An Introduction to Trust Law in Singapore

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1. Characteristics of Singapore Trust Law[1]

1.1 Creation of a Trust

Singapore, being a former British colony, inherited the common law legal system. One of the unique features of the common law model is the dualism which is inherent in the legal system. Common law legal systems are largely precedent-based and the precedents can be divided roughly by their origins, namely, Law and Equity. Equity may be defined as a body of rules, principles and remedies initially developed and administered in the English High Court of Chancery before 1873. Both branches of the law are historically distinct although both are now administered by the same courts concurrently (see section 3 of the Civil Law Act (Cap 43, 1994 Revised Ed.) and section 26 of the Subordinate Courts Act (Cap 321, 2007 Revised Ed.)). Another unique feature of the Singapore system is that *syariah* law applies to Muslims domiciled in Singapore with regard to their inheritance (see section 111 of the Administration of Muslim Law Act (Cap 3, 2009 Revised Ed)). Thus, it is possible for Muslims domiciled in Singapore to create Muslim charitable trusts i.e. a *wakaf* in their wills. All *wakafs* are administered by the Islamic Council of Singapore (*Majlis Ugama Islam Singapura*). This paper will not explicate the principles governing *wakafs*.

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1 Some parts of this paper are adapted from the Equity and Trusts chapter written by the author on www.singaporelaw.sg

One of the unique features of the common law system is the existence of a dual ownership of property. Ownership of property can be divided into the following: a legal interest and an equitable interest. A legal interest is enforceable against the whole world while an equitable interest is enforceable against the whole world except for the bona fide purchaser for value without notice. For example, where the property is held on trust, a trustee holds the legal title of the trust property, whereas the beneficiary has the equitable interest in the trust property. It must be noted that in matters of priority, the position might be decided by the relevant statute e.g. the Land Titles Act (Cap 157, 2004 Revised Ed.) will govern issues of priority with regard to registered land. The duality of property ownership also enables the creation of security interests such as mortgages, floating charges and fixed charges. Usually in these security interests, the debtor is the legal owner whereas the creditor is the equitable owner of the property. The equitable ownership can be asserted as a proprietary claim if the debtor becomes insolvent. It must be noted that some security interests must be perfected under the relevant statutory regime (see e.g. Companies Act (Cap 50B, 2006 Revised Ed.)).

This paper concentrates on the express trust. An express trust is a trust which is expressly created to achieve certain desired consequences. The usual pattern of an express trust is as follows: a settlor transfers trust property to the trustee on trust for the beneficiaries and specifies the terms of the trust. A settlor may also declare himself or herself to be a trustee for the beneficiaries.

1.1.1 Elements of a Valid Express Trust

The initial transfer of the trust property must comply with relevant formalities (e.g. see section 7 of the Civil Law Act (Cap 43, 1999 Revised Ed)) which requires a trust in respect of immovable property to be manifested and proved in writing signed by some person who is able to declare such trust. Apart from real property, there are no formalities associated with the declaration of an express trust. In order to be considered a validly constituted trust, the `three certainties´ must be met (see *Joshua Steven v Joshua Deborah Steven and others* [2004] 4 SLR(R) 216 at [12]). First, the intention of the settlor to create the trust must be certain. Second, the identity of the trust property must be certain. Finally, the identity of the beneficiaries must be defined with some precision.

With regard to certainty of intention, it is not necessary to use the word "trust" to settle a trust. Rather, the focus of the inquiry is "whether it was possible and appropriate to infer an intention to create a trust by looking at evidence not only of the alleged settlor's words and conduct, but also of the surrounding circumstances and the interpretation of any agreements that might have been entered into" (per Menon CJ in *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [58]).

The issue surrounding certainty of subject matter revolves around the question whether the subject matter of the trust is defined with sufficient clarity. For example, a trust fails if a settlor declares a trust over a 'bulk' of his or her estate. Such a trust is not valid because the subject matter is not described with sufficient certainty and the court would not be able to enforce the trust. A trust over future property is also regarded as invalid. Future property is property which the settlor does not presently own but property which the settlor hopes he or she will own in future. An illustration of future property is property which the settlor may inherit in future. Thus, if a person purports to declare a trust for certain beneficiaries over property which he or she may inherit from his or her parents, this is not regarded as binding on the person as there is no certainty of subject matter. This means that even if the person actually inherits the property in future, he or she is not obligated to settle the property on trust. The fact that it is not possible to create a trust over future property does not mean that the settlor may not transfer further property into the trust after the trust has been created. It is quite common for a trust to be declared over an initially nominal sum. Further transfers of property will then be made from the settlor to the trustee.

