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English Fiduciary Standards and Trust Law

*David Hayton**

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I. INTRODUCTION

This Article will focus on two major areas of inquiry in contemporary English trust law: fiduciary standards and substantive trust law. In Part II it will cover the trustees' exercise of managerial discretions and of distributive discretions, before considering the role and duties of protectors in relation thereto. In Part III it will focus upon spendthrift and other protective trusts, the termination of trust rules, the hesitancy to invoke public policy to invalidate conditions imposed by settlors, and difficulties in ascertaining whether a proper valid trust has been created.

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II. FIDUCIARY STANDARDS

A. *The Exercise of Managerial Discretions by Trustees*

English[1] law makes a distinction between the investment discretion of trustees and their other managerial discretions. The general managerial rule is that discretions must be exercised with the care of an ordinary prudent person in the management of his own affairs[2] but "a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee."[3] A trust corporation is expected to exercise the care of a specialist in trust administration, reflecting the fact that it holds itself out as having such specialist skill.[4]

However, when it comes to making investments, Lindley L.J., in a much endorsed[5] passage, stated:

> The duty of the trustee is not to take such care only as a prudent man would take if he had only himself to consider, the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. [6]

On appeal to the House of Lords in this case, Lord Watson stated:

> Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended by hazard.[7]

However, as Dillon L.J. has emphasized, "[W]hat the prudent man should do at any time depends on the economic and financial conditions of that time—not on what judges of the past, however eminent, have held to be the prudent course in the conditions of 50 or 100 years before."[8]

Indeed, at first instance Hoffmann J. made it clear that "[m]odern trustees acting within their investment powers are

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1. The law of England and Wales differs from that in other jurisdictions within the United Kingdom, e.g., Scotland, Northern Ireland, Isle of Man, Jersey, and Guernsey.
2. *See* Mendes v. Guedalla, (1862) J&H 259, 277; *Re* Lucking's Will Trusts, [1967] 3 All E.R. 726, 733 (Ch.).
3. *Re* Waterman's Will Trusts, [1952] 2 All E.R. 1054, 1055 (Ch.).
4. *See* Bartlett v. Barclays Bank Trust Co., [1980] Ch. 515, 525; Nestle v. National Westminster Bank, [1994] 1 All E.R. 118, 140 (C.A.).
5. *See, e.g.,* Cowan v. Scargill, [1985] Ch. 270, 289; *Nestle,* [1994] 1 All ER at 125-26, 140.
6. *In re* Whiteley, 33 Ch. D. 347, 355 (1886).
7. Learoyd v. Whiteley, 12 App. Cas. 727, 733 (1887).
8. *Nestle,* [1994] 1 All E.R. at 126.

entitled to be judged by the standards of current portfolio theory, which emphasises the risk level of the entire portfolio rather than the risk attaching to each investment taken in isolation." [9] This led Lord Nicholls extra-judicially to write:

> Investment policy is aimed at producing a portfolio of investments which is balanced overall and suited to the needs of the particular trust. . . . Different investments are accompanied by different degrees of risk, which are reflected in the expected rate of return. A large fund with a widely diversified portfolio of securities might justifiably include modest holdings of high risk securities which would be . . . imprudent and out of place in a smaller fund . . . . In such a case it would be inappropriate to isolate one particular investment out of a vast portfolio and enquire whether it can be justified as a trust investment. Such a line by line approach is misplaced. The inquiry, rather, should be to look at a particular investment and enquire whether that is justified as a holding in the context of the overall portfolio. Traditional warnings against the need for trustees to avoid speculative or hazardous investments are not to be read as inhibiting trustees from maintaining portfolios of investments which contain a prudent and sensible mixture of low risk and higher risk securities. They are not to be so read, because they were not directed at a portfolio which is a balanced exercise in risk management.[10]

Significantly, in its Consultation Document on the Investment Powers of Trustees—published in May 1996—the Treasury accepted that trustees, within the limits of their investment power, are entitled to invest in accordance with modern portfolio theory.[11] While a power to "invest" in "investments" traditionally required the purchase of income-yielding assets,[12] it would seem that, in accordance with modern portfolio theory, such a power can be exercised to purchase a capital appreciation asset like a painting if it is balanced in a portfolio with some high-income-yielding assets.[13]

The Treasury Consultation Document also reflected modern practitioners' views,[14] including that of Lord Nicholls,[15] that the duty of a trustee when investing is simply that of the ordinary

9. Nestle v. National Westminster Bank, 1984 NNO 1892 (N.D. 1988), *reported in Case Report*, 10 TR. L. INT'L. 112, 115 (otherwise unreported) [hereinafter *Case Report*].

10. Lord Nicholls, *Trustees and Their Broader Community: Where Duty, Morality, and Ethics Converge*, 9 TR. L. INT'L 71, 75-76 (1995).

11. H.M. Treasury, *Investment Powers of Trustees*, para. 35 (May 1996).

12. *In re* Wragg, [1919] 2 Ch. 58, 64-65; Tootal Broadhurst Lee Co. v. Inland Revenue Comm'rs, [1949] 1 All E.R. 261, 265.

13. See emphasis on capital growth in *Cowan v. Scargill*, [1985] Ch. 270, 287, endorsed in *Nestle*, [1994] 1 All E.R. at 140, and in *Harries v. Church Comm'rs*, [1992] 1 W.L.R. 1241, 1246 (Ch.).

14. Including those of the Law Commission and of the Trust Law Committee who provided input for the Treasury Document.

15. *See* Lord Nicholls, *supra* note 10, at 73.

prudent person or specialist trustee *investing for the benefit of others*, ignoring any stricter "safety first" standard that might be regarded as additionally implicit in Lindley L.J.'s *"for whom he felt morally bound to provide,"* e.g., a widow and orphans whom the trustee would personally support if the trust fund were lost.

However, as stated by Leggatt L.J. in *Nestle v. National Westminster Bank*,[16] the standard of prudence, even of a bank trustee, is "undemanding." The plaintiff, as remainderman entitled to capital after the death of various life tenants, complained that the 1922 trust fund of £53,000 should have been worth either £1,800,000 or £1,360,000 (depending on the percentage of equities in the fund) in 1986 when she obtained the capital actually worth only £269,203. The Court of Appeal found that the trustee throughout erroneously interpreted the investment clause as much narrower than it actually was (so as to concentrate upon a narrow range of investments within the banking and insurance sectors) and failed to conduct regular periodic reviews of investments until 1960. Because some life tenants were domiciled abroad, during their lives[17] a large part of their shares in the fund was invested in Government gilt-edged securities exempt from income tax and from death duties, thereby benefiting both income and capital beneficiaries, as the tax savings on capital on deaths of the life tenants matched any increase that would have arisen if equities had been bought instead of fixed-interest gilts.

The court held that the onus lay on the plaintiff to prove that a prudent trust company, knowing the proper wide scope of the investment power and conducting regular reviews, would so have invested the trust fund in a greater range of investments as to make it worth more than it was worth when the plaintiff inherited it.[18] The plaintiff had to show that, through one or both of the trustee's mistakes, breaches of trust arose either because the trustee made decisions which it should not have made or failed to make decisions which it should have made, so resulting in the trust fund suffering loss[19] (which would include the gain that would have been made but for the wrong decisions of the trustee).[20] The court then held that the plaintiff had failed to discharge this difficult and costly burden of proof.[21]

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16. *Nestle*, [1994] 1 All E.R. at 142.

17. The plaintiff's uncle died abroad in 1972, his widow died in England in 1982 after living abroad, while the plaintiff's father died abroad in 1986. *See id.* at 122.

18. *See id.* at 141.

19. *See id.* at 133-34.

20. *See id.* at 140.

21. *See id.* at 127, 134.

If a breach of trust had been proved,[22] the court would have been prepared to presume in favor of the plaintiff and against the trustee that the plaintiff should not receive compensation based on the very minimum that a prudent trustee might have achieved, but rather should receive fair compensation[23] based on what the average prudent trustee was likely to have achieved, taking into account the average performance of ordinary shares during the relevant period. However, the court was not prepared to assume that the trustee's continued ignorance of its wide investment powers (despite its doubts thereon) and lack of periodic reviews until 1960 would have lead to wrong investment decisions.

As Leggatt L.J. stated:

> The fallacy is that it does not follow from the fact that a wider power of investment was available to the bank . . . that it would have been exercised or that, if it had been, the exercise of it would have produced a result more beneficial than actually was produced. Loss cannot be presumed if none would necessarily have resulted.[24]

Dillon L.J.[25] endorsed the following dictum of Megarry V-C:

> If trustees make a decision upon wholly wrong grounds, and yet it subsequently appears, from matters which they did not express or refer to, that there are in fact good and sufficient reasons for supporting their decision, then I do not think that they would incur any liability for having decided the matter upon erroneous grounds; for the decision itself was right.[26]

Thus, the plaintiff's claim apparently would fail if he cannot disprove the trustee's allegation that unimpeachable investment conduct could have resulted in a situation in which "right" decisions[27] produced a trust fund of the low value of the actual trust fund.[28] In essence, the plaintiff therefore must prove that the actual value of the trust fund is one which no trustee acting prudently could have produced, taking account of bad luck.[29] Is

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22. For example, if the fund had been wholly invested in fixed interest securities. *See Re* Mulligan [1998] 1 N.Z.L.R. 481.

23. *See* Nestle v. National Westminster Bank, [1994] 1 All E.R. at 127, 138, 141.

24. *See id.* at 141.

25. *See id.* at 128; *id.* at 141 (inferentially endorsed by Leggatt L.J.).

26. *See* Cowan v. Scargill, [1985] Ch. 270, 294.

27. There is no one objectively right decision at the time of decision making but a myriad of possible right decisions.

28. *See generally* Gary Watt & Marc Stauch, *Is there Liability for Imprudent Trustee Investment?*, 1998 CONV. & PROP. LAW. (n.s.) 352.

29. Hoffmann J. and Staughton L.J. accepted that to maintain the real value of a trust fund may require extraordinary skill or good luck. *See Case Report, supra* note 9, at 115 (opinion of Hoffmann); Nestle v. National Westminster

this not an almost impossible burden for any plaintiff to discharge? If the trustee therefore has immunity from liability for failure to conduct periodic reviews and for failure to ascertain the width of its power of investment despite having doubts thereon, the message this sends to trustees is that they do not need to worry about their duty[30] to ascertain the width of their power of investment (the most crucial managerial power) and to conduct periodic reviews of investments. Did not the Court of Appeal condone behavior that most would regard as reckless?

Should not the proper position be that breach of such duty is per se a breach of trust rather than only a breach of trust if loss is proved to result? Strict deterrent or preventive duties like the "no profit" and "no conflict" rules are imposed upon trustees to ensure the proper administration of a trust in the interests of vulnerable beneficiaries, and are reinforced by presumptions against trustees who are in a strong knowledgeable position and in favor of beneficiaries who are in a weak ignorant position.[31] With the advent of many share indices, an appropriate index[32] can be chosen to determine the percentage increase to expect over a particular period for the part of the fund that should have been invested in equities as opposed to fixed interest securities. However, the onus of disproving the beneficiaries' claim that a particular percentage should have been invested in equities, as well as the onus of claiming that an index other than the one claimed by the beneficiaries is more appropriate in the particular circumstances, should lie with the trustees: after all, the trustees have only themselves to blame for this once they break their basic duties.

