HOW SHOULD TRUSTEES REGAIN TRUST IN TODAY'S WORLD?

Keynote Address by Deputy Attorney-General,
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I. Introduction

1 I am grateful to the Singapore Trustees Association for inviting me to speak at what I am sure will be a fascinating conference. It is certainly a timely one, given recent developments in the world of trusts – or should I say, the secretive world of trusts. Indeed, the names "Panama" and "Paradise" have a whiff of James Bond.

2 The title of my address is "How should trustees regain trust in today's world?". The implication in that title is that trusts, and by association trustees, have lost the trust of the public. Deserved or not, that is plainly the perception. Trusts are viewed with suspicion in today's social and political climate. The fact that none of the media coverage on the Paradise Papers has been positive speaks for itself.

II. Why has there been a loss of trust?

3 So the first question is, why has there been a loss of trust? I suggest that there are two reasons innate to the trust device. The first lies in the history of the trust device and how it has evolved.

Evolution of the trust leading to greater flexibility

4 The roots of the trust come from the English medieval property device called the 'use', which arose as a way to avoid undesired rules of the feudal system. One undesired rule was that land could not be left by will, but had to pass

according to the rules of primogeniture. This kept estates united, but often meant that a man's lands passed in its entirety to his eldest son, to the exclusion of the rest of his children[1]. Another example relates to the Franciscan monks, who were forbidden to own any property. As a practical matter, though, the friars needed some kind of accommodation in the towns they worked in. To get around this problem, benefactors who were minded to give them a house would convey that house to the borough community but 'to the use of' the friars[2].

5 Trusts were also used in early Singapore, such as in the settling of wakaf by wealthy Arab migrants. Settling a wakaf was not only an act of charity but had the happy benefit of increasing the family's social standing. In fact, this is possibly an early example of how settlors could select a jurisdiction to their advantage. Asst Prof Nurfadzilah Yahaya has argued that "the default application of English law in Singapore meant that Muslim testators were granted more testamentary freedom than a strict application of Islamic law would allow. For example, they could pass the whole of their property through wakaf, and not just a third of it as prescribed by Islamic law. It was not until 1 January 1924 that property was by default devolved according to Islamic law should a Muslim die[3]".

6 As the examples I have given show, the core purpose of a trust has remained constant and resilient over time. By separating legal and beneficial ownership, trusts serve to protect wealth and avoid unwanted rules. What has changed over the years is that trusts have moved from a device centred around the family to a corporate structure available to multi-national corporations. In

[1] D.J. Seipp, 'Trust And Fiduciary Duty In The Early Common Law', *Boston University Law Review*, vol. 91, 2011, p. 1014

[2] F.W. Maitland, "The Origin of Uses", Harvard Law Review, vol. 8, no. 3, 1894, p. 130 and J.E. Penner, The Law of Trusts, 10th edn, Oxford University Press, 2016, 1.27

[3] N. Yahaya, British colonial law and the establishment of family waqfs by Arabs in the Straits Settlements, 1860–1941 N Yahaya, "British Colonial Law and the Establishment of Waqfs by Arabs in the Straits Settlements, 1860-1941" in Lionel Smith, ed. *The Worlds of the Trust*, New York: Cambridge University Press, 2013, p. 174

their scope, trusts today are less restricted in almost all aspects. They are not primarily confined to land; their beneficiaries or entitlements to the trust fund need not be pre-determined[4]; and the bar for the courts to set aside a trustee's exercise of his fiduciary powers is relatively high[5]. Of particular note is a modern-day settlor's freedom in his choice of jurisdiction. So if a settlor wants to set up a non-charitable purpose trust, which is not permissible under common law, he can today easily set up his trust in Jersey[6], Guernsey[7], or the Cayman Islands[8], all of which have legislation allowing for such purpose trusts, and all of which have relatively low levels of regulation.