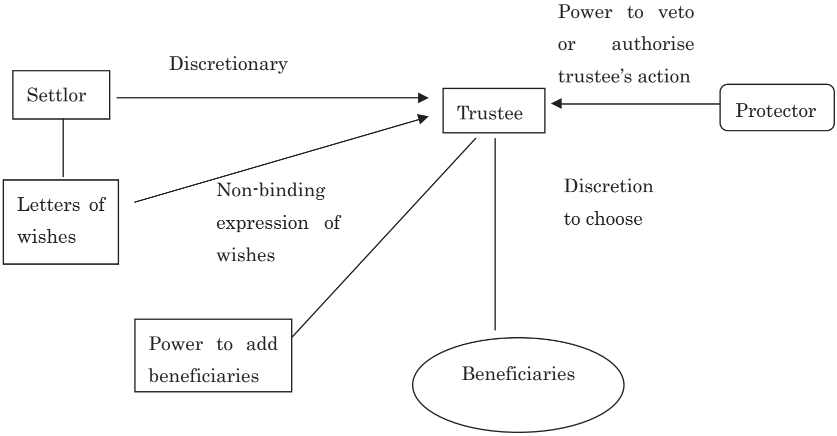
With the exception of a charitable trust, the general rule with regard to certainty of objects means that a trust must be declared for the benefit of identifiable legal persons. In Singapore, it is possible to declare a trust where the beneficiary is a company (see ***Goi Wang Firn (Ni Wan-fen) and others v Chee Kow Ngee Sing (Pte) Ltd*** [2015] 1 SLR 1049).

A trust may be created by a contract between the settlor and the trustee. In Singapore, this is the common arrangement between settlors and professional trustees.

An express trust may be a fixed or discretionary trust. A fixed trust is a trust where the shares of the beneficiaries are fixed from the outset. In contrast, a discretionary trust is a trust where the potential beneficiaries and their shares are not fixed. Instead, the trustee is given the discretion to decide on potential beneficiaries and their shares. A typical discretionary trust confers on the trustee a wide power of selecting potential beneficiaries from anyone in the world and the discretion to determine the amount to be paid to each beneficiary. This power of appointment may be drafted as a general power, special power or hybrid power. A general power of appointment allows the donee to appoint anyone he or she wishes. In contrast, a special power authorizes the donee to exercise his or her discretion in favour of a defined class of persons. Finally, hybrid powers are powers which entitle the donee to appoint anyone in the world except members of a specified class. In addition, the settlor might wish to include a protector i.e. a third party who will have a role in the administration of the trust. Typically, the protector is given the power to veto or authorise a trustee's action in certain matters. A pictorial representation of the discretionary trust is shown below in Figure 1.

A common reason why a settlor might wish to declare a discretionary trust is that such a trust is able to cater to the settlor's change of circumstances such as divorce, the addition of new family members etc. If the class of beneficiaries is drafted widely enough, the settlor might even be regarded as a potential beneficiary through an exercise of the trustee's discretion. In addition to these benefits, the settlor may also

Figure 1



inform the trustee of his wishes from time to time through a letter of wishes as to the appointment of beneficiaries. Although the letter of wishes is often drafted as being non-binding, the settlor's wish is certainly a factor which the trustee may legitimately take into account in exercising his or her discretion. Thus, the letter of wishes gives the settlor a degree of influence over the trustee's exercise of discretion in the appointment of the beneficiaries. Due to its inherent flexibility, the discretionary trust is a popular method of wealth transmission for high-net worth individuals.

1.1.2 Creation of Trust by Will

Besides a lifetime declaration, a trust may also be created by a will as long as it complies with the Wills Act (Cap 352, 1996 Revised Ed.). There are reported cases in Singapore where a trust is created by a will (see e.g. *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339).

1.1.3 Declaration of Trust (Self-Trust)

While it is more common to ask a third party to be a trustee, it is also possible for the settlor to be the trustee for the beneficiaries of the trust. Outside real property, there are no formalities associated with a declaration of a trust. For settlors who wish to protect their assets, it is more common to use a discretionary trust and appoint a third party to be the trustee. Under a discretionary trust, it is possible for the settlor to be a potential beneficiary depending on the wording of the trust deed. However, if the settlor is meant to be the primary beneficiary, then the trust may be subject to attack by the settlor's creditors or divorcing spouse (see HW Tang, "An Impregnable Fortress? Possible Attacks on the Singapore Trust?" (2011) 25 Trust Law International 66).

1.2 Fundamental Structure of a Trust

1.2.1 Trust Property Legally Separated from Trustee's Individual Property

A trust is not regarded as a separate legal entity. However, the conventional understanding is that once a trust is declared over property, title to the property is split into legal and equitable title. The trustee holds the legal title while the beneficiaries hold the beneficial title. Therefore, the personal creditors of the trustee are not entitled to reach the trust property to satisfy the personal claims of the trustee. There is no requirement for trust property to be registered as trust property.