Bank, [1994] 1 All E.R. at 133 (opinion of Staughton). Bad luck could lead to the purchase of "blue chip" shares in companies which suddenly fail, e.g., Rolls Royce Ltd, lack of clairvoyance not being negligence.

30. On this duty see *Nestle*, [1994] 1 All E.R. at 123, 125, 133, 140.

31. Equity presumes trustees to be good men and to act properly so that they cannot take advantage of their breaches of duty. Equity looks on as done that which ought to be done, e.g., rules on liability as constructive trustee for profits or bribes, Attorney-General for Hong Kong v. Reid, [1994] 1 App. Cas. 324 (P.C.), tracing rules' presumptions against wrongdoing trustee, presumption that wrongdoer made the most beneficial use of trust property, Wallersteiner v. Moir (No 2), [1975] All E.R. 849, 864; Guerin v. R., [1984] 2 S.C.R. 335; Nant-y-Glo & Blaina Ironworks Co. v. Grave, 12 Ch. D. 738 (1878). Deliberate or reckless breaches of trust should be severely treated as breaches of "fiduciary duty" rather than in the same fashion as negligent breaches of an "equitable duty of care." *Cf.* Bristol & West B.S. v. Mothen, [1996] 4 All E.R. 698.

32. This avoids the obsolete defeatist approach that "the discretion given to the trustees to select an investment among several securities makes it impossible to ascertain the amount of loss (if any) which has arisen to the trust fund from the omission to invest." Shepherd v. Mouls, 4 Hare 500, 504 (1845) (per Wigram V-C).

Then, the National Westminster Bank might not have escaped unscathed when damned by Leggatt L.J.'s comment that "[n]o testator, in the light of this example, would choose this bank for the effective management of his investments,"[33] and Dillon L.J.'s conclusion that it was "inexcusable that the bank took no step at any time to obtain legal advice as to the scope of its power to invest in ordinary shares" despite having "doubts as to its powers."[34] The plaintiff may consider herself unfortunate in the membership of the Court of Appeal which included no trust specialist: Staughton and Leggatt L.J.s were common lawyers, while Dillon L.J., although elevated from the Chancery Division of the High Court, had, as a barrister, specialized in company and commercial law rather than trust law.

However, the case usefully made clear that relevant circumstances for a trustee to consider in investing trust assets include general economic conditions; the possible impact of inflation; the expected tax consequences of investment decisions or strategies; modern portfolio theory for a balanced portfolio, taking account of the expected total return from income and the appreciation of capital; other resources of the beneficiaries as to which the trustee should make reasonable efforts to verify the facts; and needs for liquidity, regularity of income, and preservation or appreciation of capital in acting fairly in making investment decisions which have differing consequences for differing classes of beneficiaries. This duty to act fairly confers a wide discretion upon trustees[35] enabling them to act partially but honestly[36] by favoring an elderly penurious life tenant needing income at the expense of a wealthy remainderman, especially where the life tenant was close to the testator or settlor and the remainderman is a more remote relative or a charity.

Trustees should take into account all these circumstances in carrying out their "paramount duty . . . to provide the greatest financial benefits for the present and future beneficiaries"[37] or to

33. *Nestle*, [1994] 1 All E.R. at 142.

34. *Id.* at 123.

35. *See id.* at 137; *see also Case Report*, *supra* note 9, at 114.

36. Such as trustees of a discretionary trust who are entitled to favor some beneficiaries to the exclusion of others. *See* Edge v. Pensions Ombudsman, [1998] 2 All E.R. 547, 568-69 (Ch.).

37. Cowan v. Scargill, [1985] Ch. 270, 289. Trustees must put aside their personal, political, or ethical views unless "all things are equal" from a financial viewpoint when they can refuse to invest in companies whose policies or products they find disagreeable. In the best financial interests of their beneficiaries they may have to act dishonorably. For example, when not bound by a legally enforceable contract to sell trust land, they are under a duty to "gazump," by exploring a better offer and accepting it, unless it is beaten by the person to whom

seek "the maximum return, whether by . . . income or capital growth, which is consistent with commercial prudence . . . having due regard to . . . the need to diversify, the need to balance income against capital growth, and the need to balance risk against return."[38] While the need to diversify arises from the duty to act as a prudent person would in investing for others, it is embodied in section six of the Trustee Investments Act of 1961 requiring a trustee to have regard "(a) to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust; (b) to the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description."[39]

The clause "in so far as is appropriate to the circumstances of the trust" recognizes that effect should be given to the intentions of the settlor if, for example, clearly intending a leasehold (a wasting asset) to be occupied by a particular beneficiary for as long as wished, or the retention of a special heirloom or of a controlling shareholding in a family business. However, the paramount emphasis upon the financial interests of present *and future* beneficiaries requires a contrary intent to be express (or necessarily implied);[40] for example, "no sale or other disposition is to take place without the consent of B, who in deciding whether or not to consent may consider her own personal interests entirely to the exclusion of the interests of all other beneficiaries" or "my trustees shall have no responsibility or duty with respect to such house" being one of the testator's Hong Kong houses where his ninety-two and eighty-six-year-old siblings lived as licensees and were allowed to continue as such until their deaths, by which time the house was worth much less than would have been obtained by a speedy sale.[41]

In carrying out their various managerial discretionary functions, the trustees must personally comply with the above duties and may not delegate those functions unless authorized by statute or the trust instrument.[42] When acting personally, their

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they had earlier orally agreed to sell the land. *See generally* Buttle v. Saunders, [1950] 2 All E.R. 193 (Ch.).

38. Harries v. Church Comm'rs, [1992] 1 W.L.R. 1241, 1246 (Ch.). In the context of charitable trusts, however, trustees should not invest in companies whose products are inconsistent with the charitable purpose or where such investment might hamper the charity's work by alienating potential donors or by making potential recipients of aid unwilling to be helped. *See id.*

39. Trustee Investments Act, 1961, 9 & 10 Eliz. 2, ch. 62, § 6.

40. *See generally In re* Herklots' Will Trusts, [1964] 1 W.L.R. 583 (Ch.).

41. *See* Hayim v. Citibank, [1987] App. Cas. 730, 748-49 (P.C.).

42. *See* Turner v. Corney, 5 Beav. 515, 517 (1841); *In re* Speight 22 Ch. D. 727, 756 (C.A. 1882).

duties include "the duty to seek advice on matters which the trustee does not understand, such as the making of investments, and on receiving that advice to act with the same degree of prudence."[43] Trustees have to obtain and consider the advice, so that they may not automatically follow such advice: they must exercise an independent conscious discretion[44] in deciding what to sell and what to purchase or what other managerial action to take.

As Robert Walker J. stated in *Scott v. National Trust*:

> Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. Those matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts. It is, however, for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions even to experts.[45]

Where a trustee in good faith, acting within the scope of his powers, does make a decision based on less-than-complete information, the Court does not invalidate the decision unless "it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."[46] "[It] is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they a proper understanding of it, they would not have acted as they did."[47]

Thus, the purported exercise of a power to transfer assets from one pension fund to another on sale of part of a company's business was held void by the Court of Appeal[48] where based on

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43. Cowan v. Scargill, [1985] Ch. 270, 289.

44. *Compare* Wilson v. Turner, 22 Ch. D. 521 (C.A. 1883), *with* Turner v. Turner, [1984] Ch. 100.

45. *See* Scott v. National Trust, [1998] 2 All E.R. 705, 717 (Ch.) (plaintiff complained that the Trust should not have bowed to public pressure and refused to renew deer-hunting licenses on its land).

46. *In re* Hastings-Bass, 1975 Ch. 25, 41 (C.A.).

47. Mettoy Pension Trustees Ltd. v. Evans [1990] 1 W.L.R. 1587, 1624 (Ch.). In *Re* Duxbury's Settlement Trusts, [1995] 3 All E.R. 145 (C.A.), three trustees appointed a sole trustee to replace themselves under Trustee Act, 1925 § 36, although the trust deed prevented discretionary distributive powers from being exercised unless there was more than one trustee. The appointment was upheld, either because the *Hastings-Bass* principle did not apply to § 36 appointments or the case fell outside it because the sole trustee could easily appoint a co-trustee before attempting to exercise the discretionary powers, so justifying appointment of the sole trustee. The latter view is preferable.

48. Stannard v. Fison Pension Trust Ltd, 21 I.R.L.R. 27 (1992).

an out-of-date valuation of the trust fund. In giving judgment, Dillon L.J. happened to use the expression "*might* have acted otherwise" rather than "*would* have acted otherwise" but in context it does not appear that he was consciously considering weakening the position of trustees and creating damaging uncertainty as to what has, or has not been, validly decided.

Although having to act in good faith, responsibly and reasonably, trustees are under no duty to give reasons for their decisions,[49] and thus beneficiaries have no correlative right to demand to know such reasons. However, if a prima facie case of a breach of trust can be established by particularizing factual circumstances in the statement of claim to substantiate the alleged breach of trust (so that the claim is not struck out as a mere "fishing expedition"), then the trustees can be compelled either legally (through the civil litigation discovery of documents process and by subpoenas) or practically, in order to avoid adverse inferences being drawn, to disclose the reasoning for their decision.[50]

B. Delegation by Trustees

The current position is most unsatisfactory.[51] The effect of sections twenty-three and thirty of the Trustee Act of 1925 is uncertain; as a result, in the absence of express powers in the trust instrument, it is almost impossible for trustees to manage the trust fund in the best financial interests of the beneficiaries, which inevitably require the use of discretionary portfolio managers and custodians.

Before 1925, in the absence of express powers, not only could no discretionary functions be delegated but the execution of decisions made by trustees in the exercise of their discretion could not be delegated unless it was a legal necessity or prudent and in accordance with ordinary business usages to employ an agent to carry out such task.[52] Where agents could be employed, there was a duty to use the common prudence that a person would use in his own affairs in the selection of the agent, the

49. *See generally In re* Londonderry's Settlement, 1965 Ch. 918 (C.A.); Wilson v. Law Debenture Trust Corp., [1995] 2 All E.R. 337 (Ch.).

50. *See* Scott v. National Trust, [1998] 2 All E.R. 705, 719 (Ch.). However, the reasons will be immaterial if not revealing a lack of good faith, where the trustees have an absolute or uncontrolled discretion. *See Londonderry*, [1965] Ch. at 936; *In re* Beloved Wilkes Charity, 3 Mac. & G. 440 (1851).

51. *See generally* LAW COMMISSION CONSULTATION PAPER NO. 146, TRUSTEES' POWERS AND DUTIES (1997) (report expected in July, 1999).

