Willoughby's Misplaced Trust, James Wadham, 2nd edn [Saffron Walden: Gostick Hall Publications, 2002, xxiv + 229 pp, paperback, HK$440, US$56]

Peter Willoughby's *Misplaced Trust*, published in 1999, is a powerful polemic against the modern trust that is commonly found in international tax planning and asset protection. Avid readers of the first edition would no doubt be delighted to find that the proud tradition started by Willoughby is now continued in the capable hands of James Wadham, in the form of the second edition of *Willoughby's Misplaced Trust*.

The main message of both editions of the book is clear: the integrity of the trust relationship rests on certain fundamental principles that cannot be lightly tampered with to suit the convenience of asset and tax planning. Accordingly, while each of the 12 chapters of the book focuses on a specific issue, they all seek to explain what can and cannot be done with the trust, and the dangers of ignoring the fundamental rules. In the interest of a full account of the book, a few brief words on each chapter are in order.

Chapter 1 discusses the sham doctrine; unlike in the first edition, this topic now takes up a separate chapter of its own. New decisions and useful articles are discussed and referred to, as well as important ones from the more distant past, such as *Re Sharrment Pty Ltd & Others*.[1] Chapter 2 deals with the distinction between the trust and other legal concepts. Crucial differences between trust and bailment, as well as trust and agency, are explained.

Chapter 3 is devoted to the essential criteria for establishing a trust. Without rendering this chapter a recitation of the basic principles of trusts law that are already explained in most treatises on the subject, the author rightly begins by setting forth 11 essential points[2] derived from Riddal's *The Law of Trusts*.[3] This allows adequate scope for the author to devote Chapters 3 through to 5 to addressing relevant case law and legal doctrines in the international trust context on the issue of validity.

For a reader from Hong Kong, the discussion of the controversial case of *Hunter v Moss*,[4] on certainty of subject matter, might be of some interest.[5] This is because a recent landmark decision of the Hong Kong Court of First Instance, *Re CA Pacific Finance Ltd (in liquidation) v Another*,[6] is precisely on point. The controversial issue in each case is whether it is of sufficient certainty of subject matter for a settlor to declare himself as trustee of a smaller number of a larger sum of shares (for example, 10 of 100 shares) currently

1 Bankruptcy No G348 of 1987.
2 At pp 27–29.
3 (London: Butterworths, 5th edn, 1996).
4 [1994] 3 All ER 215.
5 At pp 36–37.
6 [2000] 1 BCLC 494; [1999] 2 HKLRD 1.

held by him, or whether he needs to express it as a fraction of the larger part (for example, one-tenth). The supposed difference is that only the latter formulation can give rise to an equitable interest of one-tenth of each and every share held by the settlor, so that should some part of the settlor's shares be misappropriated it would not be necessary to decide which part was lost. The loss would simply be shared *pro rata* between the trust and the settlor.[7] *Hunter v Moss* held that as each unit of share is indistinguishable from the other, the former formulation is just as valid as the latter. This ruling was applied by Yuen J in *Re CA Pacific (No 1)*. Significantly, there is no controversy as to the validity of the latter formulation, that is, to identify the beneficial interest in terms of a fraction of the whole. In this light, it is doubtful if a settlement of "half my shares in Microsoft Corp" would fail for want of certainty of subject matter, as suggested by the author.[8]

While the first five chapters are concerned with the validity of the trust, the next four, Chapters 6 to 9, deal with issues arising from administration of trust, the duties and liabilities of professional trustees in advising and administering trusts, and the extent to which they could invoke exemption clauses to protect themselves. Of particular importance is Chapter 9, which discusses the potential liabilities open to trustees who act as so-called "nominee directors" of asset-holding companies or private trustee companies in typical trust structures. These directors normally purport to delegate their duties to other directors who are their clients' family members, without being aware that their duties as directors cannot be delegated and that they would be subject to the full range of directors' liabilities should any mishaps occur.

This is followed in Chapter 10 by a succinct discussion on the position of letters of wishes and protectors, and two final chapters (11 and 12) on issues arising from possible attacks against the trust by creditors and beneficiaries.

In light of this survey, the author should be commended for having given much thought to ensuring a coherent structure of the book, and not seeing his contribution merely in updating the first edition. One final issue for future editions might be the balance between the exposition of the law and the discussion of issues in non-technical language and in their practical context, keeping in mind that the readership is likely to include both lawyers and other professionals – accountants and trustees – involved in trust practice.

The present author has done an excellent job not just in continuing, but also in developing, a unique monograph bequeathed by a legendary academic cum practitioner. It should not be missed by anyone interested in the law of trusts.

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[7] *See* D. Hayton (1994) 110 LQR 335; but *see* Jones [1993] Conv 460; Martin [1996] Conv 223.
[8] At p 39.
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