1.2.2 Beneficial Interest and its Nature

The nature of beneficial interest under a trust is still a debated concept. A recent English textbook has helpfully summarized the four different ways to conceptualise the beneficial interest in a trust (see G. Virgo, *The Principles of Equity and Trusts*, (OUP, 2012), 51-57). This is a much debated issue and it is only possible to present an outline of the arguments here. First, the beneficial interest is characterized as a right *in rem*. However, it has been pointed out that the *in rem* model is inconsistent with the fact that the beneficial interest under a trust is not good against the whole world. It is an axiomatic principle that an equitable interest is only good against the whole world except for the *bona fide* purchaser for value without notice. Second, the beneficiary's equitable rights have been regarded as personal (*in personam*) rights against the trustee. The difficulty with this approach is that it does not provide an explanatory force as to why the beneficial interest is capable of binding third parties who are not good faith purchasers. Third, some scholars have argued the beneficial interest is a right against rights (see B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1). In other words, the beneficial interest describes the beneficiary's rights against the trustee's right of ownership. It is said that this right against rights model explains why the beneficiary's rights bind third parties. When the property is transferred to a third party who is not a good faith purchaser, the beneficiary continues to assert a right against the third party's right of ownership. The main weakness with this model is that the case law has never used the language of a right against rights. Finally, the beneficial interest is seen as a unique form of proprietary right. It is a lesser right as compared to a fully-fledged *in rem* right because it does not defeat *all* third party interests i.e. a beneficial interest is defeated by a bona fide purchaser for value without notice.

1.3 Administration of Trust

1.3.1 Trustee's Power

1.3.1.1 Trustee's Power in General

The trustee's power is derived from the trust deed. Certain powers are also found in the Trustee Act (Cap 337, 2005 Revised Edition). The trustee may be empowered under the trust deed to decide as to when to sell the trust property. However, the courts may intervene with the decision not to sell the trust property in appropriate circumstances where the trustee has ignored relevant considerations and taken on board irrelevant considerations (see *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339).

1.3.1.2 Delegation of Trustee's Power to a Third Party

Under section 27 of the Trustee Act (Cap 337, 2005 Revised Ed.), a trustee may by power of attorney delegate his or her power to a third party. Such a delegation may continue for a period of 18 months or any shorter period provided by the instrument creating the power. The delegation permitted by section 27 is to accommodate trustees when they are unable to perform his or her duties for a period of not more than 18 months. An illustration of such a situation is when the trustee is abroad for a short period of time. Section 27 of the Trustee Act (Cap 337, 2005 Revised Edition) is almost identical to section 25 of the English Trustee Act 1925.

1.3.2 Trustee's Duties

1.3.2.1 Duty of Loyalty and Conflict of Interest

A trustee is a fiduciary of the beneficiary. It has been said the 'standard of duty imposed by law on a fiduciary is the highest standard known to the law. It is a duty to act for someone else's benefit by sacrificing one's own personal interest to that of the other. If the fiduciary is not prepared to make such sacrifice he will never be able to protect and advance the interest of the other. Selfishness is the antithesis of selflessness. The office of a fiduciary is founded on selflessness. Selfishness is absolutely prohibited' (per GP Selvam in *Kumagai-Zenecon Construction Pte Ltd and Another v Low Hua Kin* [1999] 3 SLR(R) 1049 at [13]; upheld by the Court of Appeal in *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation)* and another [2000] 2 SLR(R) 529). Thus, a fiduciary has a duty not to put himself or herself in a position of conflict of interests, not to misuse trust property and confidential information, and not to make an unauthorised profit by reason of his position as a fiduciary. It has been suggested that the test of "mere possibility" of conflict is the preferable test in Singapore (per Rajah JA in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109). The remedies against a fiduciary who makes an unauthorised profit may be personal or proprietary. A fiduciary may in appropriate circumstances be made to account for an unauthorised profit or to hold a property acquired in breach of a fiduciary duty on a constructive trust for the plaintiff. Furthermore, a fiduciary may be ordered to make equitable compensation to the principal for losses suffered.

A trustee is not allowed to engage in self-dealing i.e. to purchase trust property or sell his or her property to the trust. Such a transaction would be voidable due to the inherent conflict of interest because the trustee acts as both the vendor and purchaser. The law is less strict when it comes to a beneficiary selling his or her interest in trust property to the trustee. Such a transaction is not set aside automatically at the beneficiary's option. Instead, such a transaction is allowed to stand if the trustee can demonstrate that he or she has not taken advantage of the beneficiary, disclosed all relevant information to the beneficiary and the price was fair.