52. *See Ex parte* Belchier, 1754 Amb. 218; *In re* Speight, 22 Ch. D. 727, 756-57 (C.A. 1882).

terms of employment of the agent, and the supervision of the agent.[53] It is clear that section 23 considerably enlarges trustees' powers:

> Trustees may, instead of acting personally, employ and pay an agent . . . to transact any business or do any act required to be transacted or done in the execution of the trust . . . and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.[54]

Section 30(1) merely replaces a provision found in the Trustee Act 1893 and the Law of Property Amendment Act of 1859, which reflected a provision commonly found in trust instruments:

> A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and *not for those of any other trustee . . . or other person* with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any loss, *unless the same happens through his own wilful default.*[55]

One would expect a trust lawyer in 1926 to construe the two sections in the light of the traditional duty to use common prudence in the selection, employment terms and supervision of agents and the traditional equitable meaning of "wilful default" as encompassing not just deliberate and reckless conduct but also negligent conduct,[56] even though the common law (and lay) meaning of wilful default covered only deliberate and reckless conduct.[57] Thus, under section 30 a trustee is not liable for the conduct of his agent (whom he can now employ whenever he wishes, regardless of necessity or usual business usages) unless personally to blame by virtue of his own deliberate, reckless, or negligent breach of duty, for example, by failing to use common prudence in the selection, employment terms or supervision of the agent. While there was automatic strict responsibility for the defaults of agents employed outside the limited circumstances before 1925, now that such circumstances have become unlimited there is to be no *strict* responsibility for the defaults of

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53. *See* Munch v. Cockerell, 5 My. & Cr. 178 (1840); Rowland v. Witherden, 3 Mac. & G. 568 (1851); *Speight*, 22 Ch. D. at 762-63.

54. Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19. § 23(1) (emphasis added).

55. *Id.* § 30(1) (emphasis added).

56. *See In re* Brier, 26 Ch. D. 238, 243 (C.A. 1882); *In re* Chapman, [1896] 2 Ch. 763, 776 (C.A.); *Speight*, 22 Ch. D. at 745.

57. *See generally* Lewis v. Great W. Ry. Co., 3 Q.B.D. 195 (1877); *In re* City Equitable Fire Ins. Co., [1925] Ch. 407 (C.A.).

agents employed in good faith, only *fault-based* responsibility if guilty of wilful default in respect of such agents.

In contrast, a 1999 lawyer could take the literal view that once a trustee has in good faith employed an agent, thereby fixing the employment terms, he is not thereafter to be responsible for the default of such agent[58] (so as to be protected by the "umbrella" of an honest appointment) or (a preferable view) he is not to be responsible by reason only of such appointment. He can then be responsible for loss arising from his subsequent failure in the supervision of the agent if guilty of "wilful default," but perhaps only in the ordinary common law meaning of consciously committing a breach of his duty or acting recklessly, (i.e., indifferent whether or not it be a breach of duty) rather than in the traditional equitable meaning.

Despite the fact that section 30 is merely a consolidating provision, and that earlier caselaw[59] had established that "wilful default" in exemption clauses had the same meaning as "wilful default" (the hallowed touchstone of liability in equity) when surcharging the accounts of trustees and mortgagees with amounts that should have been received but for their deliberate, reckless or negligent conduct,[60] Maugham J.[61] in 1931 applied to a trustee seeking the protection of section 30 the common law meaning of wilful default in the commercial context of company director liability, which a well-known 1925 case discussed.[62]

Surprisingly, Millett L.J. recently endorsed[63] the view of Maugham J., so that while "wilful default" normally includes negligence, it does not include negligence when an exemption clause expressly excludes liability unless the trustee was guilty of wilful default.

A trustee who is guilty of such conduct either consciously takes a risk that loss will result or is recklessly indifferent whether it will or not. If the risk eventuates, he is personally

58. *See* Steel v. Wellcome Custodian Trustees Ltd., [1988] 1 W.L.R. 167, 174 (Ch.) (assumption of Hoffmann J.).

59. *See supra* note 56.

60. *See* Bartlett v. Barclays Bank Trust (No. 2), [1980] 2 All E.R. 92, 97 (Ch.); *In re* Lucking's Will Trusts, [1968] 1 W.L.R. 866, 874 (Ch.); Chaplin v. Young (No. 1), 33 Beav. 330, 337-38 (1863); White v. City of London Brewery Co., 42 Ch. D. 237, 243 (C.A. 1889).

61. *See In re* Vickery, [1931] 1 Ch. 572 (Ch.).

62. *See In re* City Equitable Fire Ins. Co., [1925] Ch. 407 (C.A.).

63. *See* Armitage v. Nurse, [1998] Ch. 241 (C.A.). Because liability in equity is on the footing of wilful default, which includes negligence, "wilful default" in the clause "[m]y trustee shall be exempt from liability for wilful default" should cover negligence, although in "[m]y trustee shall not be liable unless guilty of wilful default" it should be construed according to Millett L.J. as extending only to deliberate or reckless breaches, so that negligent liability is excluded. Is this not illogical?

liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default.[64]

Earlier, in upholding the efficacy of a clause which exempted a trustee from liability "unless such loss or damage shall be caused by his own actual fraud," Millett L.J. had stated:

> By consciously acting beyond their powers (as, for example, by making an investment which they know to be unauthorised) the trustees may deliberately commit a breach of trust; but if they do so in good faith and in the honest belief that they are acting in the interest of the beneficiaries their conduct is not fraudulent. So a deliberate breach of trust is not necessarily fraudulent.[65]

Can trustees therefore, if protected by an express clause exempting them from liability unless guilty of wilful default,[66] conduct the affairs of the trust as if they have a broader power of investment than they actually have, and indeed delegate their investment management function (subject to their overriding supervision) to a discretionary portfolio manager and their title-holding function to a custodian when having no such power of delegation?[67] Unfortunately, Millett L.J. stated, "[A] trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term."[68]

One may be forgiven for wondering what is the point of an exemption clause if one cannot consciously rely upon it. The point seems to be that a trustee cannot rely on an exemption clause for consistently pursuing a policy that is in breach of trust. In such circumstances an application should be made to the court for more extensive powers under section 57 of the Trustee Act as "expedient." Indeed, it is common[69] for a court to

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64. *See id.* at 252.

65. *Id.* at 251.

66. Section 30 of the Trustee Act, 1925 is limited by an *ejusdem generis* construction to loss flowing from the depositing of trust money or securities. *See* Eaves v. Hickson, 30 Beav. 136 (1861); *In re* Vickery, [1931] 1 Ch. 572, 582; *In re* Lucking's Will Trusts, [1968] 1 W.L.R. 866, 874 (Ch.).

67. Section 23 of the Trustee Act does not extend to distributive functions or to fiduciary discretions like the selection of investments and decisions to sell or lease trust property, although trustees can employ an agent for collection of rents and day-to-day management of rented property, assumed to extend to re-letting vacant property in *In re Muffett*, 39 Ch. D. 534 (1888). The core title-holding function of trustees cannot be delegated unless expressly authorised by the trust instrument or a special statute.

68. *Armitage*, [1998] Ch. at 254.

69. *See Anker-Petersen v. Anker-Petersen*, LAW SOC'Y GAZETTE, May 1, 1991, at 32; (1998) 12 TRUST L.I. 166.

grant to trustees of old trust instruments powers to employ discretionary portfolio managers and custodians, coupled where necessary with wider investment powers.

Such is the need, in the case of large trust funds, for discretionary portfolio managers to be employed and investments to be held by custodians, that the Pensions Act 1995 now authorizes this, subject to safeguards for the beneficiaries.[70]

The 1996 Trusts of Land and Appointment of Trustees Act authorizes trustees of land by power of attorney for a specific or indefinite period to delegate to any beneficiary or beneficiaries of full capacity with an interest in possession (e.g., life interest) any of the trustees' functions relating to the land.[71] The trustees then "are jointly and severally liable for any act or default of the beneficiary . . . if, and only if, the trustees did not exercise reasonable care in deciding to delegate the function to the beneficiary."[72] Once reasonable care was so exercised, it seems that the trustees are protected even if the beneficiary makes a disastrous job of things, unless one can successfully argue that such protection only relates to their vicarious liability, so that personal liability remains if they neglect to exercise their power (under section 9(3) of the 1996 Act) to revoke the delegation when prudent trustees would so act.

In respect of land or other property outside the United Kingdom, section 23(2) of the Trustee Act 1925 authorizes the trustees collectively to delegate any of their ministerial functions or their fiduciary discretions to an agent, who may even sub-delegate. The trustees are not to be responsible for any loss arising "by reason only" of having made the delegation.[73] Thus, personal responsibility apparently can arise for subsequent failure to supervise the agent with common prudence.

Section 25 of the 1925 Act—as substituted in 1971[74]—authorizes the trustees individually to delegate any or all of their

70. *See* Pensions Act 1995, ch. 26, §§ 33-36 (Eng.) (applying only to pension trusts). To avoid problems over whether the standard of care for selecting an investment manager is the same as for selecting investments (to take as much care as a prudent business person would take, not in the management of his own affairs, but mindful that he is investing for others), section 34 (4) protects pension trustees if they take "all such steps as are reasonable to satisfy themselves . . . that the fund manager has the appropriate knowledge and experience" and that "he is carrying out his work competently and complying with" the diversification and suitability of investments requirements of section 36. Liability for negligent investment by the trustee or the fund manager cannot be excluded.

71. Trusts of Land and Appointment of Trustees Act 1996, ch. 47, § 9 (Eng.).

72. *Id.* § 9(8).

73. *See* Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, § 23(2) (Eng.).

74. *See* Powers of Attorney Act 1971, ch. 27, § 9 (Eng.).

"trusts, powers and discretions" whether managerial or distributive, so long as a power of attorney is used and its period does not exceed twelve months. Notice must be given to the other trustees and to anyone having power to appoint new trustees (who may wish to consider replacing the trustee-donor of the power). The trustee-donor remains automatically responsible for conduct of the donee of the power. In practice, the trustees can all exercise their individual rights so as to make an effective collective delegation to others of their right to invest trust assets and hold title to trust assets—but they must remember to renew the power of attorney every twelve months.

The position clearly is unsatisfactory, so the Law Commission (assisted by papers produced by the Trust Law Committee) has produced a Consultation Paper[75] provisionally recommending that trustees collectively should have broad powers for delegating to others their managerial duties and discretions (including power to use custodians or nominees), subject to some safeguards, which will be clarified in a Report (expected in July 1999) based on responses received to the Consultation Paper. The likely outcome will be one standard of care for all types of delegation which will cover selection, employment terms and the supervision of the agent. That standard will either be to exercise the care of the ordinary prudent businessperson acting in his own affairs, or, more likely, the care that may reasonably be expected having regard to the nature, composition and purposes of the particular trust, the skills which the trustees actually have, or if they are employed as professional trustees, those skills which they either ought to have or hold themselves out as having. This standard should also apply to express powers of delegation unless some other standard is expressly or impliedly specified in the trust instrument. In addition, if, in the reasonable opinion of the trustees, delegation was in the best interests of the trust, the trustees likely will have power to employ agents on terms which limit the agents' liability and which authorize actual or potential conflicts of interest of the agents, and which authorize agents to employ sub-agents.

Connected with these broad powers of delegation that allow flexible use of discretionary portfolio managers will be recommendations in the Law Commission Report that trustees should have a right to charge for their services and that trustees of trusts (like trustees of pension trusts)[76] should have the same unrestricted power to make an investment of any kind as if they

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75. *See* LAW COMM'N, CONSULTATION PAPER NO. 146, TRUSTEES' POWERS & DUTIES (1997).

76. *See* Pensions Act 1995 § 34.

were absolutely entitled to the assets of the trust. The Consultation Paper made no mention of this power, but such a recommendation was made in the Treasury Consultation Document of May 1996,[77] which was universally acclaimed by those responding to it.

