sook Yee's relevance and context was seamless in many ways despite the gap years. Before the Law School's relocation from Kent Ridge, Derek Davies came as Sook Yee's invitee in the 1990s and with him equity and trusts began to modernise and to shed its dominating land law paradigms. Unlike earlier more fleeting visitors such as David Parker and David Hayton (now Hayton J) in the 1980s, Derek's connection was more lasting and deeper. Derek did not have an imposing presence but had influence. He was the forerunner of the 'Oxford school', if I may put it that way, as well as the Law School's first CJ Koh Professor of Law (in 2000). There are obvious signs that what he taught about the fact-specificity of fiduciary relationships resonated with equity and trusts students.[18] Some still remember being persuaded by his more credible factual analysis of *Regal (Hastings), Ltd v Gulliver*,[19] namely, that the directors had been too quick to profit from an opportunity which the company was unable to exploit; they had sailed 'too close to the wind of advantage'.

The most visible and overt change in the course was arguably the transition and conversion to sectional teaching in 2002. This was much more than a reconfiguration of people and students. A redesign of the curriculum was probably too difficult given the balance of old and new and the inertia against radical makeovers. Going sectional however offered a painless transitional solution to crossing into a new paradigm. Those who wanted more far-reaching change could do so in their own sections. Those who wanted more incremental changes could co-run another section.

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17 Vols 9(3), 9(4) (Singapore: LexisNexis, 2017).

18 JD Davies, "Keeping Fiduciary Liability within Acceptable Limits" [1998] Sing JLS 1.

19 [1942] 1 All ER 378 (HL).

One tends to forget that sectional teaching in its inception was highly controversial. The advantages of stakeholding and personal creativity were not certain or obvious. More downsides including problems of sectional inequity, grade disparities, and dysfunctionality were anticipated and feared. All the same, the course was among the first of the core courses to head in the new direction. My assessment is that the transition was a success, in no small measure due to the unexpected addition and participation of Adrian Briggs, Gerard MacCormack, and Kelvin Low. Adrian Briggs surprised all by expressing a willingness to help teach equity and trusts. His inimical style and powerful intellect were hugely impressive (and unforgettable) in imparting a fresh spirit and energy to equity and trusts. Gerard MacCormack was the perfect man with the wholesome commercial law experience to lecture on constructive trusts and fiduciary law. Kelvin Low, newly returned from his Bachelor of Civil Law ("BCL") studies at Oxford, inspired students in the new section with his youthful zest and intelligence. Meanwhile, Barry Crown, William 'Bill' Ricquier and Tang Hang Wu much later added succession law and beefed up constructive trusts and fiduciary law in the other section. Two then became three when Tsun Hang and much later James Penner came aboard.

V. Covert Structural Changes

For more subtle shifts in direction and emphasis, one should turn to structural changes which followed upon relocation of the Law School from Kent Ridge to the Bukit Timah Campus in 2005. Nestled in one of the troughs (more trough than valley at any rate) of Kent Ridge, the Law School premises in their original condition were in many ways a cocoon, and an enclave. Sandwiched between the Business School and the Central Forum, with the Spaceship, as the Arts canteen was fondly called, to the west, and the verdant foliage of Prince George's Park to the east, faculty and students worked and lived in splendid isolation, boasting a high level of interaction. There was however no deep dogmatic attachment to isolationism for isolationism's sake. In 2005, when it was announced that the Law School would move, relocation was welcomed by a strong majority, a rare phenomenon in a school with more opinions than faculty. The Oxbridge-style quad architecture at the 'old new campus' reflected the then quintessential academic preoccupations of introversion and reflection. But if anyone thought that the same high level of collegial interaction and strong collective spirit would be replicated, he or she could not have been more wrong. The isolation remained. If anything it was accentuated; there was now both geography and design. But on the heels of relocation the age of the Internet soon arrived. It changed everything about congregating in the corridors and common spaces. Second, the Law School ceased to be small. In place of respect and tolerance in personal and collegial terms, the Law School now needed to foster respect and tolerance for ideas and learning in a new climate of diversity. Third, distanced from the main campus, it seemed now to be closer to the legal fraternity in the city. New adjustments to tacitly perceived external demands became inevitable.