1.3.2.2 Duty of Care

Not all breaches of duties by trustees are necessarily breaches of fiduciary obligations. A breach of fiduciary duty must be distinguished from mere incompetence. The latter does not attract equitable rules but is governed by tort principles. In other words, a breach of duty care would attract a remedy whereby the trustee must compensate the beneficiary for his or her loss instead of an account of profits or a declaration of a constructive trust. Although there is no direct case law in point in Singapore, it is likely that it is possible to exempt a trustee's liability for a duty of skill and care. Only fundamental duties of a trustee may not be excluded. Such fundamental duties include the duty to carry out the trust honestly and in good faith.

1.3.3 Expenses of Trust Administration

A trustee is in a different position from an agent because a trustee acts as principal in connection with the administration of the trust and incurs personal liabilities to the creditors. Where a trustee incurs a liability towards a creditor in the proper discharge of the trust, the trustee is entitled to an indemnity out of the trust property to meet that liability. There are two types of a trustee's indemnity－a right to be indemnified out of the trust property and a personal indemnity against the beneficiary which extends beyond the trust assets (see *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123). The existence of the personal right of indemnity against the beneficiary is somewhat controversial (the debate is summarized in R. Flannigan, “Trust or Agency: Beneficiary Liability and the Wise Old Birds” in *Equity and Contemporary Legal Developments*, (S. Goldstein, ed), (Hebrew University, 1992), 275). The right to be indemnified out of the trust property is effected by a lien or charge over the trust property and confers an equitable interest in the trust fund to the extent of the amount of the liability. Hence, the trustee’s right of indemnity takes priority over claims of any beneficiary.

1.4 Beneficiary

1.4.1 The Nature of the Beneficial Interest (Already Explained Above)

1.4.2 Acquisition of Beneficial Interest

In a fixed trust, where the beneficiaries are fixed from the outset, the beneficial interest is acquired once the trust is properly constituted. This means that the beneficiaries would obtain a beneficial interest once the three certainties are satisfied (certainty of intention, subject matter and objects). However, in a discretionary trust where the shares are dependent on the exercise of the trustee’s discretion, a potential beneficiary does not acquire a beneficial interest until the trustee exercises his or her discretion. Up until the time of the exercise of the trustee’s discretion, the potential beneficiary merely has a hope or *spes* of acquiring a beneficial interest.

It is possible to stipulate in a trust deed that a particular beneficiary enjoys a life interest and the remainder to another beneficiary. Non-charitable trusts are subject to the perpetuity rule. This means that the trust will only be valid if it is vested in the beneficiaries within the perpetuity period. The perpetuity period in Singapore is 100 years. Thus, if a settlor declares a trust for the benefit of A, A’s first born and

A's first born grandchild, the trust will only be valid if it vested in each person within the perpetuity period.

1.4.3 Trust Administrator, Trust Supervisor, Agent of the Beneficiary

In Singapore, there is no concept of trust administrator, trust supervisor and beneficiary's agent.

1.5 Termination of a Trust

For a fixed trust, a trust may be terminated by all the beneficiaries if they are of full age, under no disability and absolutely entitled under the trust (see *Saunders v Vautier* (1841) 4 Beav 115). This rule probably does not apply in the context of a discretionary trust.

1.6 Special Types of Trust

1.6.1 Trust without Beneficiaries

Singapore follows the English law position that a non-charitable purpose trust is generally regarded as void. There are several exceptions to this rule. The most well-known case being the *Re Denley* [1969] 1 Ch 373 trust (discussed in *Goi Wang Firn (Ni Wanfen) and others v Chee Kow Ngee Sing (Pte) Ltd* [2015] 1 SLR 1049). *Re Denley* was a trust over land to be "maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company". Goff J upheld the trust and said: "[w]here, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle".

However, there are some exceptions to the rule that a non-charitable purpose trust is invalid. Notable exceptions include trusts for the maintenance of animals, trusts for maintenance of monuments and graves and trusts for the performance of certain religious rites provided they do not offend the rule against the perpetuities. For example, a trust for the performance of Sin Chew rites in the memory of settlor was upheld (*see In The Matter of The Estate of Khoo Cheng Teow, Deceased* [1932] SSLR 12). However, trusts for the performance of Sin Chew rites are rare these days. There is one case where the court had to terminate the trust because all the children had become Christians and refused to perform the Sin Chew rites (*see Bermuda Trusts (Singapore) Ltd v Wee Richard and others* [1998] 3 SLR(R) 938).