C. *The Exercise of Distributive Discretions by Trustees*

As just seen, delegation of discretionary distributive functions requires express authorization in the trust instrument, except for the statutory power[78] enabling a trustee to delegate whatever functions he or it wishes by a power of attorney lasting for only a year. After all, the distributive role of the trustee is the critical role for which the settlor has specially chosen the person who is trustee, and much leeway is afforded to the trustee in exercising the discretionary distributive function, whether under discretionary trusts or under discretionary powers of appointment, maintenance or advancement.

The exercise of managerial discretions must be in accordance with the standards of care already considered. Indeed, even a power "in the trustee's absolute discretion" to sell and purchase investments likely will be subject to the implicit restriction that it should be exercised with the standard of care of a prudent business person or professional trust corporation mindful that it is investing for the benefit of others,[79] unless exemption from such standard is provided by a general exemption clause in the trust instrument.[80]

However, a power "in the trustee's absolute discretion" to choose between beneficiaries of a discretionary trust or to exercise a power of appointment or advancement need only to be exercised honestly and for the purpose for which the power was given.[81] The trustee's exercise of the power cannot be set aside

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77. *See id.*

78. *See* Trustee Act, 1925, § 25, *amended by* Powers of Attorney Act 1971, § 9.

79. *See* Bishop v. Bonham, [1988] 1 W.L.R. 742, 753-54 (C.A.); Bartlett v. Barclays Bank Trust Co., [1980] Ch. 515, 536-37; Elder's Trustee & Ex'r Co. v. Higgins (1965) 113 C.L.R. 426, 449.

80. In *Armitage v. Nurse*, [1998] Ch. 241 (C.A.), the Court of Appeal upheld exemption from any liability unless caused by the trustee's own actual fraud, although statute prevents trustees of debenture trusts and unit trusts from exempting themselves from liability for negligence, whether ordinary or gross. *See* Companies Act 1985, ch. 6, § 192 (Eng.); Financial Services Act 1986, ch. 60, § 84 (Eng.).

81. *See* Gisborne v. Gisborne, 2 App. Cas. 300, 305 (1877), Tabor v. Brooks, 10 Ch. D. 273, 277 (1878); *In re* Gulbenkian's Settlement, [1970] App. Cas. 508, 518; *In re* Londonderry's Settlement, [1965] Ch. 918, 936 (C.A.); Edge v. Pensions Ombudsman, [1998] 2 All E.R. 547, 568-69 (Ch.).

simply because the judge thinks that it was unreasonable or unfair.[82] Exceptionally, where the trustee's action does not have the full intended effect, then the court can interfere if "it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account or (b) had he not failed to take into account considerations which he ought to have taken into account."[83] Where the trustee's action does have the full intended effect but no reasonable body of trustees properly directing themselves would have done what the trustee did,[84] the courts now seem prepared to intervene and nullify such action.[85] In conferring discretionary distributive powers, draftsmen of trust instruments nearly always permit the trustee "absolute discretion;"[86] nowadays, however, the omission of "absolute" seems unlikely to affect the court's approach, and indeed, the presence of "absolute" in the leading case, *Gisborne v. Gisborne*,[87] was probably not crucial to the decision therein.

After all, the essence of the matter is that the settlor intends the trustees—not the court[88]—to exercise the discretions conferred upon them and to have plenty of leeway in exercising those discretions. Persuading persons to be trustees would be

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82. *See Tabor*, 10 Ch. D. at 278; *Edge*, [1998] 2 All E.R. at 568; *In re* Steed's Will Trusts, [1960] Ch. 407, 418 (C.A.).

83. *In re* Hastings-Bass, 1975 Ch. 25, 41 (C.A.).

84. This is *Wednesbury* unreasonableness applicable to decisions of public bodies that can legitimately be expected not to make a decision that no reasonable body could have reached, which is a different matter altogether from what the court considers unreasonable. *See* Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223, 229-30 (C.A.).

85. *See Edge*, [1998] 2 All E.R. at 568; Scott v. National Trust, [1998] 2 All E.R. 705, 718 (Ch.) (accepting that trustees do not have a general duty to consult beneficiaries who will be detrimentally affected by trustees' decision, nevertheless, if trustees have for the last ten years paid £10,000 per annum to an elderly penurious beneficiary, no reasonable body of trustees would discontinue the payment without any warning and without giving the beneficiary an opportunity to persuade the trustees otherwise). In exporting a trust by distributing the funds to foreign trustees, the court needs "to be satisfied only that the proposed transaction is not so inappropriate that no reasonable trustee could entertain it." *See* Richard v. Mackay, [1990] 1 OTPR I; (1997) 11 TRUST L.I. 23.

86. *See, e.g.*, Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, § 32-33 (Eng.) (statutory power of advancement; protective trusts).

87. Gisborne v. Gisborne, 2 App. Cas. 300, 307 (1877).

88. However, if trustees do not carry out their distributive *duties* under a discretionary trust, the court can intervene "by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself[,] directing the trustees so to distribute." McPhail v. Doulton [1971] App. Cas. 424, 457 (Lord Wilberforce). The court has similar jurisdiction in the case of pension trustees' powers to augment the pensions of beneficiaries. *See generally* Thrells Ltd. v. Lomas, [1993] 2 All E.R. 546 (Ch.).

difficult if the court, at the instigation of the beneficiaries, could upset decisions it considered not to be reasonable or justifiable. Moreover, in revealing the trustee's reasons, feelings between the beneficiaries are likely to be embittered, as is the relationship between the beneficiaries and the trustees, thereby prejudicing continuity of administration by encouraging frequent retirements of trustees when faced with beneficiaries threatening actions for their removal. Thus, the general rule is that, so long as the trustees exercised the relevant discretionary power honestly and for the purpose for which it was conferred upon them by the settlor, their exercise of the power cannot be challenged in the courts. The presumption is that the power was duly so exercised, such presumption being reinforced by the trustees' statement that this was so.[89] Thus, a disaffected beneficiary can do nothing unless he can produce some evidence that the trustees acted dishonestly or exercised the power for a purpose beyond the expectations of the settlor.

This showing is difficult because the facts rarely speak for themselves so as to put the trustees on the defensive, needing to explain or justify their conduct so as to avoid the adverse inferences that arise from the factual situation. This contrasts with the exercise of managerial discretions where, for example, the significant loss in value of the investment portfolio must be explained away, whether due to poor selection of investments for sale and purchase, or due to lengthy fraud perpetrated by the discretionary portfolio manager employed by the trustees. In the area of distributive discretions, for the facts to speak for themselves one needs an extreme situation, such as when the trustee appoints capital to a beneficiary with whom he is having an affair, or when the trustee commits a fraud on the power by appointing capital to a beneficiary to enable the beneficiary to repay a personal debt to the trustee or to make a gift of half the appointed capital to the trustee although the trustee is not a beneficiary.

Policing the exercise of distributive discretions becomes even more difficult where the trust deed expressly authorizes appointments of trust money to a trustee or the trustee's spouse, children or grandchildren so long as there are two trustees when such discretion is so exercised. The two trustees might then be allowed to appoint half the capital to each of themselves, which the settlor must have contemplated as a possibility, or to settle the capital equally on each of their family branches, even if this

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89. *In re* Beloved Wilkes Charity (1851) 3 Mac. & G. 440; Palmer v. Locke, 15 Ch. D. 294, 300 (C.A. 1880); *In re* Gresham Life Assurance Soc'y, 8 Ch. App. 446, 450 (1872).

ousts the family of a sibling of theirs, which is another possibility which the settlor must have contemplated. At face value, such conduct could accomplish a possible purpose of the settlor, especially if the trust deed provides that in exercising the power, the trustees may have regard solely to their own several interests to the exclusion of all other interests. Indeed, such provision should make this particular power a personal power and not a fiduciary power.[90]

In the absence of such provision, the trustees must exercise the power as a fiduciary power "in a responsible manner according to its purpose."[91] It is here that a settlor's letter of wishes may be very helpful, but there is uncertainty over whether beneficiaries have an absolute right to see the letter of wishes (as well as the trust instrument) to enable them to ascertain the settlor's purposes and to check whether the trustees are exercising their powers properly in a manner designed to fulfil those purposes.

At one extreme, a "letter of wishes" may be a letter regarded as a mandatory document having to be read alongside the trust instrument, overriding such instrument insofar as inconsistent with it. Thus, a settlor may contemporaneously provide with a discretionary trust instrument a letter in which he directs the trustees to pay the income to him for the rest of his life, and which the trustees must sign to acknowledge that they must implement its terms; then during the settlor's life, the real trust is in the letter, not in the discretionary trust instrument (except for administrative powers and any powers of appointment, etc.).

At the other extreme from such a *legally binding* letter of wishes that is part of the beneficial provisions of the trust is a *morally binding* (as opposed to a *legally significant*) letter of wishes.[92] Such letter may be prefaced by words such as the following:

> This letter is not to be regarded as indicating the purposes for which the powers in my trust deed have been conferred on my trustees because I do not want my trustees to have extra legal obligations placed upon them by this letter, so as to have to go out of their way to justify the exercise of their powers. I believe the imposition of such extra legal obligations would cause more difficulties than benefits to accrue, creating greater cost and proving likely to upset relationships between my beneficiaries. Thus, my trustees are only to be under a moral obligation to take

90. On "personal" and "fiduciary" powers, see discussion of Protectors in Part II.C.

91. *Re* Hay's Settlement Trusts [1981] 3 All E.R. 786, 792 (Ch.); *see also Re* Beatty's Will Trusts, [1990] 3 All E.R. 844, 846; McPhail v. Doulton [1971] App. Cas. 424, 449 (Lord Wilberforce).

92. *See* P. Matthews, *Letters of Wishes*, 5 OTPR 176, 181, 184 (1995).

> into account the following wishes of mine and shall not be accountable before the courts in relation to taking into account or failing to take into account such wishes.

Assuming that such preface is not a pro forma sham inserted by the trustees without the settlor's mind being directed to the point to appreciate and approve it, effect should be given to the settlor's intention as revealed therein to create a mere morally binding letter.

Between these extremes is a letter of wishes intended to be *legally significant* [93] in revealing the purposes for which the settlor conferred an extensive range of powers on the trustees who have to exercise any discretionary power "in a responsible manner according to its purpose."[94] The greater the range of discretionary powers conferred on the trustees by the trust instrument, the greater the need for some guidelines in a letter of wishes.

To preempt the possibility that any particular term of the letter will be regarded as a *legally binding* letter containing part of the beneficial provisions of the trust instrument, it is standard practice to preface the letter with words such as, "This letter is not to be legally binding upon the trustees and is not to be taken account of as part of my trust." There then follows detailed guidance to varying extents to help the trustees fulfil the settlor's purposes as much as possible. It seems that the proper *contra proferentem* approach to trustees trying to rely on the prefatory words to protect themselves is that the settlor did intend the letter of wishes to be *legally significant* in revealing the purpose for which he had conferred extensive discretionary powers upon the trustees. Why else did he go to the lengths of considering his purposes and setting them out on paper? Does he not want the trustees to be under a legal obligation to take his wishes into account, although not to be slavishly bound to them, especially if circumstances have changed[95] significantly since the letter of wishes was written?

To minimize the impact of a letter of wishes signed by the settlor, the trustee often merely prepares a memorandum of wishes after extensive consultation with the settlor. However, such a memorandum is likely to be regarded as a legally significant letter of wishes, with the court rejecting a trustee's self-serving attempts to rely on morally binding terminology used

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93. *See, e.g.*, Hartigan Nominees Pty. Ltd. v. Rydge (1992) 29 N.S.W.L.R. 405.