<u>Secrecy around trusts</u>

7 The second reason is the secrecy that surrounds trusts. Often this is because the trust is structured around a web of shell companies and other intermediaries, incorporated in exotic locations which most people would not ordinarily visit. However, the legislative regime of the chosen jurisdiction also plays an essential role – and these jurisdictions may not be the usual suspects. Take for instance New Zealand pre-Panama Papers.

Usually known as the land of sheep and the occasional Hobbit, it could add to its epithets what one news website termed "the quiet tax haven achiever"[9]. One factor that contributed to the use of the New Zealand tax regime was the lack of disclosure requirements. Under the previous New Zealand law, a trustee was generally not required to supply any information at all as to:

a. the name of the settlor;

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[4] See as example *McPhail v Doulton* [1970] UKHL 1.
[5] *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339; [2012] SGCA 41
[6] Article 12 of the Trusts (Jersey) Law 1984 (as amended)
[7] Articles 11 and 12 of the Trusts (Guernsey) Law, 2007, (as amended).
[8] Commonly known as a STAR trust. See Part VIII of the Trusts Law (2017 Revision).
[9] N. Chenowerth, The Panama papers: NZ - the quiet tax haven achiever ', *Financial Review*, 4 April 2016, http://www.afr.com/business/banking-and-finance/the-panama-papers-nz--the-quiet-tax-haven-achiever-20160401-gnvw7s (accessed 13 November 2017).

b. the country of residence of the settlor;
c. the names of the beneficiaries;
d. the country of residence of the beneficiaries;
e. the nature of the assets held by the trust;
f. the country in which the assets were situated;
g. the value of the assets;
h. the amount of income derived from the assets; or
i. to whom, if anyone, the income was distributed.

8 What then **did** he have to disclose? For a start (and actually the end), the trustee had to disclose the name of its trust. As should be obvious, this was perfect for secrecy but virtually useless for the purpose of combating tax avoidance or more nefarious purposes. It was not until 21 February 2017 that legislation to improve disclosure requirements was enacted[10].

III. <u>What have trusts been misused for?</u>

9 The suspicion around trusts would be unwarranted if they had not in fact been misused. One can say of many other things, I suppose. Most trusts may well be used for legitimate purposes, but there is no denying that some have been used for purposes ranging from the dubious to the downright illegal. As early as 2005, the US Money Laundering Threat Assessment Working Group reported that "legal entities such as shell companies and trusts are used globally for legitimate business purposes, but because of their ability to hide ownership and mask financial details they have become popular tools for money launderers"[11]. And especially when it means that a select few are able

[10] The discussion on New Zealand's disclosure requirements in paragraphs 7 and 8 is from M. Littlewood, 'Using New Zealand Trusts to Escape Other Countries' Taxes', 13 July 2017, p. 15. Available from SSRN (accessed 12 November 2017).
[11] US Money Laundering Threat Assessment Working Group, 'US Money Laundering Threat Assessment', 2015, https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf (accessed 13 November 2017).

to profit substantially, and sometimes at the expense of the majority, the use of the device, even if for legitimate purposes, carries a presumption of suspicion.

10 The same problems continue to exist a decade later. In 2014, the FATF Guidance on Transparency and Beneficial Ownership stated that "despite the essential and legitimate role that corporate vehicles play in the global economy, under certain conditions, they have been misused for illicit purposes, including money laundering, bribery and corruption, insider dealings, tax fraud, terrorist financing, and other illegal activities"[12]. The public also finds it unsavoury when public figures advocate for greater wealth equality on one hand and have undisclosed millions stashed away on the other.

Public examples of trusts being misused

11 In recent years, this issue has been given increasing prominence in the media. Let me give 3 recent examples.

12 First, the Panama Papers from 2015, which was arguably ***the*** event that brought public awareness to the dark side of wealth protection[13]. I will just speak on the case study of Prince Jefri Bolkiah - former Finance Minister of Brunei and (then) chair of its sovereign wealth fund, the Brunei Investment Agency (BIA).