1.6.2 Charitable Trust

A charitable trust is exempt from the beneficiary principle and the rule against perpetuity (on charities see generally R. Leow, “Four Misconceptions about Charity Law in Singapore” [2012] 1 SJLS 37). The method of creation of a charitable trust is similar to a non-charitable trust. A charitable trust is subject to governance by the Commissioner of Charities and Charities Act (Cap 37, 2007 Revised Edition). In modern times, it is increasingly common to structure a charity by way of a company limited by guarantee instead of declaring a charitable trust.

2. Trust Business in Singapore

2.1 License for Trust Business

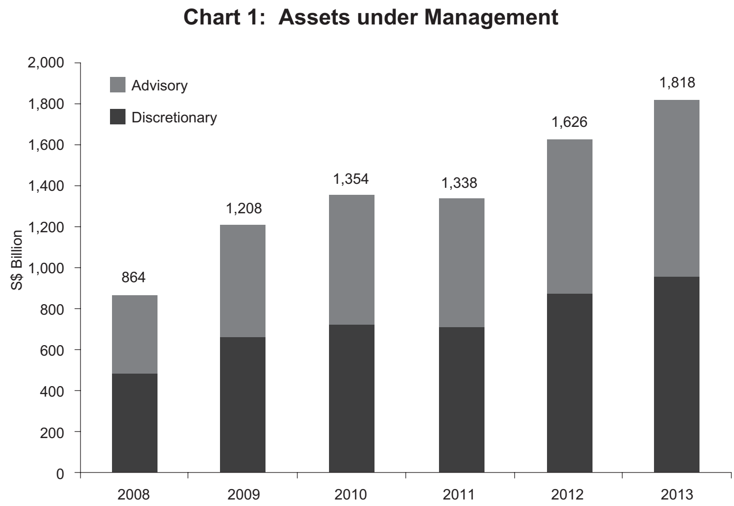
In order to carry out trust business in Singapore, a company must be a licensed trust company (see Trust Companies Act, Cap 336, 2006 Revised Ed.). The licensing regime is governed by the Monetary Authority of Singapore. Banks which are licensed under the Banking Act (Cap 19, 2008 Revised Ed.) are also entitled to carry out trust business in Singapore.

2.2 Commercial Trusts and Trusts in Wealth Management

Singapore is one of the leading preferred places of residence for high net worth individuals in Asia. The Monetary Authority of Singapore reports that assets under management in Singapore have grown from S$ 864 billion dollars in 2008 to S$ 1.8 trillion dollars in 2013. A breakdown of these figures is shown in Figure 2 below. Although the Monetary Authority of Singapore’s report does not give a precise break-

Figure 2

ASSETS UNDER MANAGEMENT("AUM")



down of the proportion of these assets which fall within the ambit of private client business, these figures certainly suggest the emergence of Singapore as a major wealth management centre in Asia. Indeed, the fact that many international banks and trust companies and Singapore banks have set up specialized private banking arms in recent years is a testament to the rapid growth of the business of wealth management in Singapore.

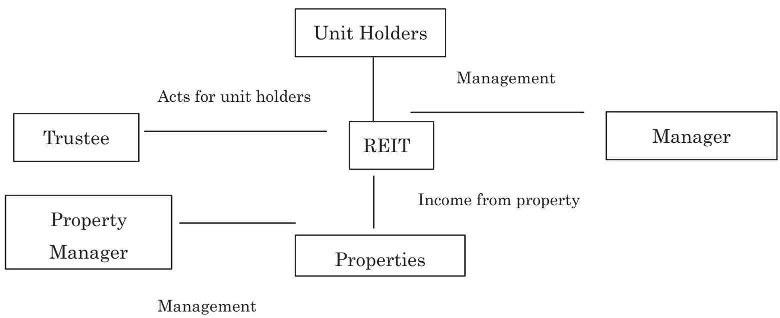
There are several anecdotal reasons to account for Singapore's recent emergence as a major wealth management centre in Asia. These include a combination of legal and non-legal factors. From the legal perspective, Singapore's comparative low income tax (the maximum income tax rate in Singapore is 22 % for income above S$ 320,000 for the year of 2017 onwards), comparatively liberal immigration policies for high net worth individuals and the relatively few legal restrictions on foreigners purchasing Singapore property make the country an attractive place of residence. Further, the existence of strict banking and trust secrecy laws coupled with amendments to Singapore's trust laws ensure that the needs of these high net worth individuals are protected especially with regard to privacy considerations. The favourable legal regime coupled with non-legal factors such as the existence of a multitude of excellent international schools, good air quality, low crime rate and stable political environment render Singapore to be a popular choice of residence for high net worth individuals especially those with school going children.

The trust is used in both in wealth management and in business. In the sections below, I will elaborate on the Real Estate Investment Trust, Business Trust and the Special Needs Trust Company.