94. *Hay's*, [1981] 3 All E.R. at 792 (Ch.).

95. These circumstances may justifiably lead the trustee not to follow the letter of wishes. *See* Bank of Nova Scotia Trust Co. (Bahamas) v. Ricart de Barletta, *discussed in* Heather Thompson, *Case Reports*, 3 J. INT'L TR. & CORP. PLAN. 35 (1994); 1 BOCM 5 (1985).

by the trustee in the memorandum as creating a situation similar to that of a mere morally binding letter.

Like the trust instrument, a *legally binding* letter of wishes must be made available for inspection and copying by beneficiaries.[96] However, a *morally binding* letter of wishes should not need to be made available to beneficiaries: taking, or failing to take it into account is not intended to be a justiciable issue where complaint can be made and a judicial adjudication made thereon.[97]

With respect to a *legally significant* letter of wishes there seems no reason why the settlor should not have the option expressly to make the letter confidential to the trustees, especially if its contents may embarrass or embitter some beneficiaries. This choice will make the life of the trustees easier than would be the case if the beneficiaries had the letter available to them and could thus pressure the trustees to justify divergences from the settlor's wishes.[98] Confidentiality of the letter will provide the trustees with a zone of protection, as the letter only need be disclosed under civil litigation discovery processes[99] if some evidence of improper conduct by the trustees were available to enable a particularized statement of claim to be drawn up—and not be struck down as merely a device to enable the discovery process to be used as a "fishing" expedition for evidence which might support the claim.

Where the settlor has chosen to write a legally significant letter and has not chosen to make it expressly confidential to the trustees (until the discovery process of litigation for breach of trust) the caselaw is unclear on whether beneficiaries have an unfettered right to see and copy the letter of wishes.[100] In principle, the key must be the settlor's intention. He must intend the letter to be a trust document to be handed on with the trust deed from trustee to trustee. After all, the trustee's discretionary duties and powers can only be exercised for the purposes for which the settlor conferred them on the trustees[101] as indicated by the settlor in his legally significant letter of wishes. The settlor also must intend to grant the beneficiaries the ability to bring the

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96. *See generally* SIR ARTHUR UNDERHILL & DAVID J. HAYTON, LAW OF TRUSTS & TRUSTEES, Article 62 (15th ed. 1995).

97. P. Matthews, *supra* note 92, at 179.

98. *See generally* Hartigan Nominees Pty Ltd. v. Rydge (1992) 29 N.S.W.L.R. 405.

99. *See* Compagnie Financiere v. Peruvian Guano Co., 11 Q.B.D. 55, 63 (C.A. 1882).

100. In *Hartigan*, 29 N.S.W.L.R. 405, the three Court of Appeal judges' views differed.

101. *See Re* Hay's Settlement Trusts, [1981] 3 All E.R. 786, 792 (Ch.); *Re* Beatty's Will Trusts, [1990] 3 All E.R. 844, 846 (Ch.).

trustees to account in the exercise of the trustee's discretionary duties and powers, since accountability of the trustee to the beneficiaries is at the core of the trust concept.[102] To give substance to the beneficiaries' right to make the trustee account for exercise of his discretions, surely the beneficiaries need to be able to see the letter of wishes indicating the purposes for which those discretions were conferred upon the trustee.[103] Without knowing such purposes, how can the beneficiaries possibly monitor the trustee's conduct and establish a prima facie case of improper exercise of powers? Do the beneficiaries not have a legitimate expectation of being able to see the letter of wishes in order to be able effectively to protect their interests, legitimate expectations having a part to play in trust law?[104]

In my opinion, the settlor must therefore be understood implicitly to intend those with a right to make the trustee account to the beneficiaries[105] to have the right to see the settlor's letter of wishes (or a trustee's memorandum of such wishes). Thus, such persons should have an unfettered right to see the letter unless the settlor expressly made the letter confidential to the trustees; even in the latter case, however, the letter must be disclosed in the discovery process of litigation if a particularized breach of trust claim can properly be pleaded. Then, as Robert Walker J. states, "[i]f a decision taken by trustees is directly attacked in legal proceedings, the trustees may be compelled either legally (through discovery or subpoena) or practically (in order to avoid adverse inferences being drawn) to disclose the substance of the reasons for their decision."[106]

Letters of wishes may well play a vital role where trustees have been given the immensely wide power to add anyone in the world (other than the settlor, his spouse and the trustees) to a class of beneficiaries, or of objects of a power of appointment or,

102. *See generally* David Hayton, *The Irreducible Core Content of Trusteeship*, *in* TRENDS IN CONTEMPORARY TRUST LAW 47 (A. J. Oakley ed., 1996).

103. *Cf.* Scally v. Southern Health & Soc. Serv. Bd., [1992] 1 App. Cas. 294, 306-07. The letter may or may not give the beneficiaries some insight into the reasons for the trustees' actions, but this should be immaterial as in the case of the provisions of the trust deed.

104. Per Robert Walker J. (as he then was) in *Scott* v. *National Trust*, [1998] 2 All E.R. 705, 718 (Ch.).

105. Beneficiaries (except temporarily under a blind trust for example, for the Prime Minister, Chancellor of the Exchequer, or Director of Serious Fraud Office) must have a right to make the trustee account, and objects of a power will normally be intended to have such a right, see Spellson v. George (1987) 11 N.S.W.L.R. 300, 316-17, but the settlor could expressly exclude such a right, with the core trustee beneficiary duty-right relationship sufficing to validate a trust.

106. *Scott*, [1998] 2 All E.R. at 719.

even to appoint income or capital to anyone in the world (except the above persons).

A discretionary trust for everyone (except four persons) is void, not for uncertainty but for administrative unworkability.[107] The court cannot positively enforce such a trust, whether by appointing new trustees, or by authorizing or directing representative persons of various classes of beneficiaries to prepare a scheme of distribution, or by itself directing the trustees to distribute on what is obviously a proper basis for distribution.[108] Thus, positive justiciability is lacking. Neither would one imagine that the court can negatively intervene in the vast majority of cases where it is alleged the trustees acted improperly in distributing money to X (not being one of the excepted persons). After all, there seem to be no clear criteria to enable the court to adjudicate upon the dispute once the trustee is not obviously acting improperly for his own benefit by distributing capital to a lover or dependant.

However, because "beneficiaries under a trust have rights of enforcement which mere objects of a power lack . . . ,"[109] trustees' powers of appointment to anyone in the world (apart from excepted persons) have been held valid in some first instance decisions. Templeman J. accepted[110] that in the case of wide powers to add anyone to a beneficial class and of wide special powers of appointment—and so *a fortiori* in the case of powers of appointment in favor of everyone (except four persons):

> [T]he court cannot insist on any particular consideration being given by the trustees to the exercise of the power . . . . That consideration is confided to the absolute discretion of the trustee . . . . The court cannot judge the adequacy of the consideration given by the trustees to the exercise of the power, and it cannot insist on the trustees applying a particular principle or any principle in reaching a decision . . . . the settlor has no doubt good reason to trust the persons whom he appoints trustees.[111]

107. *See Re* Hay's Settlement Trusts, [1981] 3 All E.R. 786, 794, 796 (Ch.); R. v. District Auditor, [1986] R. & V.R. 24.

108. These methods are detailed in *McPhail v. Doulton*, [1971] App. Cas. 424, 457 (1970).

109. *Hay's Settlement Trusts*, [1981] 3 All E.R. at 796.

110. *See In re* Manisty's Settlement, [1974] Ch. 17.

111. *Id.* at 25-26 (taking account of valid special powers to benefit exceptionally wide classes (citing *In re* Gestetner Settlement, [1953] Ch. 672; *In re* Gulbenkian's Settlement, [1970] App. Cas. 508, 524-25 (Lord Upjohn)). On the weak position of objects of powers, see also *McPhail*, [1971] App. Cas. at 425, 441, 445; Lutheran Church of Australia. v. Farmers' Cooperative Executive & Trustees Ltd. (1970) 121 C.L.R. 628, 639.

He considered that the court could only intervene by removing the trustees if they failed to consider exercising the power or failed to consider a particular request from an object of the power or acted for "reasons which I apprehended could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor . . . ."[112] He thus considered immensely wide powers to be negatively justiciable to a limited extent.[113]

Megarry V-C shared this view in subsequently upholding the validity of a power to appoint to anyone (other than excepted persons). He stated that as in the case of wide special powers, "the trustee must first consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments."[114]

However, how does one ascertain such "appropriateness" or the "sensible expectations of the settlor"? According to Templeman J., "reasonable trustees will endeavour to give effect to the intention of the settlor, and will derive that not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited."[115] Clearly, a letter of wishes can clarify the settlor's expectations by indicating the considerations that should influence the trustees to exercise their powers in favor of particular persons.

Such letter should be used if the trust instrument does not provide any guidelines. Otherwise, there is a danger that a power to appoint to anyone but an excepted class might be held to be void, either because negative justiciability does not exist in the particular circumstances (there being no clear criteria to enable a judge to intervene negatively), or because positive justiciability is required not just for discretionary trusts but also for powers.

After all, Warner J. in *Mettoy Pension Trustees Ltd v. Evans*[116] considered that the means available for the court to enforce discretionary trusts were also available to bring about the exercise of powers vested in trustees.[117] Thus, the court exercised an insolvent company's fiduciary power to augment the pension benefits of its employee-beneficiaries out of a trust fund surplus available for both the employer and its employee-beneficiaries.[118] There are also some earlier cases (ignored by Templeman J. and

112. *In re* Manisty's Settlement, [1974] Ch. at 26.
113. *See id.*
114. *Hay's*, [1981] 3 All E.R. at 793.
115. *In re* Manisty's Settlement, [1974] Ch. at 26.
116. [1991] 2 All E.R. 513 (Ch.).
117. *See id.* at 549.
118. *See generally id.*

Megarry V-C) indicating that if a trustee is refusing to exercise (or even to consider exercising) a power in circumstances where no reasonable, properly informed trustee could do other than exercise the power in a particular way, then the court can directly order a particular payment to be made, while also having available the remedy of replacing the perverse trustee with a reasonable trustee.[119]

It may be, however, that one can justify the pension cases as turning on the fact that the beneficiaries had earned rights to deferred pay and had legitimate expectations of benefiting to some extent from surpluses, or that both the pension cases and the earlier cases concerned powers being exercised in favor of persons who were beneficiaries and not merely objects of a power of appointment. Because of these uncertainties, to be safe, settlors should either use letters of wishes or expressly restrict the trustees' powers only to benefit persons nominated in writing by the settlor, if alive, or by beneficiaries explaining why they believe the settlor, if alive, would have wished those persons to be eligible to benefit.

D. *The Role and Duties of Protectors*

While protectors are much used in offshore trusts and are becoming used in mainland domestic trusts, no accepted meaning of protector[120] exists unlike that of settlor, trustee, beneficiary of a trust or object of a power. Clearly, however, a protector is the holder of one or more powers capable of affecting what the trustees are to do with the trust property.[121]

Such powers may be classified as "personal" powers,[122] also known as "bare"[123] or "beneficial"[124] powers, or as "fiduciary,"[125]

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119. *See* Klug v. Klug, [1918] 2 Ch. 67; *In re* Lofthouse, 29 Ch. D. 921 (C.A. 1885); *In re* Roper's Trusts, 11 Ch. D. 272 (1879); *In re* Hodges, 7 Ch. D. 754 (1878). *But see* cases cited *supra* nn. 81-82; G. THOMAS, POWERS 343-67 (1998).

