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A Critical Study on whether the Single Asset Theory is Applicable in the Creation of Private Express Trust in Malaysia

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Abstract

The aim of this paper is to ascertain whether the single asset theory of Professor Goode is applicable in the context of Malaysia trust law. The said theory postulates that company shares of the same issue and class are a single asset that can only be co-owned. Separate ownership of the said shares is not possible. Essentially a doctrinal methodology is employed for this research. Primary sources of law include the Malaysian Companies Act 2016 and the latest common law of Malaysia and some commonwealth countries. Secondary sources of law taken into consideration include law journals published worldwide. The current law on certainty of subject matter in Malaysia pertaining to an unidentified portion of unascertained fungible shares requires only semantic certainty. This entails an accurate description of the purported trust property and its quantity. Precise identification of the shares held on trust is not required. The ensuing nature of proprietary holding of the beneficiary of the shares subject to a trust is that of separate property. The recent resurgence of the single asset theory seems to cast doubt on the current law on certainty of subject matter. The said theory postulates that company shares of the same issue are non-fungible units that can only be co-owned, namely separate ownership is not possible. If the theory is applicable in Malaysia, it would alter the current trust law on the requirement of certainty of subject matter. Identification of unascertained fungible shares subject to a trust would then be required to satisfy the requirement of certainty of subject matter. Such a conclusion means that traditional trust law which requires identification of shares subject to a trust becomes applicable. This paper concludes that the said theory cannot be justified in Malaysia as it arguably contradicts the Malaysian Companies Act 2016, the current trust law of Malaysia, Hong Kong, United States and England. Thus it is submitted that the single asset theory that seeks to revive traditional trust law pertaining to the requirement of certainty of subject matter of fungible shares has no place in current Malaysian trust law.

Keywords*:* Certainty of Subject Matter, Fungible Shares, Single Asset Theory, Identification

Introduction

There are recent judicial authorities which have approved the single asset theory of Professor Goode (Goode, 2003 & Goode, 2008, pp. 240-241). The said theory postulates that company shares of the same issue are not fungible units, but a single unit of share capital. Thus separate ownership of shares of the same issue is not possible and the shareholders are co-owners of fractional units of a single share capital (Goode, 2003, p. 384). The theoretical implication is that if the said theory is applicable in Malaysia, then the law relating to certainty of subject matter in the creation of trust of unascertained fungible shares is incorrect. The practical implication of this lies in the fact that anyone declaring a trust over unascertained fungible shares need to undertake the arduous task of segregating unnumbered fungible shares from his total shareholding. Thus the requirement of certainty of subject matter is not satisfied simply by specifying the amount and type of shares subject to the trust. The main objective of this paper is to make an evaluation on the applicability of the said theory in Malaysia will be made in the light of existing company and trust law. This is to ascertain whether the current law pertaining to the requirement of certainty of subject matter of unascertained fungible company shares in Malaysia is correct. The requirement of certainty of subject matter of unascertained fungible shares in Malaysia requires no identification of the shares declared on trust in order for a trust to be validly constituted. The authority is Rofia Sdn Bhd v Taraf Dimensi (M) Sdn Bhd & Ors - [1995] MLJU 118, pp. 8-9. The Court of Appeal decided that a trust could be created over 260,000 shares which were not identified out of a bulk of 1,200,000 shares of the same type and same company. The English case of Re London Wine Co (Shippers) [1986] P.C.C 121 which stands for traditional trust law was argued but not followed. Traditional trust law requires precise identification of trust property in order to satisfy the requirement of certainty of subject matter. Trust property under traditional trust law includes tangible and intangible property. Company shares fall under the latter category.

In ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422, the plaintiff and defendant agreed to open a joint bank account where all monies received in respect of its mechanical works will be deposited into the said account. The court held that a trust was validly constituted as the corpus of the trust property and the extent of the defendant's beneficial interest is sufficiently certain (ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005], pp. 434-435). In essence, there is semantic certainty and there is no need to precisely identify the property held on trust. Both cases followed the principle of Hunter v Moss [1994] 1 W.L.R. 452 where it was held that there is no uncertainty of subject matter when the owner of 950 unascertained fungible shares declared himself as trustee over 50 shares. The 50 shares held on trust were not identified from the 950 shares and were held as separate property of the beneficiary. The 50 shares were not co-ownership property between the trustee and beneficiary (Martin, 1996, pp. 224-225). Professor Birks (1992, p. 71) explains that the concept of separate property holding means that in a pool of mixed property where the units are fungible in nature, the respective units of property belonging to the beneficiaries exist in a manner whereby it is impossible to say which units belong to which beneficiary. The requirement of certainty of subject matter in Hunter v Moss [1994] only entails the need to describe the type of shares subject to the trust in words clearly and also the amount of the beneficiary's interest. This requirement is known as semantic certainty (Wilson, 1998, p. 101).