2.3 The Real Estate Investment Trust

Singapore is a major centre for the listing of the Real Estate Investment Trust (REIT) (see generally J. Koh, "Singapore Chapter" in *Real Estate Investment Trusts*, (Globe Business Publishing, 2006), (Booth and Boyle, eds), 175). Singapore was one of the earliest Asian jurisdictions to change its regulatory framework and tax incentives in 1999/2000 in order to encourage the listing of the REITs. The REIT market in Singapore has been nothing short of phenomenal. Currently, there are 28 REITs and six stapled trusts listed on Singapore Exchange, with a combined market capitalisation of S$66.7 billion. The following diagram in Figure 3 explains the REIT:

Figure 3



Essentially, the REIT involves large real estate like shopping complexes, factories, hotels or hospitals which are settled on trust and sold to investors. The owner of these properties would sell the property to a REIT; shares or beneficial units in the REIT would then be sold to investors who hold shares or beneficial units in the REIT as unit holders.

Income generated from these properties (e.g. rental income) would eventually be paid to the unit holders after paying off the various fees involved in running the REIT. The REIT is usually managed by a trustee and a manager while the underlying property would be managed by a property manager. For listed REITs, this is subject to listing requirements prescribed by the Singapore Stock Exchange.

Why would property owners want to divest their property into the REIT structure? There are several commercial advantages to the owner in divesting the property to a REIT. First, the owner eliminates the property holding costs of a large piece of real estate by selling it to the REIT. In other words, the REIT removes the following risks for the owner: (i) fluctuating interest rates associated with borrowing costs; (ii) voids in rental; and (iii) potential falls in the value of the property. Second, a related point is that by divesting the property, the REIT frees up valuable capital to the owner which can be used more profitably elsewhere. This is especially vital for property owners who have many building projects in markets like India and China. Thus, a successful owner can build a commercial property, divest it into a REIT structure and move on to the next building project. Third, the REIT also overcomes the difficulties in locating suitable institutional investors to purchase the property. Many of the properties managed by REITs are worth hundreds of millions of dollars. As such, it may not be so easy to find large institutional investors who have the financial muscle to purchase the properties. Furthermore, negotiations for the purchase of such properties may be unduly protracted. In contrast, the REIT is not sold to a single institutional investor but to members of the public via the unit holding structure. Therefore, it could be easier to structure a REIT than to actually sell the property to an institutional investor.

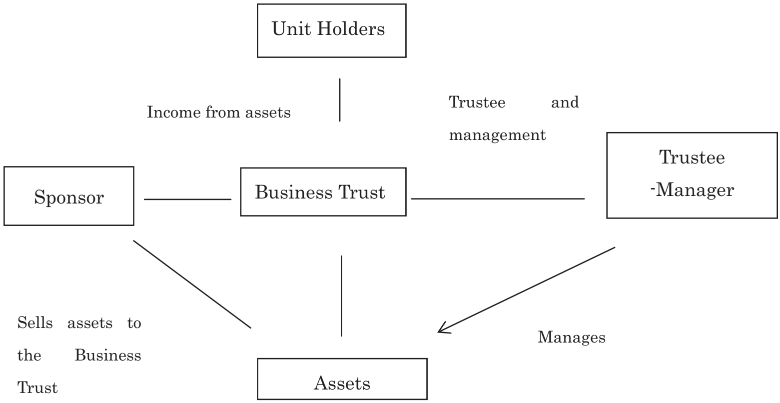
Finally, the REIT assures the owner a steady stream of income even after the property is transferred to the REIT. Usually, the owner or its subsidiary company remains as the management company or property manager. Fees are payable to the owner or its subsidiary company for playing this role. It could be argued that these fees represent an income that is 'locked in' free from the risk associated with ownership of the property. Correspondingly, why would a unit holder wish to invest in the REIT? First, the REIT allows the individual investors to invest in a diversified property portfolio. Second, there are sometimes tax advantages in investing in a REIT. And finally, before the economic crisis, the returns on the REIT have been generally quite favourable.

2.4 The Singapore Business Trust

Eager to repeat the success of the REIT, Singapore's authorities changed its laws to facilitate the listing of other assets to accommodate businesses which manage non-real estate assets. Since the REIT only deals with real estate or real estate related assets, it is conceptually difficult to structure other income generating assets such as ships and infrastructure projects as a REIT. The business trust appears to be a logical extension of the REIT due to the fact that the business trust can accommodate various kinds of assets. The business trust was introduced to create a new asset class for investors, and potentially add depth and sophistication to Singapore's capital markets. As such, the Business Trusts Act (Cap 31A, 2005 Revised Ed.) was enacted in October 2004 after a consultation paper was published seeking views of various stakeholders in Singapore.