120. *See generally* Donovan W. M. Waters, *The Protector: New Wine in Old Bottles?*, *in* TRENDS IN CONTEMPORARY TRUST LAW 63 (A. J. Oakley ed., 1996); Antony Duckworth, *Protectors—Fish or Fowl, Part I*, 4 J. INT'L TR. & CORP. PLAN. 131 (1995); Antony Duckworth, *Protectors—Fish or Fowl, Part II*, 5 J. INT'L TR. & CORP. PLAN. 18 (1996); P. Matthews, *Protectors: Two Cases, Twenty Questions*, 9 TR. L. INT'L 108 (1995).

121. *See* Waters, *supra* note 120, at 63.

122. *See* UNDERHILL & HAYTON, *supra* note 96, at 23.

123. *See In re* Gulbenkian's Settlement, [1970] App. Cas. 508, 524; C.T. Emery, *The Most Hallowed Principle—Certainty of Beneficiaries of Trusts and Powers of Appointment*, 98 LAW Q. REV. 551, 580 (1982); THOMAS, *supra* note 119, at 25.

124. *See In re* Wills' Trust Deeds, [1964] Ch. 219, 228.

125. *See* Steele v. Paz Ltd., [1993-95] Manx L.R. 102, 426 (where fiduciary powers are contrasted with "mere" or "bare" powers); Mettoy Pension Trustees Ltd.

or "vicarious"[126] powers, depending upon the intention of the settlor as it appears from the trust instrument and from the surrounding circumstances.[127] The approach of the court is to facilitate and not to frustrate intentions of settlors, so long as it does not contravene mandatory rules of trust law whether based on policy or on practical grounds (e.g., rules against perpetuities, the beneficiary principle, the requirements of certainty, justiciability and accountability of trustees to beneficiaries). Thus, the English Court of Appeal has recently upheld exemption clauses preventing trustees from being liable unless guilty of actual fraud[128]—even if inserted in the trust instrument by the settlor's solicitor and accountant (accepted as being in a fiduciary relationship with the settlor) who became the original trustees—so long as the settlor knew and approved of the wide exemption clause, having been told that individuals taking on the trusteeship would normally not accept office without such a clause.[129]

Personal powers "arise where the settlor's intention is to confer some individual benefit or protection or right of patronage upon the donee."[130] The donee is intended in his lifetime to have full dominion so that he can discharge his legal or moral obligations to objects of the power or use the trust fund to benefit persons he would otherwise seek to benefit from his own resources,[131] or so that he can protect his own position,[132] for

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v. Evans, [1991] 2 All E.R. 513, 545-46 (Ch.). Fiduciary powers are sometimes divided into "trust powers" where there is an obligation to exercise them with discretion (as to how to exercise them, see, for example, *McPhail v. Doulton*, [1971] App. Cas. 424, dealing with discretionary trusts) and "mere powers" where there is no obligation to exercise them (see *In re* Gulbenkian's Settlement, [1970] App. Cas. 508, 518, 524 (1968)).

126. *See In re* Will's Trust Deeds [1964] Ch. 219, 228-29.

127. *See* Vestey's Ex'rs v. IRC, [1949] 1 All E.R. 1108, 1131; Mettoy Pension Trustees Ltd. v. Evans, [1991] 2 All E.R. 513, 537.

128. *See* Armitage v. Nurse, [1998] Ch. 241 (C.A.); *see also* Hayim v. Citibank, [1987] App. Cas. 730 (P.C.) (upholding clause stating that "trustee shall have no responsibility or duty with respect to such house" occupied by very elderly siblings until death of both siblings).

129. *See Draftsman Entitled to Protection*, TIMES (London), Apr. 22, 1998 (discussing *Bogg v. Raper*).

130. *Steele*, [1993-95] Manx L.R. at 436 (Hegarty JA), *cited in* P. Games and J. Wright, *Protectors in the Isle of Man*, 4 J. INT'L TR. & CORP. PLAN. 165, 170 (1995).

131. *See In re* Wills' Trust Deeds, [1964] Ch. at 228.

132. *See* Rawson Trust v. Perlman, 1 BOCM 135 (Bahamas Sup. Ct. Eq. No. 194) (1984); *In re* Z Trust, [1997] CILR 248 (unreported Cayman case discussed in 2 CHASE J. 57 (1998)).

example, as occupier of a house owned by the trustees[133] or as director of a company controlled by the trustees.

In the case of less absolute personal powers, where the settlor does not intend to confer such full dominion on the donee, he will intend that there be no justiciability or accountability beyond requiring the donee of the power to exercise the power only in favor of the objects of the power, so as not to benefit non-objects.[134] Indeed, just as a personal power to appoint to anyone in the world except the donee or his spouse is valid,[135] since satisfying the test of administrative workability or justiciability is not required, so it would seem a personal power to appoint such person as the donee considers to have been friends of the testator-settlor should be valid,[136] with the donee having to choose those within the "black" core meaning of friend or the "grey" penumbra and being prohibited from choosing those in the "white" outer area, the donee's decision being unchallengeable unless no reasonable person could have grounds[137] for finding the chosen appointee to fall within the grey penumbra of meaning of friends.

The donee of a personal power does not need to consider periodically whether or not he should exercise his power, and then to consider the range of possibilities within the power and the appropriateness of particular exercises of the power. The power is the donee's personal power to use or not use as he wishes within the scope of the power. Whether the donee releases the power, or never bothers to consider exercising the power, or exercises the power irresponsibly for personal, spiteful or malicious reasons, the court cannot intervene. As P.O.

133. It seems the English court has power to override an elderly beneficiary's refusal to consent to sale of an increasingly run-down house where the beneficiary resides in an extreme case, whether to prevent remaindermen being detrimentally affected beyond limits contemplated by the settlor or, paternalistically, if the beneficiary's subjective view is one no reasonable person could have. *See In re* Beale's Settlement Trusts, [1932] 2 Ch. 15; Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 30, *amended by* Trusts of Land and Appointment of Trustees Act 1996, ch. 47, §§ 14-15 (applicable to land only).

134. *See In re* Gulbenkian's Settlement, [1970] App. Cas. 508, 518; *Re* Hay's Settlement Trusts, [1981] 3 All E.R. 786 (Ch.); *In re* Wills' Trust Deeds, [1964] Ch. 219; *In re* Somes, [1896] 1 Ch. 250.

135. *See In re* Park, [1932] 1 Ch. 580 (stating that a power to appoint the income of fund to any person "other than herself" [the donee] is valid).

136. A discretionary trust for S's friends or a fiduciary power of appointment in favor of S's friends is void for uncertainty. *See In re* Gulbenkian's Settlement, [1970] App. Cas. 508; Brown v. Gould, 1992 Ch. 53, 57.

137. *See, e.g., Re* Barlow's Will Trusts, [1979] 1 All E.R. 296 (Ch.) (illogically holding, despite the cases cited *supra* note 136, that the testamentary provision of a painting for each of the testatrix's friends was not void for uncertainty); *Re* Gibbard, [1966] 1 All E.R. 273 (Ch.) (holding that "any of my old friends" was precise enough).

Lawrence J. stated, "[t]he donee is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the Court will uphold it."[138]

Fiduciary powers arise where the settlor intends that the donees exercise their powers to benefit beneficiaries or objects in ways appropriate to fulfil the settlor's purposes and expectations.[139] Except for special cases where the power (e.g., to benefit selected persons within a class) must be exercised even though there is a discretion as to how it must be exercised,[140] the power need not be exercised. However, the donee is under a duty to consider periodically, or when consent is sought by the trustees, whether to exercise the power and whether to consider the range of possibilities within the power and only to take appropriate action[141] (i.e., not irrational, perverse, or irrelevant to any reasonable expectation of the settlor).[142] Thus, the donee must exercise the power bona fide for the purposes for which the settlor created it, and will be precluded from fettering or releasing the power[143] and from receiving any personal benefit unless authorized in the trust instrument expressly or by necessary implication.[144] If the power relates to investment or other managerial matters then, in the absence of a contrary intention, the duty of care already discussed as applicable to trustees likely should apply to fiduciary donees.

In this author's firm view it is inappropriate to regard a person holding exclusively personal powers as a protector, for example, where the settlor has a power of revocation or a general power of appointment, or where a testator's widow, not being a trustee of his testamentary trusts, has a special power to appoint the trust fund between such of her descendants as she sees fit in her absolute uncontrolled discretion. As the name implies, the powers of a protector should be regarded as attached to an office-holder[145] for the duration of the trust and for the protection of those interested in the trust fund as beneficiaries or as objects of powers. However,

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138. *In re* Wright, [1920] 1 Ch. 108, 118; *see supra* note 134.

139. *See In re* Wills' Trust Deeds, [1964] Ch. at 228-29; Mettoy Pension Trustees Ltd. v. Evans, [1991] 2 All E.R. 513 (Ch.); Steele v. Paz Ltd, [1993-95] Manx L.R. 102, 426.

140. For example, discretionary trusts, or where trustees are to invest only as directed by the "investment adviser" such that the adviser must act.

141. *See Re* Hay's Settlement Trusts, [1981] 3 All E.R. 786, 793 (Ch.).

142. *See In re* Manisty's Settlement, [1974] Ch. 17, 26.

143. *See In re* Gibson's Settlement Trusts, [1981] Ch. 179 (holding an undertaking to be invalid "as fettering the trustees' discretion"); *In re* Wills' Trust Deeds, [1964] Ch. at 228-29.

144. *See* Edge v. Pensions Ombudsman, [1998] 2 All E.R. 547 (Ch.); Sargeant v. National Westminster Bank, 61 P. & C.R. 518, 519 (1990) (holding that "the rule that a trustee must not profit from his trust" does not apply when he is put by the testator in the position where his interest and duty conflict).

145. This is also the view of Duckworth, *supra* note 120.

circumstances can exist in which the protection is intended by the settlor to be for her own protection for the rest of her life or for the personal protection of the protector for the rest of his life, such as where the settlor or the protector needs the protection of the trustees' voting rights as a significant shareholder in a company of which the settlor[146] or the protector is a director or chief executive.

Here it is appropriate to consider the wide-ranging powers that can be conferred on a protector, whether an individual or a company or a board or a committee and whether called "protector," "guardian," "supervisor," or "management committee." Such wide-ranging powers usually relate to management of the trust fund but may relate to the distributive functions of trustees. Examples of such powers[147] are:

(a) to remove and appoint trustees;
(b) to review the trust administration and to approve accounts;
(c) to appoint auditors;
(d) to agree to trustees' remuneration;
(e) to approve self-dealing by trustees;
(f) to apply to the court at the expense of the trust fund if bona fide believing this to be in the interests of any unborn or unascertained beneficiary;[148]
(g) to export the trust and change the governing law;
(h) to trigger or cancel flight arrangements in flee clauses for new trustees in a new jurisdiction to replace the old trustees;
(i) to withhold consent (generally or only in specific areas) to investment or other managerial decisions of the trustees (including their powers to amend the administrative terms of the trust);
(j) to direct (generally or only in specific areas) the exercise of trustees' investment or other managerial discretions;
(k) to obtain and provide tax advice for the trustees;
(l) to veto the settlor's exercise of reserved powers (e.g., if believing the settlor to be under duress in his home jurisdiction);
(m) to decide whether the settlor is suffering a disability or other misfortune so that his reserved powers should be suspended or terminated;

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146. *See, e.g.*, Von Knierem v. Bermuda Trust, 1 BOCM 116 (Bermuda High Court, 1994).