The outward change accompanying the relocation was rather an unspoken and unarticulated relook at teaching equity and trusts in a more open manner. The seeds were already quietly sown before the relocation when Yeo Tiong Min and Ho Hock Lai (whose first love has always been evidence but unstintingly agreed to assist

his overstretched colleague) started a new course on restitution which entailed re-examination of ideas of resulting and constructive trusts as responses to unjust enrichment. The stirrings of fresh critical thought over equity and trusts, in particular the influence of the 'Oxford school', as I have dubbed it, were reinforced by a wave of returnees from Oxford, many of whom had chosen to read trusts for the BCL degree. Soh Kee Bun and Tiong Min were early protagonists and they would be followed by others. This wind of critical inquiry was an indirect bonus for equity and trusts, providing opportunities for cross-cutting research and shifting trusts to a more contractarian perspective. Meanwhile, on the city side, there were developments afoot to evolve a stronger and more mature financial services sector. Reconstruction of the financial and capital markets and a new and intense ambition to reform, upgrade, and modernise the country's investment laws kept the law of equity and trusts relevant. Much later, the internationalisation of the courts made knowledge of equitable remedies desirable and in time a vital apparatus of the young ambitious law graduate.

Other changes were more progressive. In a word, equity and trusts became progressively more commercial, more conceptual, more theoretical. Teaching approaches became eclectic as a consequence. An article written by Hang Wu making a pitch for conveying the commercial side of equity and trusts more seriously gives a healthy picture of readiness to shed the familiar and to innovate.[20] In these respects as in the earlier, there was no concerted effort. Notably, no report had ever been commissioned to plan such a course. The Law School went through several planning exercises to update and stay relevant. The multiplying of electives both permanent and transient was one of the visible outcomes of a planning exercise. But within each core module including 'Equity and Trusts' there had never been any conscious effort to organise or orchestrate changes. One almost supposes that a basic course, a core module as we say, is not in need of long-range planning. Some might almost suggest, to paraphrase Mark Twain, that the more you explain (or plan), the less it is understood. Perhaps things fairly worked out because there was a bit of old blood and more of new. The Law School was fortunate in my view to have had a succession of new blood bringing new ideas and aspirations, such as Kee Bun, Tiong Min, Hans Tjio, Tsun Hang, Hang Wu, and Kelvin Low. The first four pursued other interests and specialisations in commercial law. The last two also taught 'Property I', soon to be renamed 'Principles of Property Law' and Hang Wu later on took up the mantle of leading 'Restitution'. But the important thing was that all had great respect and tolerance, if not admiration, for equity's paradigms and methodologies.

Kee Bun created a new course on remedies where he demonstrated his distinctive combination of intellectual acuity and pragmatism which made him a respected faculty member and credible with outsiders especially policy-makers. Tiong Min never really taught equity and trusts (he was roped in for a year to tide things over) though it was one of his fields of research and writing. As was said, he was instrumental in introducing a new elective on restitution where he covered resulting and constructive trusts from perspectives of unjust enrichment. He also raised the bar for research in equity and trusts when he pioneered the re-conception of equity in the conflict of laws. Other important complementary gap fillers helped to deepen the teaching of

[20] Tang Hang Wu, "Teaching Trust Law in the Twenty-First Century" in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) 125.

fiduciary law. In 2001 Hans enlisted Richard Nolan as visiting professor or perhaps enticed him to visit. In revamping the 'Company Law' course, Hans introduced a large chunk of fiduciary law in the section of director's duties.