An investigation by independent accountants concluded Prince Jefri had siphoned USD $14.8b out of the fund into his personal bank accounts. This $14.8b funded an international spending spree including 600 properties, over

[12] FATF, 'FATF Guidance: Transparency And Beneficial Ownership', 2014, http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf (accessed 13 November 2017).

[13] The International Consortium of Investigative Journalists, 'Key findings: The Panama Papers by the numbers', *ICIJ: The Panama Papers* [web blog], 2016, https://panamapapers.icij.org/blog/20160403-key-findings.html (accessed 13 November 2017).

2000 cars, over 100 paintings, 5 boats and 9 aircraft[14] with cash to spare. The prince signed a settlement agreement in 2000 but continued to be embroiled in litigation to recover the assets, including a Privy Council judgment in November 2007 allowing summary judgment for a claim to enforce the settlement agreement and dismissing Prince Jefri's various defences as "devoid of weight", "hopeless", and "factually implausible"[15]. Legal battles to recover the assets ended only in 2014.

13 According to *The Guardian* newspaper, what the Panama Papers allegedly showed was that throughout this period, Prince Jefri was a client of Coutts & Co Trustees in Jersey. In 2015, Mossack Fonseca discovered it was acting as registered agent for two British Virgin Islands companies of which Prince Jefri was the ultimate beneficiary. One company, Taurus Estates Limited, held a bank account with Coutts Zurich, a commercial property and seven residential apartments in London. Taurus in turn was owned by a trust called PJ Settlement. Prince Jefri's involvement was masked because Coutts and its sister companies supplied nominee directors and shareholders to Taurus and trustees to PJ Settlement[16].

14 In this case, not only was Prince Jefri a politically exposed person, litigation to recover BIA's funds was still ongoing at the time he was a client. Given such circumstances, it is not surprising that there have been suspicions of trusts being misused to hide assets from the Brunei Government. Indeed, it was reported that when it learned of the Prince's involvement, Mossack Fonseca

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[14] M. Hosenball, 'Special Report: A prince, a sultan, diamonds and a lawsuit', *Reuters*, 4 November 2010, https://www.reuters.com/article/us-brunei-usa-diamonds/special-report-a-prince-a-sultan-diamonds-and-a-lawsuit-idUSTRE6A33VQ20101104 (accessed 13 November 2017).
[15] *Bolkiah & Ors v. The State of Brunei Darussalam & Anor (Brunei Darussalam)* [2007] UKPC 63
[16] Paragraph 13 is adapted from L. Faull, 'Revealed: Coutts managed tax haven firms for controversial clients', *The Guardian*, 1 December 2016, https://www.theguardian.com/world/2016/dec/01/revealed-coutts-bank-managed-tax-havens-high-risk-clients-jefri-bolkiah-brunei-panama-papers (accessed 13 November 2017).

immediately resigned as agent, telling Coutts that Prince Jefri's companies "present a high risk to us"[17].

15 Closer to home, there is 1MDB and related litigation in the New Zealand courts in *Low Hock Peng v Rothschild Trust (Schweiz) AG*[18]. Subsidiaries of the Rothschild group, acting as trustees for Jho Low and his family, set up several trusts in New Zealand. These trusts held assets in the US worth about USD $265m (a private jet, a hotel in Beverley Hills and other real estate in New York and Los Angeles). Later on, the US government commenced proceedings in California, seeking forfeiture of the trusts' US assets, on the ground that they were "traceable to an international conspiracy … to launder money misappropriated from 1MDB" and were consequently "derived from violations of United States law, including money laundering offences". As the Rothschild trustees had declined to resist the US government's claims for fear of exposing themselves to liability, the beneficiaries applied to the courts to have them removed as trustees[19].

