Book Launch – Nuncio D'Angelo, "Commercial Trusts"

Lord Mansfield was Lord Chief Justice of England for thirty-two years from 1756. He presided at the pinnacle of the common law jurisdiction at a time when law and equity were quite separate and, we are led to believe, somewhat competitive. We tend to have in our minds today a picture of common law courts in the second half of the eighteenth century as places where everyone had one eye on the door in case an emissary from Chancery burst in brandishing a common injunction. So it may come as something of a surprise to know that Lord Mansfield was a great admirer of the ingenuity shown by equity in the invention of the trust.

In 1759, the Lord Chief Justice sat as part of a bench of three in the case of *Burgess v Wheate* (1759) 1 Black W 123; 96 ER 67. The other judges were the Lord Keeper (Sir Robert Henley who, as the Earl of Northington, was later Lord Chancellor) and the Master of the Rolls (Sir Thomas Clarke). Those two were, of course, equity judges. At that stage of history, they were the only equity judges. So how did it come about that the two Chancery judges and the highest-ranking common law judge were sitting together?

The fact is that they were sorting out a knotty problem in which the King himself had a very distinct interest – a problem about the nature of legal and equitable estates and the susceptibility of property held in trust to escheat.

It was in that context that Lord Mansfield expressed his admiration for the innovations of equity. He saw a systematic law of trusts as having been the brainchild of Lord Nottingham, the Lord Chancellor from 1675. Lord Mansfield praised Lord Nottingham's founding efforts in these terms:

> "By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been since raised."

Lord Mansfield then said:

> "Trusts are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the Statute Henry VIII [that is, 27 Hen 8, c 10, the Statute of Uses] meant to avoid."

The trust was thus said on high authority more than 250 years ago to be a mechanism that could answer "the exigencies of families and all purposes" – in other words, a flexible and adaptable mechanism that could deal with an array of situations.

While, at that time, the utility of the trust still centred mainly on land and inheritance, its value in commercial settings was also established. When *Burgess v Wheate* was decided, the *Bubble Act* (6 Geo 1 c 18) had been in force for almost forty years and had dampened the efforts of entrepreneurs seeking to aggregate investors' capital for commercial ventures. But the trust, so much admired by Lord Mansfield for its flexibility, promised some prospect of sidestepping those restrictions. Under a trust based-structure, the property of the venture was settled upon trustees, usually chosen from among the venturers, and those trustees were authorised under a deed of settlement to conduct the management of the enterprise. The venturers were, in broad conceptual terms, partners who limited their liability, as among themselves (but not externally), through provisions in the deed of settlement to which each became a party. Contract law and the law of trusts sustained what was a somewhat cumbersome and uncertain form of legal organisation.

This unincorporated joint stock company form (supplemented, in some cases, by a special Act of incorporation) held some sway until largely superseded in the mid-19th century by the registered company we know today. And the legislation that made the corporate form and limited liability readily available to the commercial world contained what were, in essence, exclusivity or monopoly provisions. It outlawed large commercial associations formed otherwise than under its provisions. The reasons were explained by James LJ in *Smith v Anderson* (1880) 15 ChD 247:

> “. . . to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed.”

With the help of that kind of legislative approach, the incorporated company came to prevail; and the joint stock company based on trust principles went into decline. But, according to Tom Hadden in his book “Company Law and Capitalism”, a revival of trust based investment vehicles occurred in the 1930s as a means of avoiding the increasing controls that were being imposed on the flotation of new issues on the stock market. Again, therefore, the flexibility and adaptability of trusts came to the fore to meet a commercial need. The unit trust scheme became an established investment vehicle.

There was also a proliferation of trading trusts which are very much with us today and owe their existence to another commercial motive: avoiding the creation of a separate legal entity that can be taxed. The trading trust and the unit trust scheme (which now tends to be treated as a subset of the managed investment scheme) are today, I suppose, the most commonly encountered examples of the commercial trust – a form of organisation that, in many of its manifestations, combines the best of two worlds by casting in the role of trustee an entity having separate existence and perpetual succession but no beneficial ownership.

But commerce is never content to let the law rest on its laurels. Today, we hear calls for commercial trusts – or, at least, the registered managed investment scheme version – to be assimilated to companies. Why should they be different, people ask. If you enjoy a particular advantage through having a company, why shouldn’t you be able to secure the same advantage if you have a registered managed investment scheme? That is no doubt a proper subject for discussion at the law reform level.

The problem comes when people who should know better are influenced by ill-formed preconceptions and lose sight of fundamentals. I mention in the foreword to the book the statement of claim I saw with my own eyes only a short while ago in which it was solemnly alleged that “Homebush Unit Trust is a corporation and/or business name . . . liable to sue and/or be sued by its name and style”. Now there is someone who should be sat down and forced to read this book.

For a very fine book it is. The author is to be congratulated on the way in which he has drawn so many threads together. He has achieved something that, as far as I know, has never been attempted before. We have books on equity and trusts. We have books about partnership and about corporations. We have books about business organisations more broadly. But only now do we have a book that deals with the relationship between persons and property that we call the trust and the ways in which lawyers have harnessed that relationship to serve a range of commercial purposes. The particular beauty of the book is the way in which it blends legal scholarship, practical guidance and economic explanation. It will be a valuable addition to the libraries of practitioners and scholars alike.

I have great pleasure in declaring “Commercial Trusts” by Dr Nuncio D’Angelo well and truly launched.

R I Barrett
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