Important though these more peripheral developments were, they suffered either from the lack of universal inculcation or the awkwardness of timing. Remedies ceased to be taught following Kee Bun's departure. Restitution being an elective was not studied by all. The critical understanding of resulting and constructive trusts gained there was confined to restitution students. They were limited in numbers in view of the formidable and exacting intellectual demands of the subject as taught. Company law as a core module was studied by all but director's duties were done at the wrong time, before exposure to equity and trusts. So students studied fiduciary law without appreciating the general background to conceptions of loyalty and the overarching power of fiduciary analysis. Nevertheless, this heightened significance to what would soon be massive case law developments helped to drive the subsequent shift to more satisfying general fiduciary law coverage in equity and trusts. Another obvious omission which became evident later was the unsatisfied commercial demand for business trust-cognisant graduates. In 2009, Hans roped in Mark Lea and me to establish an international trusts course. We covered business and trading trusts, real estate investment trusts, trusts in the conflict of laws and trust documentation. Again, there was more catch up as the commercial side of equity and trusts and with it the increasing important perspective of the contractarian trust crept into the course. Given the growth trends, an overhaul of the course content was evidently long overdue. The course needed to be made attractive and relevant to demands from the growing financial markets and wealth management industry. An eye on what had been taught about the personal equity and proprietary estoppel was necessary in order to capitalise on knowledge already garnered. Coordination was needed to teach the basics to those who had studied director's fiduciary duties extensively. The juggling between priorities was not easy. In my section, this was done by taking secret trusts and charities out to make room for more commercial trust cases and more of the trust as an obligation. The subject of charities was then covered by requiring students at their option to write research assignments after self-study.

When all is said and done, the equity and trusts course might have been just fortunate in the resulting synergies with equity-friendly paradigms and methodologies in diverse commercial fields, in escaping insularism by drawing on ideas from the 'Oxford school', and in the avoidance of any distinctive pedagogical camp. However, the problems of designing a fully integrated course remain. How much of trusts and how much of equity to dispense, what contents to include (should secret trusts be left out), what structure to follow (equity and remedies first or second), what obligational perspectives to incorporate to instil perfect understanding, how much theoretical learning to pack in? Then as now, deeper issues simmer beneath the facile impression of an established normalcy. Some may be asking whether the time has come to take equity out and devote the course entirely and exclusively to trust law. Those of this persuasion will not be persuaded that there is still virtue in delineating the uniqueness of equitable reasoning and permeation. Not when, they say, in many departments of law the principles imported from equity have blended imperceptibly to the point where it may be futile and a clutter to harp on equitable origins. In addition, they are quick to point out that the uniqueness of equitable reasoning dwindles as the years pass. Why should one in Singapore continue to be troubled by historical

relics and territorial turf battles and rivalries? Perhaps this is why the fusion of law and equity debate in Singapore is a stormless fury signifying little. Doubtless the Law School will continue to experiment and innovate. There are many troublesome and difficult issues to work out.

VI. Developments in Scholarship

Something more and more generally should be said about phases and periods as I turn to the larger phenomenon of the making and remaking of equity and trusts law beyond teaching and laying foundations. I would not make the ensuing comments and observations except in an attitude of humility. Historians are the experts on the exact discovery and appraisal of large-scale causalities. One thinks of Braudel's large-scale works implementing his rejection of atomistic or 'particle' theories of history, urging us to think of history in wave-like terms and concentric circles. Borrowing this wave model enables us to sketch the periods of development of equity and trusts law by reference to distinctive socio-economic and political conditions. In the earliest period, one sees much of equity and trusts as irrelevant or as relevant only to the layer of society in dialogue with the colonial masters. There admittedly is less concrete proof than reasoned speculation about the irrelevance of equity and trusts law. Colonial judges were not unmindful of the need to adapt the common law in personal matters since the *Second Charter of Justice*'s[21] admonition to do so in personal matters was explicit. However, such adaptations as were effectuated avoided making substantive choices. Personal law was applied to personal matters in accordance with techniques adapted from the conflict of laws. This recourse to the conflict of laws was founded on the belief that an even-handed and neutral jurisdiction-selecting way best accommodated the legitimate expectations and the interests of justice of the several races and religious groups in the colony of Singapore in their civil interactions with one another. Equity consequently held no answers to these conflicts. In commercial and other non-personal civil matters, there was no explicit mandate to take account of personal law. Nevertheless, it would not be far-fetched to suppose that personal law furnished an alternative non-judicial and non-curial solution to equity if discretionary justice was needed. The advantages of equity administered by the court were not obvious. Equity was then not welcome in commercial matters. In civil matters, equity would not have been perceived among the unindoctrinated as affording anything or any advantage that the personal law did not already furnish. Like equity, personal law systems of contract and wrongs took account of standards of probity and matters of conscience. Indeed, they took far better account of usage and custom than the court which insisted on strict proof of notoriety of custom and accommodated trade usage subject to the primacy of the written contract. So if a dispute should be resolved according to standards of probity, it would more likely have been resolved by personal law extra-curially. This could explain why unlike in other places such as New South Wales there was no clamour for a separate equity bar and equity judge and why the volume of equity business remained small.[22]