A simplified pictorial representation of the Singapore Business Trust is shown in the Figure 4 below. In order to structure a Singapore Business Trust, the sponsor would transfer income generating assets to the trustee-manager for a consideration which would be raised from the unitholders. Thus, the unitholders own a proportionate share of the underlying assets and a corresponding share in the returns generated. The trustee-manager would manage the assets and income generated

Figure 4



from the assets would be distributed to the unitholders after paying off the trustee-manager's fees.

It can be argued that the Singapore Business Trust is essentially an orthodox trust where legal and beneficial interests are split between the trustee-manager and the unitholders. In other words, the trustee holds the legal interest in the underlying assets whereas the unitholders hold the equitable interest. Therefore, conceptually there is no distinction between orthodox trust principles and the Singapore Business Trust. The main difference between a traditional trust and the Singapore Business Trust lies essentially in the ***purpose*** in which the trust is constituted. The traditional form of trust is usually constituted as a form of gratuitous transfer whereas the Singapore Business Trust is constituted primarily to manage an income generating asset for the purpose of generating returns for the unitholders. The traditional trust normally involves the following scenarios. The settlor will transfer property to a trustee to manage the asset for the benefit of certain named beneficiaries or a discretionary class of beneficiaries. Alternatively, the settlor may declare himself or herself as the trustee for certain beneficiaries or a discretionary class of beneficiaries. Once the trust is constituted, the trustee will have the duty to manage the assets in order to bring in the best possible returns for the beneficiaries according to the standard of the prudent man of business test. In contrast, the Singapore Business Trust is constituted primarily for a profit making purpose. The sponsor would transfer certain assets to the trustee for consideration and units representing shares in the beneficial ownership in the trust property of the business trust will be offered to members of the public. Thus, the primary objective of the Singapore Business Trust is not a gratuitous transfer of property but a profit making venture utilizing funds raised from members of the public. Since there is the added element of raising funds from members of the public, the Business Trusts Act provides the main regulatory and governance framework in setting up the fundamental rights of the unitholders and the duties and accountability of the trustee-manager companies and the directors who sit on these companies. These duties are explored elsewhere (see HW Tang, "The Resurgence of "Uncorporation": The Business Trust in Singapore" (2012) Journal of Business Law 683). One major difference between the Singapore Business trust and the orthodox trust is the extent of liability of the beneficiaries. Section 32 of the Business Trusts Act explicitly provides that a unitholder's liability is only limited to the amount which the unitholder expressly agreed to contribute to the Business Trust. This limitation of liability shall apply notwithstanding any provision to the contrary in the trust deed or in the event of the winding up of the Singapore Business Trust. Section 32 of the Business Trusts Act is an extremely important provision because it effectively limits the unitholders' liability. Therefore, even though the Singapore Business Trust is not a separate legal entity, the liability of the unitholders is limited by reason of the statute.

Having outlined the basic features of the Singapore Business Trust, the question is this: what is the attraction of the Singapore Business Trust as an organization structure over the company? First, the Singapore Business Trust allows the trust to pay returns to the unitholders from its cash profits. In contrast, a company can only pay dividends out of its accounting profits i.e. non-cash expenses such as depreciation must be taken into consideration. Therefore, the Singapore Business Trust is particularly suited to manage income generating assets with high levels of depreciation. Second, the Business Trusts Act prescribes an onerous threshold before a trustee-manager may be changed. Section 20 of the Business Trusts Act provides that a trustee-manager may be removed by the unitholders only by a resolution approved by not less than three-fourths of the voting rights of all the unitholders who are entitled to vote in person or where proxies are allowed, by proxy present at a meeting of the unitholders of the registered business trust. A three-fourth majority at a meeting is not an easy figure to achieve and this provision makes it difficult for the unitholders to remove the trustee-manager. It may very well be that this particular feature makes the Singapore Business Trust attractive to the sponsoring entity. Since the sponsoring entity is likely to control the trustee-manager company by way of majority shareholding, a sponsoring entity may prevent the possibility of removal of the trustee-manager by retaining 25% of the units plus one. Finally, the Singapore Business Trust provides a very well-defined and understandable picture to potential investors on the investment portfolio of the business enterprise. For example, in a shipping trust, it is very clear to the investor that the business is essentially managing a particular fleet of ships owned by the Business Trust in order to obtain returns for the unitholders.