Recently, there is some judicial support for the single asset theory. In Lehman Brothers International (Europe) (In Administration) v Lehman Brothers Finance SA, Briggs J (2010)

EWHC 2914 (Ch). para. 232 and 225, it was stated that the co-ownership approach of holding trust property as postulated by Professor Goode is the preferred way to explain the creation of trust in Hunter v Moss [1994]. This is opposed to trying to identify particular trust assets in a bulk which the beneficiary owns as separate property. Cooke ((2011), p. 137) pointed out that since the basis the decision in Hunter v Moss [1994] is doubtful, there is scope for the single asset theory endorsed by Briggs J. In Australian, the case of White v Shortall (206 FLR 254, para. 159) mentioned the paper of Professor Goode embodying the single asset theory. In Ellison v Sandini Pty Ltd (125 ACSR 249, pp. 281-282), the Federal Court of Australia held any declaration of trust must be applicable to the entire bulk of fungible shares and not an unidentified portion thereof thus supporting the single asset theory.

Professor Goode's (2003, pp. 383-384) single asset theory postulates that company shares of the same issue are non-fungible units. It constitutes a single unit of share capital that can only be co-owned but not separately owned by the shareholders. Thus all the shareholders of that same issue of shares are co-owners of fractional units of that single share capital. Further, the test of fungibility of shares is whether they are legally divisible into units capable of being held as separate property. Thus property that forms a single entity like a car or a horse, are not fungible in nature as they cannot be owned separately. The same reasoning applies to company shares of the same issue.

The theoretical implication of the single asset theory is that it rejects the notion that shares are fungible divisible units capable of separate ownership. In short, the entire bulk of 950 shares in Hunter v Moss [1994] are co-owned as trust property once the trust is declared. Thus no problem of identification arises as every share in the said bulk becomes trust property which is identified. However this was clearly not what was decided in Hunter v Moss [1994]. The nature of proprietary holding of the 50 shares by the beneficiary in Hunter v Moss [1994] was in the form of separate ownership, not co-ownership with the trustee. The concept of co-ownership holding of the shares was expressly rejected in Hunter v Moss ([1994] pp. 457-458; Martin, 1996, p. 225). Thus the single asset theory which insists on co-ownership of the 50 shares held on trust is clearly opposed to the ruling of Hunter v Moss [1994]. The said case does not rule out the fact that shares subject to a trust can be also co-owned. However the single asset theory insists that shares of the same issue can only be co-owned and not be held as separate property as they are not fungible units. Simply put, if the single asset theory is correct, then the principle of Hunter v Moss [1994] which stands for the current law in Malaysia cannot stand. Under the current law, the requirement of certainty of subject matter over a portion of unascertained fungible shares in a bulk does not require any identification of the shares subject to the trust. In short, the traditional trust law that requires identification of trust property as stated in Re London Wine Co (Shippers) [1986] would be revived if the single asset theory is applicable in Malaysia.

Methodology

A doctrinal research method is employed in this paper in view of the fact this is a pure legal research with no socio implication. Schneider & Teitelbaum (2006, p. 60) states such a research is the study and development of legal doctrines by traditional legal methods of statutory analysis and case analysis. Yaqin (2007, p. 10) provides that the doctrinal research is essentially a library based research as the materials can be obtained therein. The materials of this research are elicited from primary and secondary sources of law. The former consists

of the Companies Act 2016 and the common law of Malaysia and England. The latter consists of the published law journals.

Results on the Applicability of the Single Asset Theory in Malaysia

The results of the research reveal that the single asset theory in general cannot be applied in the context of Malaysian trust law. The reasons are as follows. Firstly, is the theory's insistence that identical company shares of the same issue are non-fungible units which cannot be separately owned (Goode, 2008, pp. 240-241), cannot be justified. There are legal authorities which suggest that company shares are capable of being fungible units and separately owned by shareholders.