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[21] *Second Charter of Justice, 1825* (UK), 6 Geo IV, c 85.

[22] *Cf* ML Smith, "The Early Years of Equity in the Supreme Court of New South Wales" (1998) 72 Austl LJ 799.

In the next intermediate period, as personal law solutions receded, receiving the law of equity in their place required an understanding of the relevance and possibilities of equity and trusts and developing an ability to tap into those possibilities. The results from case law paint a consistent picture. Equity cases from this period show judges relying on judicial experience and rendering decisions which kept very close to the ground. Any adaptive development was allusional and accretional. Another consistent piece of inferential evidence can be found in a prominent Law School initiative, the *Singapore Law Series* publications (begun in 1976 and completed in 1979). These far from modest publishing efforts had no competitors. They had a captive audience among students. If they were uncritical, they nevertheless pulled beyond their weight befitting their high ambitions. Concentrating on what English law to imitate, they extracted the principles and shunned details which might seem of slight relevance to Singapore. They could not however endure. Once the principles had been identified, there was a clamour for more details, perhaps a common law hazard, which they could not satisfy. A second series was initiated by Sook Yee in 1985. Notably, equity and trusts law did not feature in the first or second series.

VII. Critical Scholarship

The critical periods which overlapped with and then followed the intermediate period manifested themselves on two fronts. On the first, no one seemed particularly conscious of any dramatic change. Life went on and perhaps because it seemed that all things remained unchanged that the change in mindset seemed more momentous. The first volley was fired by Mohan Gopal who wrote on the reception of common law that never was.[23] Drawing on the Indian experience, he suggested that Singapore never received any common law, only the illusion of it. It was not entirely clear what normative recommendation he would make as a solution to the problem he announced. Perhaps it was a recommendation for a fresh start towards an autochthonous Singapore law. Geoffrey Bartholomew had much earlier (as early as 1976) suggested that the time was ripe to develop an autochthonous Singapore law.[24] The clarion call ahead of its time had attracted little practical and academic interest. But whether or not Mohan's article aimed to renew that call, Andrew Phang penned a rejoinder.[25] Thus began an exchange which sparked keen academic interest in the roots and origins of the common law of Singapore. It probably also marked a turning point in Andrew's developing scholarship in the law of contracts.

If Mohan's *tabula rasa* thesis had succeeded, one wonders whether the development of local equity and trusts would have arrived sooner. Andrew's reaction seemed like an apology for the status quo and conservative. But this was far from the inquiries which he sought to provoke. His rejoinder was not for jettisoning the corpus for the sake of a fresh start but as was to appear more and more clearly in his ensuing writings, for a more nuanced reception, for adaptation, for conscious and critical sifting. Since 1993 when the Attorney-General Chan Sek Keong, as he then was,

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[23] Mohan Gopal, "English Law in Singapore: The Reception that Never was" (1983) 1 MLJ xxv.

[24] GW Bartholomew, "The Singapore Legal System" in Riaz Hassan, ed, *Singapore: Society in Transition* (Kuala Lumpur: Oxford University Press, 1976) 84.