147. In a rare case excessive powers may be given to a protector such that there is no true trust for beneficiaries, but only a trust of capital and income for the settlor absolutely (albeit with power to benefit the beneficiaries simply as objects of a power). For example, if the powers prevent the beneficiaries having any enforceable rights against the trustees for wrongful conduct in the settlor's lifetime (the protector having power to release the trustees from any liability for breach of trust, such as returning the trust property to the settlor, and the beneficiaries having no right to know they are beneficiaries or to see the trust accounts unless the protector consents in his absolute uncontrollable discretion).

148. So far, courts have been prepared to assume that protectors have *locus standi*, presumably on the basis that recognition of their office and powers requires this, as in the Scots case, *Hill v. Hunter* (1766) Mor. 16207.

(n) to withhold consent to distributive decisions of the trustees;
(o) to direct the trustees to make particular distributions of income or capital or to accumulate income;
(p) to make or approve additions to or deletions from the class of beneficiaries or of objects.

Of course, the existence of such express powers conferred upon a fiduciary office holder will give rise to some necessarily implied rights, such as seeing the trust accounts and being indemnified out of the trust fund for properly incurred expenses.[149] The protector will normally also be given power to release any of the protector's powers.

In ascertaining the fiduciary standards applicable to the exercise of the above powers in default of express or necessarily implied provisions in the trust instrument, one needs also to consider who holds the office of protector. It may be the settlor, or on his death, a designated relative or close friend; it may be a beneficiary or committee of beneficiaries or a professional adviser of the settlor or the firm in which such adviser is a partner; it may even be a company, whether formed by the settlor or being an independent professional company. The settlor possibly may be the first protector, but on his death, his lawyer or an independent corporation is to take over as protector.

In view of the infinite variety of possibilities of powers and of persons having such powers conferred upon them by settlors, it is clearly impossible for legislation to define a protector and prescribe his powers and duties in any worthwhile fashion. However, legislation could potentially provide that if a person is expressly appointed to be "protector," then such protector has specified powers, subject to specified duties, but subject to contrary intention diminishing or enlarging such powers and duties. Indeed, such legislation could try to tackle the relationship between the protector and the trustee so as to protect the trustee for relying on the action or inaction of the protector except where believing the protector's conduct to be dishonest,[150] but subject to the contrary intention of the settlor.

The problem with statutory default rules is that they are fine for standard situations but not for unusual and complex situations, where, anyhow, one would expect skilled professional advice to be available to create a tailor-made trust. The infinite variety of circumstances requires reliance on the skill of professional advisers to specify the requisite powers, the duties applicable to the exercise of such powers, the rights of the power-

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149. *See* Blampied v. Ram, Jan. 28, 1994, Jersey Royal Court, *discussed in* Matthews, *supra* note 120.

150. *Cf. Re* Arnott, [1899] Ir. R. 201; Royal Brunei Airlines v. Tan [1995] 3 All E.R. 97 (P.C.).

holder (e.g., to remuneration and indemnity), and any exemption from liability, whilst dealing with the relationship between the power-holder and the trustee (e.g., a right to require meetings with the trustee, and the trustee's protection when relying upon the conduct of the power-holder).

In default of such express provision, one has to fall back on rules relating to donees of powers, which need developing in the light of modern trust practice, especially when during the settlor's life some of the protector's powers are intended neither for the personal benefit of the protector nor for the altruistic benefit of the beneficial classes in the trust instrument, but rather for the sole personal benefit of the settlor, who is not one of the beneficiaries: he does not wish a particular shareholding to be sold nor its voting rights exercised, except to strengthen or preserve his position as a director or employee of the company so that the trustees cannot dispose of the shareholding without the protector's consent and until then must vote the shares as directed by the protector.

A skilled draftsperson would include a provision to the effect that, during the settlor's lifetime and so long as he was a director or employee of X Co. Ltd., the protector's powers in respect of the shareholding in such company should be exercised having regard only to the interests of the settlor and to the exclusion of the beneficiaries. After all, it is the settlor who decides how extensive his bounty is when he makes his gift into a trust; the beneficiaries obtain benefits along with associated burdens. In the absence of some such provision, the presumption would be that an officeholder with powers *virtute officii* has fiduciary powers[151] that must be exercised exclusively in the interests of the beneficiaries under the trust so that it would be a fraud on the power to exercise the power to benefit the settlor, not being a beneficiary. Exceptionally, if the settlor were the first protector, the background circumstances might justify a court in holding this particular power to be a personal power while the settlor was protector, even if the other powers were fiduciary.

In ascertaining duties attached to power-holders, the first question is whether the power-holder holds a particular office fundamental to the performance of the trusts throughout the trust period, such as the office of trustee or the office of protector. Normally, the answer will become clear from provisions for successor protectors and by the need for the continued

151. *See In re* Wills' Trust Deeds, [1964] Ch. 219.

involvement of the protector in either or both of the trustees' managerial or distributive functions.[152]

Where the powers were conferred on the protector *virtute officii*, they are presumed to be fiduciary powers, as is also the case if the powers were conferred on them by name when, in the particular circumstances, they were selected as donees of the power because they were protectors.[153] As already seen, fiduciary powers must be exercised bona fide for the purposes for which the settlor created the powers and cannot be released nor used for any personal benefit of the donee. If they relate not to the trustees' distributive functions, but to their managerial functions, the protector likely will need to exercise such powers with the same degree of care as the trustees. No doubt for this reason, many offshore jurisdictions have legislation preventing persons with fiduciary powers (but who are not trustees) from being liable to the beneficiaries for the bona fide exercise of their powers unless there is a contrary intention in the trust instrument.[154]

Exceptionally, where the first protector office-holder is the settlor, it may be possible, in the special circumstances canvassed in the antepenultimate paragraph, to hold that a particular power is personal, as also may occur where the first protector is a beneficiary with selfish interests that the settlor must have taken into account.[155] Thus, the beneficiary's power is personal or, if it be fiduciary, there is a necessarily implied authorization of a conflict of interest that allows the beneficiary, after due consideration of other beneficiaries' interests, to exercise the power despite personal benefit accruing therefrom.[156]

Where the relevant power is conferred on a person not in the office of trustee or of protector, the question arises whether such power is a personal power, so that it can be ignored or released or exercised capriciously, or a fiduciary power that cannot be so

152. *See* Steele v. Paz Ltd., [1993-95] Manx L.R. 102, 426 (establishing that the court has inherent jurisdiction to appoint a person to the office of protector, which should also be the view of English judges).

153. *See In re* Wills' Trust Deeds, [1964] Ch. 219.

154. *See, e.g.*, Bahamas Trustee Act 1998 § 81; British Virgin Island Ordinance § 86.

155. *See* Rawson Trust v. Perlman, 1 BOCM 35 (Bahamas Sup. Ct. Eq. No. 194) (1984).

156. For example, in *In re* Z Trust, [1997] CILR 248 (unreported Cayman case discussed in 2 CHASE J. 57, 59 (1998)), where the judge held the beneficiary-protector's power was probably personal, but if it was fiduciary there was a necessarily implied authority to exercise the power, thereby benefiting the beneficiary-protector and upholding the consent of a protector committee to an amendment of the beneficial provisions of the trust fund so as to benefit beneficiary members of the protector committee at the expense of other beneficiaries.

ignored, released or exercised. Where the power relates to the investment, management, or export of the trust fund, there is a strong presumption that the power is a fiduciary power since the investment, management, or export of the fund are for the purpose of protecting and promoting the interests of the beneficiaries.[157] Where the power relates to the distributive functions of the trustees, it seems that the power will be strongly presumed personal if vested in the settlor at one extreme,[158] and will be strongly presumed fiduciary if vested in some stranger by virtue of an external office such as Dean of the Law School or President of the Royal College of Surgeons. What of the situation (1) where the power is vested in a beneficiary or (2) in some person closely connected with the beneficiaries, such as a parent, uncle, or person in loco parentis at some stage?

In the first case it seems likely that the power will normally be personal,[159] or, exceptionally, be merely a fiduciary one where the donee is allowed to prefer his self-interest, so long as he considers the rival claims of other beneficiaries;[160] and, in the case of a pension trust, the need to maintain healthy relations between the employer-donee-beneficiary and the employee-beneficiaries.[161] In the second case, the power will be presumed to be a personal power given to the individual "warts and all," so that it is exercisable according to the prejudices of the individual, so long as the power is not used for the corrupt purpose of benefiting the individual-donee or some other person outside the scope of the power. As James L.J. stated in *Palmer v. Locke*,[162] where it was alleged that such a power was a fiduciary power, "it is fiduciary only to this extent, that the donee of the power cannot use it for any corrupt purpose." Cotton L.J. then went on to say:

> I think a great deal of inaccurate argument arises from expressions undeveloped and not explained which may bear two senses. How can you say that a man is properly a trustee of a power. As I

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157. Commissioner of Stamp Duties v. Way, [1942] 1 All E.R. 191 (P.C.) (where the settlor, although one of three trustees, had the controlling power to determine which investments were bought and sold); Vesty's Executors v. IRC, [1949] 1 All E.R. 1108; IRC v. Schroder, [1983] Simon's Tax Cases 480 (where the settlor's power to remove and appoint trustees or to remove and appoint members of a committee with such power over the trustees was held to be fiduciary).

158. *See, e.g.*, *In re* Triffitt's Settlement, [1958] Ch. 852.

159. *In re* Penrose, [1933] Ch. 793 (holding that the estate of a deceased husband, who had a power to appoint to himself the testatrix's trust fund, included such fund because her husband was competent to dispose of her fund).

160. *See supra* note 156.

161. *See* British Coal Corp. v. British Coal Staff Superannuation Scheme Trustees Ltd., [1995] 1 All E.R. 912, 913 (Ch.) (holding that employer can amend pension scheme as long as the charge would "further the purposes of scheme and ensure that the legitimate expectations of the members are met").

162. 15 Ch. 294, 299 (C.A. 1880).

> understand it, it means this, in the words of Lord *St. Leonards*,[163] that it must be fairly and honestly executed. A donee of such a power cannot carry into execution any indirect object or acquire any benefit for himself directly or indirectly. That is, it is something given to him from which he is to derive no beneficial interest. In that sense he is a trustee.[164]

Subsequently, in *Re Somes*,[165] where the life tenant had a power to appoint in favor of his children and issue, with remainder in default of appointment to a particular child, Chitty J. stated:

> [t]here is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit . . . .[166]

Rather than rely on default law, a settlor should consider (with the benefit of professional advice) what particular powers, duties, rights and exemptions he wishes to confer on his trustees and on any other persons. The settlor alone must decide how to deal with his property by transferring it to trustees for the benefit of beneficiaries, who cannot look a gift horse in the mouth but must take the benefit with associated burdens arising from the existence of fiduciary or personal powers—unless they choose to disclaim their interest. There seems no reason to invoke public policy to prevent intended personal powers from being personal powers: if a settlor has a personal power to act capriciously and irresponsibly he should also have power to authorize others[167] so

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163. Topham v. Duke of Portland, 11 HLC 32, 55 (1864).