16 Justice Toogood, in the New Zealand High Court, made the orders sought but emphasized that he was not taking any view as to the merits of the underlying issues. The second is that he was concerned with enabling a fair fight in the US. This is a fair and legitimate consideration – had he not made the order for the Rothschild trustees to be replaced, the US assets would have been lost by default since the Rothschild trustees were not willing to take the necessary legal steps in California. So, even with the bad publicity and concern surrounding such trusts, the Courts will continue to protect the rights of all pending a final resolution of the matter.

17 The third example is the Paradise Papers leak, which is now about 2 weeks old. The majority of the documents came from the offshore law firm Appleby.

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[17] See note 19.
[18] *Low Hock Peng v Rothschild Trust (Schweiz) AG* [2017] NZHC 25.
[19] Summary of the facts is adapted from M. Littlewood, p. 2.

What has caused concern locally is that about half a million files come from Asiaciti Trust, which is a Singapore-headquarted trust and corporate services provider. While the full implications of the Paradise Papers leak is still not known, the allegations already cover a wide spectrum of multinational companies and public figures, ranging from Lewis Hamilton getting a new luxury jet and a $5.2m VAT refund[20] and Apple moving subsidiaries to Jersey to continue minimizing its tax bill after a crackdown on its Irish subsidiaries in 2013[21]. On 7 Nov 2017, MAS announced that it was reviewing the Paradise Papers and will take action if any breaches are found[22]. For completeness, I should add that Asiaciti has denied any wrongdoing.

18 To sum up why trusts are not trusted, I can do no better than to use what Mr Justice Snowden of the Chancery Division said at his keynote address at a recent trust conference[23]. In this, he was quoting from a claimant's skeletal argument:

> "The discretionary trust is the vehicle of choice for asset protection schemes partly because it affords great flexibility as regards who is eventually to benefit from the settled assets; partly because no discretionary beneficiary is considered to have an interest in the trust assets before they are distributed (which is usually beneficial from a fiscal point of view, especially if the trust is established in an offshore jurisdiction which taxes trustees lightly or not at all);

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[20] The International Consortium of Investigative Journalists, 'Offshore Gurus Help Rich Avoid Taxes On Jets And Yachts', *ICIJ* [website], 2017, https://www.icij.org/investigations/paradise-papers/offshore-gurus-help-rich-avoid-taxes-jets-yachts/ (accessed 13 November 2017).

[21] The International Consortium of Investigative Journalists, 'Leaked Documents Expose Secret Tale of Apple's Offshore Island Hop', *ICIJ* [website], 2017, https://www.icij.org/investigations/paradise-papers/apples-secret-offshore-island-hop-revealed-by-paradise-papers-leak-icij/ (accessed 13 November 2017).

[22] 'MAS reviewing Paradise Papers; will take action if breaches found', *Channel NewsAsia,* 7 November 2017, http://www.channelnewsasia.com/news/business/mas-reviewing-paradise-papers-offshore-breaches-asiaciti-icij-9384038 (accessed 13 November 2017).

[23] Mr Justice Snowden's keynote address at "The Use and Abuse of Trusts and Other Wealth Management Devices" on 27 July 2017.

> and partly because outsiders find it very difficult to get behind the veil of secrecy which the trustees are able to throw over the trust and its affairs. There is, however, a tension at the centre of asset protection schemes. The settlors who own the assets to be put into the trusts are typically not the magnanimous patriarchs or plutocrats of old for whom the (onshore) discretionary trust was developed, but hugely wealthy individuals who at heart have no desire to relinquish their control or enjoyment of the assets intended to be transferred, and certainly have no intention that those assets should be advanced or appointed to others without their agreement."