[25] Andrew Phang Boon Leong, "English Law in Singapore: Precedent, Construction and Reality or 'The Reception that Had to Be'" (1986) 2 MLJ civ.

gave expression to these sentiments in charting the *Application of English Law Act*,[26] these sentiments have seemed obvious. But at an earlier time, the thesis of critical adaptation and reformulation postulated a heretical-less-than-monolithic common law. It could not have been credible without Andrew's arguments that the colony of Singapore was neither a settlement nor a ceded territory. (Later on, he would draw on Roberto Unger for support.) One cannot escape the fact that all the justifications for a fresh approach, not a fresh start, to reception are to be found here. In Andrew's mind, even the seemingly objective law of contract was not beyond adaptation. A recurring message Andrew strove for in his classes on the law of contract was adaptation and innovation to suit the circumstances of Singapore. He was well placed to do this, having gone earlier to do pioneering work in a thesis which he wrote under the supervision of Unger at Harvard on the impoverishment of the common law in Singapore.[27] He had reviewed the case law on the law of contracts, especially its rules of equity, and found little evidence of adaptation and innovation when this was necessary. Such evidence as might suggest appropriate sensitivity was exceptional, if not rare. There was even evidence of neglect such as where custom and trade usage were downplayed with good but misplaced intentions. This contrasted sharply with the innovative legislation which the government of the country had introduced on several important fronts after independence. The legislation was nothing like that posited in the common law scheme of things. There, legislation served to correct mischiefs and gaps in the common law. The post-independence legislation bore a radically different imprint and the common law could not remain oblivious to the legislative inspiration, he maintained. So there was not only the demonstration from the *Second Charter of Justice*,[28] he further provided the legitimacy for adaptation from post-independent legislation.

The research potential opened up as the new critical spirit caught on. Increasing dissatisfaction among faculty was expressed with the detailed and narrow judicial empiricism which produced fair results on the facts but gave little sense of guidance in similar cases. Sometimes the factual concentration left little clues as to what would be a similar case amenable to the same outcome. It produced a kaleidoscopic effect. With every turn, a new picture emerged. Thus began a time of critical examination of decided cases to correct the excessive judicial empiricism of the day. The conclusion was almost invariably: right result, wrong or unconvincing reasoning.

Somewhere in that period of critical evaluation, the Law School moved beyond adapting and disseminating research in equity and trusts. There were many missed opportunities to be sure. The critical spirit was predominantly directed at the common law. It looked abroad beyond England to Australia and to a lesser extent Canada and New Zealand but fixated on the common law it ignored the statutory changes at the doorstep. To cite an example, the pioneering pension scheme dubbed the Central Provident Fund ("CPF") escaped academic attention. No one then and no one to-date has considered more generally the application of equity and trusts to the CPF. To his credit, Barry Crown captured some of the significant issues in a couple of

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26 Cap 7A, 1994 Rev Ed Sing.

27 Substantially published as Andrew Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990).

28 *Supra* note 21.

articles.[29] Sook Yee addressed the law of public housing earnestly and seriously.[30] Several years later, Hang Wu turned the spotlight on the rejection of equity and trusts in the law of public housing.[31] These illuminations, however, were hardly forays. Perhaps because these statutory laws have worked well, there has been little deep and sustained interest in the pension fund trust and little examination of that trust for lessons beneficial to the CPF. One suspects there might have been a certain reserve in scrutinising novel legislative innovations utilising existing paradigms. It is easy to underestimate the power and value of change that seems to go against the familiar legal grain. For the sake of balance, the Torrens story deserves to be told here, not only in an account of land law. Not all legislative innovations escaped academic scrutiny. Of all statutes, the Torrens innovation has attracted the highest number of research articles contributed by faculty members, then and now.[32] Barry Crown[33] and Sook Yee[34] weighed in then.[35] Then following the decision in *United Overseas Bank Ltd v Bebe bte Mohammad*,[36] a second wave of writings by Barry Crown,[37] Kelvin Low,[38] Hang Wu,[39] and Teo Keang Sood[40] emerged. I shall skate over the *en bloc* collective sale innovations (and the '*Horizon Towers*' spate of cases[41]) and simply observe a contrast. Where there was less common law foliage in the subject matter of equitable 'intervention', there was less distraction; and thus, the role of equity and trusts in commercial innovations did not suffer from inattention or distraction.