In Malaysia, section 100(2) of the Companies Act 2016 provides that if all the issued shares or all the issued shares of a particular class of a company are fully paid up and rank equally for all purposes, then they need not have a distinguishing number. Further, any new shares issued by a company (within 12 months) which are rank equally for all purposes with all the existing shares or with all the existing shares of a particular class, need not have a distinguishing number (Section 100(3) of the Companies Act 2016). Thus the newly amended Companies Act 2016 also treats shares of the same issue or shares of a different issue that satisfy the requirement of being fully paid and equal in rank as interchangeable (fungible) units since they need not have distinguishing numbers. There is nothing to suggest that fungible shares of the same issue in Malaysia are only capable of being co-owned by shareholders.

Dilnot and Harris (2012, p. 273) maintain that whether assets are fungible or not would depend on whether they are legally interchangeable for the purpose of satisfying the transfer obligation in question. In Malaysia, there is nothing to suggest that shares transferred must be stated in percentage of the amount of shareholding co-owned among the respective shareholders (Section 105 and 106 Companies Act 2016). In fact, section 100(1) of the Companies Act 2016 provides that when a company issue share certificates, each share therein must be distinguished by an appropriate number, not a percentage of ownership.

It is submitted that in the context of Malaysia, purchasers of shares do not buy a percentage of shares but an actual number as separate property. Voting rights would be difficult to execute if that is the case. Thus share investors do not buy a percentage of every unit of share, which is what happens if the single asset theory is adhered to. Worthington (1999, p. 5) questions the wisdom of a contract for the sale of 20% of 1000 shares which is seen as theoretically different from a contract to sell 200 shares from the same parcel of 1000 shares. Whether any difference is intended by the parties practically is doubtful. In both situations the purchaser will want independent ownership of 200 shares together with the degree of corporate control that ensues, rather than 20% holding in every one of the individual 1000 shares. She aptly states that if a trust of 20% in each 1000 shares is acceptable but not a trust of 200 shares in a parcel of 1000 shares is to underestimate the capacity of equity.

The writer submits then that if one share carries one vote, then it makes perfect sense that the owner of 200 shares carries 200 votes, rather than 20% voting rights out of every 1000 shares. Parkinson (2002, p. 670) also argues that Hunter v Moss [1994] is the authority that a declaration of trust over 5% of the share capital of a private company equated to 50 shares. There is nothing to indicate that the 5% shareholding is only a co-owned percentage from the

entire share capital of 950 shares from the defendant's private company. If the single asset theory is correct, then 5% of the share capital would still tantamount to 5% of every share in the bulk of 950 shares and not 50 individual shares. This is clearly not the intention of the settlor (defendant) in Hunter v Moss [1994].

Secondly, on the issue of numbering of shares, Professor Goode states that numbering is only a form of accounting allocation which does not confer a share an existence distinct from the share issue to which it forms (Goode, 2003, p. 384). In short, numbering of shares does not confer fungibility. In Malaysia, shares must be numbered unless all the issued shares of that particular class are rank equally for all purposes and fully paid up (Chan, 2017, p. 200).

It is submitted that whilst is true that numbering of shares is merely an accounting label, it hardly rules out the fungibility of shares. From a practical standpoint, it is submitted that every share which carries the same vote, value and rights for the shareholder and is rank equally, is fungible in nature despite its different numbering. There are English cases which support the said contention. In Re International Contract Company (Ind's Case) (1871-72) L.R. 7 Ch. App. 485 the transfer of shares was executed by the chairman of the company numbered from 11,105 to 11,154. Mellish LJ (Re International Contract Company (Ind's Case), 1871-72) held that the numbers of the shares are simply a directory for the purposes of enabling the title of particular persons to be traced. Thus one share is regarded as the same as another share. Therefore the owner of shares, who mistakenly states the numbering of his shares in the transfer form, will not be prevented from passing the shares to the transferee as the shares are interchangeable. In Re Letheby & Christopher [1904] 1 Ch. 815, it was held that the numbering of shares is a directory only and his shares will still be transferred even if the transfer form does not indicate its number. It is immaterial that the transferor must have meant to deal with a particular share as the shares are interchangeable (fungible) in nature.