IV. What has been done to address the lack of transparency?

19 As spoken about earlier, suspicions that trusts are easily misused arise partly from their flexibility, and partly because of the air of secrecy around them. Therefore, if we want to resolve this problem, we must deal with at least one if not both these factors. With regard to the flexibility of trusts, short of legislation or judicial activism, there is not much to be done. But I would go further and say that the flexibility of trusts should not be curtailed in any case. Given that there is nothing intrinsically wrong with that aspect of a trust, limiting it would only undermine what is ordinarily a very useful and legitimate device. The problem that should be addressed, and which governments have been trying to address, is the lack of transparency.

20 The lack of transparency facilitates abuse because it obscures the involvement of known or suspected criminals, the true purpose of an account or property held by a corporate vehicle, or the source or use of funds or property[24]. What steps has Singapore taken to remedy this?

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[24] See note 13.

Amendments to the Trustees Act and the Companies Act

21 Most recently, in March this year, Singapore amended the Trustees Act, the Companies Act and the Limited Liability Partnerships (Amendment) Act to give effect to FATF Recommendations and Global Forum requirements.

22 The amendments to the Trustees Act and the Trustees (Transparency and Effective Control) Regulations 2017 codify and elaborate on trustees' duties and reporting obligations. Amongst other things, trustees are now required to identify and keep updated information of "relevant trust parties" (including the settlor, protector, beneficiary etc.), and their effective controller if any. There are also obligations as to the record-keeping of the information obtained - trustees must take reasonable steps to ensure that an accurate record is maintained and retained for at least 5 years even after the trustee ceases to be a trustee of the trust. I should also add that the amendments are very broad in scope: they apply to any express trust that is governed by Singapore law, administered in Singapore, or in respect of which any trustee is resident in Singapore.

23 In Singapore's 2016 FATF Mutual Evaluation report on anti-money laundering and counter-terrorist financing measures, it was noted that Singapore is particularly vulnerable to the misuse of legal persons due to its low tax regime, which raises the risk of attracting funds generated from tax crimes. In addition, the report mentioned that the lack of available data on the size and scope of Singapore's trust industry, with the exception of trusts administered by licensed trust companies, made it difficult to accurately assess the scale of money-laundering/terrorist financing risk for legal arrangements[25]. In ensuring that trust information is readily available and accurate, these amendments to the Trustees Act will greatly aid law enforcement.

[25] FATF, 'Anti-money laundering and counter-terrorist financing measures: Singapore's Mutual Evaluation Report', 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Singapore-2016.pdf (accessed 13 November 2017).

24 As for the Companies Act, the main change in this regard is that there are now 3 new registers to be kept by companies. The first is that Singapore incorporated companies and foreign companies registered in Singapore must maintain a register of their controllers. A "controller" is an individual or a legal entity that has significant interest in or significant control over an entity. While the register is not a public one, it must be made available to the Registrar and public agencies administering or enforcing any written law (including law enforcement agencies) upon request.

The second is the register of members of foreign companies, which will be public. Finally, Singapore-incorporated companies must now also maintain a register of their nominee directors. Although this register is non-public as well, it must similarly be made available to the Registrar and public agencies upon request. The amendments to the LLP Act are similar to those in the Companies Act[26].

25 Perhaps less directly related, but no less important are Singapore's efforts in the area of information exchange agreements. In June this year, we signed 2 Multilateral Competent Authority Agreements: the first on the Automatic Exchange of Financial Account Information under the Common Reporting Standard; and the second on Exchange of Country-by-Country Reports[27]. When PM Lee visited US President Trump in late October, there was talk of a

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[26] Indranee Rajah S.C., Senior Minister of State for Law and Finance, 'Enhancing Transparency, Facilitating Business And Positioning for Growth', https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/CALLP.pdf (accessed 13 November 2017).

[27] Inland Revenue Authority of Singapore, 'Singapore Signs Multilateral Competent Authority Agreements to Enhance Tax Co-operation on Exchange of Information', 2017, https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2017/Singapore-Signs-Multilateral-Competent-Authority-Agreements-to-Enhance-Tax-Co-operation-on-Exchange-of-Information/ (accessed 13 November 2017).

tax information exchange agreement to be signed by end 2017[28], so this area is likely to develop further in the next few years.