In short, the beginnings of a distinctive research culture can be traced to the wake of the critical phase. It was not the product of any concerted drive, not the result of any Russian-style five-year plan identifying research priorities and strategic perspectives on establishing peaks of excellence. It has had no geographical focus, no prominent facility associated with it such as a centre devoted to equity and trusts. Rather it was

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29 Barry C Crown, "Death and the Central Provident Fund Revisited: Chai Choon Yong v. Central Provident Fund Board" [2005] Sing JLS 426; Barry C Crown, "Death and the Central Provident Fund: Legislative Intervention: Central Provident Fund (Amendment) Act 2006, Section 12" [2007] Sing JLS 138.

30 Tan Sook Yee, *Private Ownership of Public Housing in Singapore* (Singapore: Times Academic Press, 1998).

31 Tang Hang Wu, "Housing and Development Board Flats, Trust and Other Equitable Doctrines" (2012) 24:2 Sing Ac LJ 470.

32 Possibly sharing the honours with s 300(c) of the *Penal Code* (Cap 224, 2008 Rev Ed Sing).

33 Barry C Crown, "Equity Trumps the Torrens System: Ho Kon Kim v Lim Gek Kim Betsy" [2002] Sing JLS 409; Barry C Crown, "Back to Basics: Indefeasibility of Title under the Torrens System: United Overseas Bank Ltd. v. Bebe bte Mohammad" [2007] Sing JLS 117.

34 Tan Sook Yee, *Principles of Singapore Land Law*, 2d ed (Singapore: Butterworths Asia, 2001) ch 14.

35 After a long hiatus if one considers that the first scholarly treatment was D Jackson, "Equity and the Torrens System: Statutory and Other Interests" (1964) 6:1 Mal L Rev 146.

36 [2006] 4 SLR (R) 884 (CA) [*United Overseas Bank*].

37 Barry C Crown, "Whither Torrens Title in Singapore?" (2010) 22 Sing Ac LJ 9.

38 Kelvin FK Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161; Kelvin FK Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities" (2009) 33:1 Melbourne UL Rev 205.

39 Tang Hang Wu, "Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility" (2008) 32:2 Melbourne UL Rev 672.

40 Teo Keang Sood, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System" [2017] Sing JLS 151.

41 See *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2009] 3 SLR (R) 109 (CA) [*Ng Eng Ghee*].

the organic culmination of a loose collocation of equity-friendly research interests, respectful of diversity and bound together by some ethos about contributing to change and development. The Law School's library must be an unsung hero of those times. It was the jewel of the Law School. Even before it was clothed with an impressive façade and generous embellishments by a handsome gift from Mr CJ Koh, it was simply much more than a teaching library. It was generously endowed and whoever had charge of the acquisition policy was so far-sighted as to build up collections which gave the equity and trusts researcher as extensive an access as he or she could wish for. Before the age of the Internet, this was a priceless asset. Even the redoubtable Francis Reynolds who was accustomed to the riches of the Bodleian Library praised its collections. He remarked more than once that he was able to consult the Commercial Cases when he visited to teach contract law and other commercial subjects.