Thirdly, the single asset theory seems inapplicable to public listed shares traded in the Hong Kong and Malaysian stock exchange. A case which involved indirectly held public listed shares in the Hong Kong stock exchange is Re CA Pacific Finance [1999] 2 HKC 632 to which Professor Goode argued that the shares stated in that case was deemed fungible but yet there was identification thereof (Goode, 2003, p. 384). The case revolved around the Hong Kong Securities Clearing System Co Ltd which has a computer matching and book entry system known as the Central Clearing and Settlement System (CCASS). The securities were held on trust for the benefit of purchasers of shares as there is certainty of subject matter over unascertained fungible shares in a pool of mixed shares. The shares were not earmarked by numbers (Section 65A Companies Ordinance (Cap 32) of Hong Kong provides that where shares are fully paid up and identical, they need not have a distinguishing number). Under Rule 809 CCASS ruling, shares traded there are regarded as fungible units and hence interchangeable for delivery and transfer purposes. The judge opined that it is difficult to see the need of identification since the shares are fungible in nature and the separate ownership holding of shares by the beneficiaries means that identical shares can exits as fungibles, rather than as fractional interests which can only be co-owned. Unnumbered shares traded in CCASS can by virtue of contract and by its regulation be interchangeable and treated as fungibles. This contradicts the single asset theory which provides that shares of the same issue are non-fungible units. Following Hunter v Moss [1994], the ruling of Re CA Pacific Finance [1999] is premised on the fact that shares are fungible in nature. Pursuant to Re CA Pacific Finance

[1999], Pullen (1999, p. 288) states that in practice any share can be fungible with any other share of the same class. He points out that section 65A the Companies Ordinance (Cap32) of Hong Kong does not require shares to be numbered and this indicates the fungibility of shares. Evans (1999) provides that most domestic and international central securities depositories nowadays hold securities deposited with them on a fungible basis. This means that depositories are only under an obligation to deliver identical securities, not the original ones purchased. In Bursa Malaysia trading, shares can also be deemed fungible and the chits issued to the investors do not contain shareholding in percentages as co-ownership but as separate ownership of a number of shares.

Fourthly, there are US cases which seems to cast doubt on the single asset theory. A discussion on these cases is arguably necessary since the case of Hunter v Moss [1993] 1 W.L.R. 934, p. 948 derived its principle from the US cases. The US cases indicate that shares are regarded as fungibles which are capable of separate ownership and this clearly contradicts the single asset theory. In Richardson v Shaw (28 Supreme Court 512, 209 US 365), it was held that there is no requirement for the owner of fungible shares who declares himself as trustee of such shares to set apart the particular portion of shares held on trust. The rationale is, the shares there are fungible units which are thus sufficiently ascertained. In DiLucia v Clemens (373 Pa. Super. 466, p. 470) the defendant declared himself as trustee over 2000 unsegregated shares out of his 25,000 fungible shares (of Unicorn) for the benefit of the plaintiff. It was held that though the 2000 shares were not specifically earmarked, the identity of the shares was clear and the description was sufficient due to the fungible nature of the shares. It is not imperative that specific shares were identified as they are all fungible units. Macchiarola (2009, p. 34) concludes that the US cases do not make a distinction between tangible goods and intangible shares, provided they are fungible units namely identical in value and kind. Thus shares are regarded as fungibles by the US courts, and not a single unit of share capital that can only be co-owned as postulated by the single asset theory. Further, Raskolnikov (2005, p. 436) maintains that a certificate of share bearing the same number of shares represents precisely the same kind and value of property as does another share certificate for a like number of shares from the same corporation. This substantiates the fungible nature of shares.

Fifthly, Dilnot and Harris (2012, p. 274) provide that Hunter v Moss [1994] approached the issue of certainty of subject matter on the basis that the owner's 950 shares was a discrete fund of fungible assets. Parkinson (2002, p. 671) agrees and points out that Hunter v Moss [1994] was distinguished from Re London Wine Co (Shippers) [1986] on the basis that shares are intangible fungible assets. Such contention again opposes the single asset theory which insists that shares of the same issue cannot be treated as fungibles.

Lastly in Malaysia, the single asset theory can be tested in the light of Rofia Sdn Bhd v Taraf Dimensi (M) Sdn Bhd & Ors [1995]. The facts of the case had been discussed above. The court held that there was certainty of subject matter over a bulk of unascertained fungible shares without identification of the shares held on trust as the shares were fungible. The shares were held as separate property, contrary to the co-ownership type of property holding postulated by the single asset theory. The Australian authorities mentioned above that support the single asset theory are not binding on the Malaysian courts.