26 So, apart from all the above, what is to be done next? While I am not in a position to comment on what the Government is looking into or should look into, our efforts in this area are still continuing and one area we can look to for ideas is to see what international trends are. Recently, there has been a push to not only have trust registries, but to make them public. In the EU, the Fourth Money Laundering Directive requires EU member states to set up central registers of the beneficial owners of legal entities, including trusts[29]. Some member states have taken that one step further and made their trusts register public, but that action in itself has come with problems. On 5 July 2016, France made its trusts registry accessible online to all French taxpayers, only for the French Constitutional Council to strike the publicly available registry down as unconstitutional as it disproportionately interfered with the right to private life[30]. This is just an example of where we can look to for ideas – given the very recent amendments to the Trustees Act, I am not advocating that we set up a public trusts register right now. Singapore's considerations are very different from those of the EU countries and such a step would need to be carefully considered first.

V. **Attitudes towards change**

27 Parliament can legislate all it wants to improve transparency, but trustees and other professionals are the ones who deal with the misuse and abuse first hand. It is therefore imperative to address the attitudes of professionals in this

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[28] Prime Minister's Office, 'Joint Statement by the Republic of Singapore and the United States of America', 2017, http://www.pmo.gov.sg/newsroom/joint-statement-republic-singapore-and-united-states-america (accessed 13 November 2017).
[29] Directive (EU) 2015/849, Articles 30 and 31.
[30] STEP, 'French Constitutional Court rules on public register of trusts', 2017, https://www.step.org/news/french-constitutional-court-rules-public-register-trusts (accessed 13 November 2017).

area of work. How should trustees, lawyers and other professionals view these increased reporting requirements (and quite likely more requirements in the future)?

28 The natural instinct may be to resent them. For one, there will be concerns that business will simply move to a friendlier jurisdiction. In the New Zealand experience, there were initially about 11,750 foreign trusts. After a requirement to register was implemented in the first half of this year, fewer than 3,000 trusts had registered- the rest had either indicated that they did not intend to register or had simply disappeared[31].

29 I have a few points to make in response. First, it is arguable the trusts that leave are likely to be suspicious and thus not ideal business in the first place. Viewed that way, reporting requirements should be welcomed as they reduce risks and provide a more conducive environment to do legitimate business. It is important to remember that while one of Singapore's aims is to be an international financial centre, that aim is not meaningful if we are not a *trusted* financial centre. In the long-term, the reputational damage to the industry is likely to outweigh any short-term gains.

30 Second, trustees cannot assume that regulators or the media will remain oblivious to dodgy practices or shoddy compliance. Leaks are inevitable and are only increasing in size and frequency. Wikileaks in 2010 was 1.7GB of information. By 2016, the Panama Papers leak was 2.6TB, the current Paradise Papers leak is about 1.4TB, and it is very likely that we have not have seen the end. Trustees thus have two options: they can focus their energies on preventing leaks, and believe that they will succeed when even militaries and security agencies around the world could not. Or they can do their best to comply with the reporting requirements, meaning that they have nothing to fear even if there is a leak. In fact, I would suggest that it would

[31] M. Littlewood, p. 26.

benefit trustees to advocate for the implementation of common standards worldwide. That way, the playing field is levelled and no particular jurisdiction gains an advantage simply because their regulations are less stringent.

31 Finally, we should not forget the role the courts have to play. There is presently a dearth of local case law concerning the abuse of offshore trusts, but the comments of an English family judge Mr. Justice Coleridge in *J v V (Disclosure: Offshore Corporations)* should be remembered: "these sophisticated offshore structures are very familiar nowadays to the judiciary who have to try them. They neither impress, intimidate, nor fool any one"[32].

32 With that, I wish you a very enjoyable conference. Thank you.

[32] *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam) at [130].