VIII. Conclusion

I began tracking the history of equity and trusts in the Law School by remarking that by reference to the number of alumni alone, the influence of equity and trusts indoctrination by the Law School would almost go without saying. Happily, there is ample evidence of more than just quantity. Within the Law School, Andrew Phang, Kee Bun, Tiong Min, Hang Wu, Kelvin Low were all alumni who made invaluable contributions. The profession is something of a nameless community; for advocates are heard not seen and legal advisers sworn to confidentiality must be neither seen nor heard. Still there was Mr TPB Menon, alumnus and acknowledged doyen of trust practitioners. As Hang Wu remarked to me, he in his time probably drafted more trust deeds than many firms over several lifetimes. Doubtless for many the telling indicator of the Law School's dominance in the home jurisdiction will be found in the defining decisions of the members of the judiciary who are alumni. As was said, in *United Overseas Bank*,[42] Chan Sek Keong CJ, as he then was, finally gave the Torrens legislation its distinctive pride of place, distancing it from its Australian counterpart. In *Bermuda Trust (Singapore) Ltd v Wee Richard*,[43] Judith Prakash J, as she then was, validated the local *Sinchew* bequest, undaunted by English judicial sentiments or reservations about such trusts being concessions to human sentiment or superstitious uses. In *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd*,[44] Sundaresh Menon JC, as he then was, had, after adopting the modern approach to proprietary estoppel, no hesitation extending its flexible notion of satisfying the equities to a developer's promise to grant a whole floor of a tower development if the builder would continue the erection works to completion. Concerned that clarity was urgent in the field of jointly acquired property for joint occupation, VK Rajah JA in *Lau Siew Kim*[45] finally placed the presumption of advancement on the footing of a conventional norm, refusing to sign its death warrant. In that same judgment, he resisted the call to marginalise the resulting trust solution. In his 'swan song' judgment in *Chan Yuen Lan v See Fong Mun*,[46] he responded to criticisms of *Lau Siew*

42 *Supra* note 36.
43 [1998] 3 SLR (R) 938 (HC).
44 [2007] 1 SLR (R) 292 (HC).
45 *Supra* note 2.
46 [2014] 3 SLR 1048 (CA).

Kim, affirmed that the resulting trust solution was neither obsolete nor inappropriate, and decided that Singapore's common intention constructive trust would not be a free fall solution replacing the resulting trust. In a judgment rendered in between, which was earlier mentioned, he held that members of an *en bloc* sale committee were akin to trustees. They owed a duty of conscientiousness which was above and beyond their duty of care to obtain the best price for the *en bloc* sale. That was the '*Horizon Towers*' case.[47] In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased)*,[48] Andrew Phang JA refused to blur the lines between the remedial constructive trust and knowing receipt liability, rejecting the notion of unconscionability as an unjust factor in the law of restitution for unjust enrichment. I have referred to some notable judgments delivered by named alumni. If one adds the defining cases decided by the *coram* comprising Chao Hick Tin JA (non-alumnus), Andrew Phang JA and VK Rajah JA, the list will go on. Leaving aside several cases on specific performance, it must at any rate include the significant contributions in the charitable trust case of *Khoo Jeffrey v Life Bible-Presbyterian Church*[49] where untroubled by concerns of non-justiciability of religious differences (in terms which would resonate with the analysis of the United Kingdom Supreme Court in *Shergill v Khaira*[50]), the court examined the doctrines in dispute and gave judgment to the Far Eastern Bible College.

Any further account than that I have given of the case law will fill many more pages than allowed to me. I shall end this account of 60 years of excavation with a bit of prospecting into the future of equity and trusts in the Law School. As the second decade of the 21st century draws to a close, no one looking at the scene will miss the richness of the research and teaching menu. The strict lines of historical precedent, and the framework of orthodox historical parameters having fallen away, equity and trusts is like a wooden vase returned to the lathe to be refashioned according to diverse agendas. In particular, theoretical overtures look set to march on relentlessly. Theoretical analyses of loyalty now clamour for attention alongside policy-heavy orientations. Not to be missed is the pragmatic commercialisation of equity and trusts alongside theorisation. I think we have yet to see how the theorisation of equity and trusts and pragmatism will pan out. Of course equity and trusts lends itself to theorisation. The reverse order works for equity and trusts; so while orthodox common law proceeds upwards, equity and trusts descends from the general to the particular. If this is right, then we shall continue to be rational in teaching a separate course on equity and trusts. Further, if theorisation works, we shall expect to be able to accomplish a hitherto unachievable goal, going beyond application of the rules, of being able to teach students how to define and frame equitable problems. Pragmatism's voice will not be outdone in all this. Equity and trusts research should never be isolationist. Its cross-cutting character forces cross-perspectives. It will have to stay relevant to evolving business needs.

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47 *Ng Eng Ghee*, *supra* note 41.
48 [2013] 3 SLR 801 (CA).
49 [2011] 3 SLR 500 (CA).
50 [2015] AC 359 (SC).