2.5 The Special Needs Trust Company

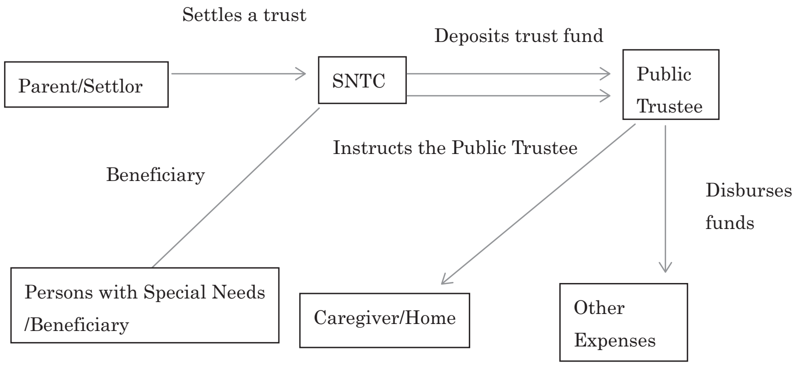
Parents with children with special needs often worry what will happen to their children after they pass away. Even if these parents are financially able to bequeath their child with a sizeable estate, there is the concern as to who should manage their estate for the benefit of the child. In Commonwealth jurisdictions where the trust exists, the obvious solution would be for the parents to settle a trust in favour of the child with special needs. However, this solution only gives rise to a whole host of further questions which may include: (i) who should be the trustee?; (ii) should a lay trustee be used or a professional trustee be engaged?; (iii) what are the fees associated with engaging a professional trustee?; and (iv) is the value of the estate sufficient to afford the fees of a professional trustee? Of course, the perennial fear of every parent in this situation is that a trustee may mismanage or embezzle the estate leaving the person with special needs impoverished when the parents are no longer around. Unlike other beneficiaries, a person with special needs does not have the ability to take the trustee to task if the estate is mismanaged or embezzled.

In Singapore, the concerns highlighted above have led to the setting up of a non-profit company called the Special Needs Trust Company ("SNTC"). Essentially, SNTC is a government funded non-profit charity which works with the Insolvency and Public Trustee's Office ("the Public Trustee") to hold and manage funds on trust for the benefit of persons with special needs. SNTC is subject to several layers of governance. First, SNTC as a company limited by guarantee is overseen by a board of directors. The current board of directors comprise of members from government, civil service, the medical profession, the legal profession and the business community. As such, SNTC is able to tap into the board of directors' expertise in various fields to deal with difficult issues which may arise from time to time. Second, SNTC as a registered charity is also overseen by the Commissioner of Charities. Third, since the government provides SNTC with funding, SNTC works closely with the Ministry of Social and Family Development in developing the trust scheme. Finally, the trust monies are not kept by SNTC but are actually deposited with the Public Trustee.

The basic idea is that the parents will develop a care plan and letter of intent before settling a trust account with SNTC. Monies settled into the trust account would be deposited with the Public Trustee who will manage the fund. As such, SNTC does not manage the investment aspects of the trust fund. The scheme is represented pictorially in Figure 5 below:

When the parents are no longer around, the trust is then activated. Under the care plan and letter of intent, the parents would have stipu-

Figure 5



lated how the money ought to be disbursed. For example, SNTC would disburse stipulated sums to the caregiver of persons with special needs, fees for their home (if they are staying in a home) and perhaps a monthly stipend to the persons with special needs if they are high functioning individuals. Of course, the letter of intent is stated to be not binding on SNTC and SNTC is able to depart from the letter of intent if it is in the beneficiary's best interest to do so. An illustration of this would be if the beneficiary requires funds for a medical emergency which is not provided in the letter of intent. In these circumstances, SNTC may depart from the letter of intent if SNTC is of the opinion that such medical treatment is in the best interest of the beneficiary.

Legally, this structure is easily achieved through settling a fixed trust where the person with special needs is named as the life beneficiary of the trust. With regard to potential surplus of the trust fund, the settlor would name people whom the surplus funds are to be distributed after the life beneficiary passes on. It is made clear in the trust deed that the persons entitled to the surplus are not regarded as beneficiaries of the trust. This alleviates SNTC from the burden of having to manage the trust fund while balancing the interest of a life interest and remainderman. Also, by stating explicitly that the funds are to be placed with the Public Trustee, SNTC is also freed from the tricky task of managing the investment of trust assets especially in a volatile and complex financial environment. These points are important because they lessen SNTC's litigation risk. SNTC also explains to the parents that this trust scheme is not meant to grow the asset through the modest interest rate provided by the Public Trustee. Instead, the scheme is meant to protect the asset for the benefit of the person with special needs.

There is no need for the parents to settle all their assets into the trust from the onset. After settling a trust with SNTC with a modest sum, the parents may provide the necessary bequest by Will to the relevant trust account. An example of how the special needs trust may be used is represented pictorially in the Figure 6 below.

Figure 6