Discussion on the Single Asset Theory and Current Malaysian Trust Law

Professor Goode maintains that under common law the transfer of tangible and intangible property remains governed by the requirement of identification (Goode, 2008, p. 68). It is submitted that the single asset theory is conceived to satisfy the general principle that it is necessary to identify the subject matter of a transfer, so that it is clear which assets are being transferred (Goode, 2008, p. 238). The single asset theory (Goode, 2008, pp. 238-239) postulates that since shares of the same issue are no more than fractions of a single asset that can only be co-owned, all the shares in the bulk of 950 shares in Hunter v Moss [1994] are thus identified as trust property. Such contention would thus satisfy the traditional law and the need of identification when the equitable title passes in the creation of trust. The problem is, such contention clearly contradicts the *ratio decidendi* of Hunter v Moss [1994] which clearly states that the 50 shares held on trust as separate property need not be identified from the bulk of 950 shares and remains unidentified pending its registration of transfer.

In view of the fact that the single asset theory clearly contradicts the decision of Hunter v Moss [1994], Malaysian trust law cannot follow such traditional requirements of certainty of subject matter. As discussed above, the single asset theory cannot be justified in the Malaysian, United States and Hong Kong jurisdictions. Certain English decisions are opposed to it. Hudson (2007, pp. 1169-1170) aptly states that the traditional approach to enforcing rights of an identified item of property is not a sufficient explanation to the proportionate rights of beneficiaries in a mixed fund. English law recognises the beneficiary's proprietary rights against the fund though no particular property needs to be segregated. Hunter v Moss [1994] thus represents the new trend of trust law and the single asset theory represents the traditional approach and clearly there is no conciliation between them. From the perspective of jurisprudence, MacCormick (1978, pp. 236-238) postulates that dominant values and principles of the law change over time and new values come in when the old principles and analogies allow them a toe-hold. The single asset theory must thus give way to Hunter v Moss [1994] in the context of Malaysian trust law.

The most significant contribution of this paper is its theoretical implication that the single asset theory cannot be applied in Malaysian trust law. The said theory essentially casts doubt on the decision of Hunter v Moss [1994] which applies in Malaysia. It follows that the case of Hunter v Moss [1994] cannot be deemed as wrongly decided because of the single asset theory. This means that the current law on the requirement of certainty of subject matter in Malaysia, as exemplified by Hunter v Moss [1994], states that there is no uncertainty of subject matter when a trust is declared over an unidentified portion of unascertained fungible shares. It also means that traditional trust law that requires identification of trust property cannot be applied in Malaysia when it comes to intangible property. Further, the traditional common law requirement of transfer of intangible property which requires identification can no longer apply when it comes to intangible fungible property like shares. This is because the creation of trusts entails the transfer of equitable title.

The practical implication of this research means that it is easier for a person to declare a trust over an unidentified portion of unascertained fungible shares. There is no need to deliberately identify the fungible shares which are to be held on trust. It is difficult for a layman to comprehend the need to identify fungible shares to be held on trust under traditional trust law which entails the process of transfer of shares under the Companies Act 2016 and the

issuance of new share certificates (Section 105 and 106 Companies Act 2016). The process of identifying fungible shares which are not numbered is even more impractical and this is no longer required when Hunter v Moss applies. It is suggested that future research on the validity of the single asset theory and its application need to be conducted on unit trusts in Malaysia. This is because there could possibly be a link between unit trust and the single asset theory (Nolan, 2004, p. 117).

Conclusion

The single asset theory was conceived to explain the controversial decision of Hunter v Moss [1994] which deviated from traditional trust law. Before Hunter v Moss [1994], the requirement of certainty of subject matter in the creation of trust over a portion of unascertained fungible shares in a bulk arguably requires identification. Malaysian trust law is represented by Hunter v Moss [1994] which states that identification of unascertained fungible shares held on trust is no longer necessary. All that is required is semantic certainty of the trust property. This paper argues that the single asset theory which insists on co-ownership of shares of the same issue cannot be sustained. It is plain that in Malaysia, company shares of the same issue can be fungible in nature if they are equally rank for all purposes and fully paid. The common law of Hong Kong, US, Malaysia and England suggest that company shares can assume fungible qualities and thus separate ownership is possible. In view of these findings it is argued that Hunter v Moss remains the current trust law in Malaysia as the single asset theory cannot cast doubt on it. The changing times of trust law in Malaysia should not be impeded by the single asset theory otherwise it runs the risk of ossification.

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