164. *See* Palmer v. Locke, 15 Ch. at 302-03.

165. [1896] 1 Ch. 250. In the case of a trust for children equally, but with power for a parent to appoint to one or more of the children, to the whole or partial exclusion of other children, the court may find a fiduciary duty not to divest the children of their default entitlements except by a non-capricious responsible consideration of the circumstances of the children leading to a responsible well-considered exercise of the power. *See In re* Little, 40 Ch. D. 418, 422 (C.A. 1889) (stating that the power to choose among children must be for purposes which the donor had in mind when he created the power); *In re* A, [1904] 2 Ch. 328 (C.A.).

166. *In re Somes*, [1896] 1 Ch. at 255.

167. However, trustees must owe an irreducible core content of obligations to beneficiaries or there is no trust for the beneficiaries, but only a resulting trust for the settlor, or absolute beneficial ownership in the so-called trustees. In *Armitage* v. *Nurse*, [1998] Ch. 241 (C.A.), Millett L.J. stated:

> [T]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept . . . that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith

to act, especially where the existence of a fiduciary power could enable challenges to be made to its exercise, such challenges being detrimental to the smooth running of the trust and provoking costly litigation.

Take the power of a protector to sack the trustee and appoint new trustees. If this be a fiduciary power does it not confer too much leeway for the sacked trustee to allege that the sacking was not bona fide for the purposes of protecting and promoting the interests of the beneficiaries?[168] If the settlor trusts the protector why should the protector's power not simply be personal so as not to be open to challenge?

Indeed, the practice is developing to have the trust assets vested in a custodian trustee—helpful, anyhow, to afford efficacy to flee clauses—with a managing trustee exercising all managerial and distributive discretions. If the protector sacks the managing trustee, instructing the custodian to ignore the sacked trustee and to act only upon the directions of the new managing trustee, what can the sacked trustee do, particularly when it has no assets to transfer to the new trustee and so does not need to be told the identity of the new trustee; and, especially, if the trust instrument provides that such a sacked trustee cannot be liable for anything happening as a result of the appointment of its replacement?

Custodian trusteeship is also attractive to trust corporations, which do not want to be a managing trustee where the trust fund mainly comprises a controlling shareholding in a company run by the settlor or his associate so that there is plenty of potential liability for breach of trust if the value of the shareholding depreciates due to the trustee's failure to supervise properly the activities of the company. A private trust company (owned and run by the settlor or his family or associates) can be managing trustee, while the professional trust corporation is custodian trustee protected by provisions in the trust instrument. For example, the instrument may provide that the custodian trustee must concur in and perform all acts necessary to enable the managing trustee to exercise its powers and discretions, unless the matter in which it is requested to concur is known by it to involve a breach of trust; but, unless the custodian so concurs, it shall not be personally or vicariously liable for any act or default

> for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts . . . .

Id. at 253-54.

168. *See* Von Knierem v. Bermuda Trust, 1 BOCM 116 (Bermuda High Court, 1994).

of the managing trustee,[169] being under no duty whatsoever to act where no direction has been given by the managing trustee.

In England and jurisdictions with an appeal to the English Privy Council, such custodianship arrangements will preclude any action by the beneficiaries against the custodian trustee for a breach of trust alleged to have arisen from such trustee's failure to act. Liability is within the exclusive jurisdiction of equity so there can be no question of any tortious liability for negligence at common law.[170] English lawyers were amazed to see the British Columbia Court of Appeal[171] hold a custodian trustee liable for common law negligence to pension fund beneficiaries, especially when the trust instrument provided that such "Trustee shall not be responsible for the collection of any funds required by the Plan to be paid to the Trustee . . . . [nor] shall the Trustee be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan,"[172] although the majority of the Court considered that this could not affect the beneficiaries who were not a party to the trust instrument.[173]

III. SUBSTANTIVE TRUST LAW

A. *Protective Trusts*

English law does not have the American concept of a spendthrift trust where the interest of a beneficiary currently[174] entitled to income (or to capital) is not transferable by him and is not available to his creditors, whether directly provided for by the terms of the trust or indirectly by virtue of a provision that the right to income for life (or the present right to capital) shall cease if the beneficiary (1) becomes bankrupt or (2) attempts to assign

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169. *See* Public Trustee Act, 1906, 6 Edw. 7, ch. 55, § 4(2)(d) (Eng.).

170. "[T]he tort of negligence has not yet subsumed all torts and does not supplant the principles of equity." China & South Sea Bank Ltd. v. Tan, [1990] 1 App. Cas. 536, 543 (P.C.) (appeal taken from H.K.); *see also* Parker-Tweedale v. Dunbar Bank, [1991] Ch. 12 (C.A.) (holding that a mortgagee's duty owed to a mortgagor in selling the mortgaged property is not a common law negligence duty of care but an exclusively equitable duty).

171. *See* Froese v. Montreal Trust Co., [1996] 137 DLR (4th) 725.

172. *Id.* at 730-31.

173. *See id.* at 739.

174. *See* Younghusband v. Gisborne, 1 Coll. 400 (1844), *aff'd* 15 LJ Ch. 355 (1846); Brandon v. Robinson, 18 Ves. 429 (1811). "[A] future interest may be made subject to a [valid] condition defeating it in the event of a [purported] voluntary or involuntary alienation." *In re* Scientific Inv. Pension Plan Trusts, [1998] 3 W.L.R. 1191, 1196 (Ch.).

the trust or (3) if any other event happens whereby, but for such a provision, the beneficiary would be deprived of his right to receive such income (or capital).

However, while a provision that conditions the beneficiary's interest in such a manner that the occurrence of a particular event cuts down the interest before it reaches its natural limit, a provision granting a beneficiary an interest in income only *until* he (1) becomes bankrupt or (2) attempts to assign the trust or (3) if any other event happens whereby, but for this provision, he would be deprived of his right to receive the benefits, is valid, as the provision merely sets a natural limit to his interest.[175] A trust creating such a determinable (as opposed to a conditional) life interest is equally valid where, upon the bankruptcy or other relevant event, a discretionary trust springs up directing the trustees in their absolute discretion to apply the income for the maintenance, support, or other benefit of the disadvantaged former income beneficiary or the spouse or issue thereof or, in default of any such spouse or issue, for such beneficiary and the persons who would, after the death of such beneficiary, be entitled to the income or capital of the trust fund.

Such combination of a determinable life interest followed by discretionary trusts is so common that section 33 of the Trustee Act 1925 expressly sets out the lengthy trusts that will be incorporated into a trust instrument containing a reference to property being held on "protective trusts" for B for life, with remainders over.[176] However, if B is the settlor and if the determining event is his bankruptcy, then such event will be ignored, so that the income for the rest of B's life will go to his creditors;[177] events other than bankruptcy will validly determine B's interest.[178] In practice, nowadays anxious settlors immediately create a discretionary trust under which they are one of the beneficiaries.

However, such a disposition by a settlor, whether or not he is a beneficiary, can be set aside[179] if made for the purpose of putting assets beyond the reach of, or of otherwise prejudicing,

175. *See Re* Aylwin's Trusts, 16 L.R.-Eq. 18 (1873).

176. *See* Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, § 33 (Eng.).

177. *See In re* Burroughs-Fowler, [1916] 2 Ch. 251, 254-55 (holding that the trustee in bankruptcy takes an indefeasible interest).

178. *See In re* Detmold, 40 Ch. D. 585, 588 (1889) (holding valid a clause that transferred the trust income to his wife upon the event of an involuntary alienation by process of law in favor of a judgment creditor of the husband).

179. *See* Insolvency Act, 1986, ch. 45, §§ 423-25 (Eng.) (replacing Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 172 (replacing a Statute of Elizabeth, 1571)) (specifying grounds on which transactions can be set aside and that no limitation period applies); *see also* G. Miller, *Transactions Prejudicing Creditors*, 1998 CONV. & PROP. LAW (n.s.) 362.

existing ascertainable creditors or contingent creditors or even future unascertainable creditors.[180] The creditor has this right even if the settlor is not insolvent. In the event of insolvency, the trustee in bankruptcy has this right as well as statutory rights to set aside transactions made at an undervalue within five years of the presentation of the bankruptcy petition.[181] Dispositions made with intent to defeat a spouse's claim to discretionary financial relief upon divorce can also be set aside so far as necessary,[182] as also is the case for dispositions made with intent to defeat applications for discretionary financial provision out of the estate of the settlor-donor after his death.[183]

B. *Public Policy*

Public policy as revealed in legislation deals with devious settlors in the preceding section hereof; however, the judiciary has invoked public policy to favor a bankrupt's creditors by ignoring the effect of the settlor's bankruptcy as a determinable event under a protective trust. The judges are loath to invoke public policy—"it is a very unruly horse, and when once you get astride it you never know where it will carry you";[184] it "is a high horse to mount and is difficult to ride when you have mounted it."[185] And:

> To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments.[186]

Remarks about "freedom of contract" are equally applicable to "freedom of trust," public policy only being invoked to invalidate a contract "in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds . . . . In popular language, the contract should be given the benefit of the

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180. *See In re* Butterworth, 19 Ch. D. 588 (1882) (holding a settlement void because it was executed to put S's property out of the reach of unascertainable future creditors); Midland Bank v. Wyatt, [1995] 1 F.L.R. 696 (also so holding).

181. *See* Insolvency Act, 1986, ch. 45, §§ 339-42 (Eng.).

182. *See* Matrimonial Causes Act 1973, ch. 45, § 37(2)(b) (Eng.).

183. *See* Inheritance (Provision for Family and Dependants) Act 1975, ch. 63, § 10 (Eng.).

184. Richardson v. Mellish, 2 Bing. 229, 252 (1824) (per Burrough J.).

185. Driefontein Consolidated Mines v. Janson, 17 T.L.R. 604, 605 (1901) (per A.L. Smith M.R.).

186. Fender v. St. John-Mildmay, [1938] App. Cas. 1, 10 (Lord Atkin) (quoting Egerton v. Browlow, 4 H.L.C. I. 123 (1853) (Parke, B.)).

doubt."[187] As the great Equity lawyer, Sir George Jessel M.R., remarked:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have the paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.[188]

Legal advisers must also take care because "public policy is a very unstable and dangerous foundation on which to build until made safe by decision."[189]

Decisions created the rules against perpetuities in the form of the rule against remoteness of vesting for trusts for persons and the rule against inalienability for the few effective trusts for non-charitable purposes.[190] However, statute created the rule against accumulations[191] which the Law Commission recently recommended should be abolished,[192] so that accumulations can last for as long as the whole trust period. The Commission recommended a 125-year maximum trust period for which a deceased settlor can rule the living from the grave.[193]

The settlor for such period can exercise much influence because, so long as the provisions of the trust instrument are sufficiently certain, he can prevent relatives from benefiting if they do not take his surname,[194] marry a person of a particular proscribed religion or color or ethnic origin,[195] cease to practice a particular religion, or cease permanently to reside in England,[196] fail to acquire a law degree, or sexually co-habit with a person of

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187. *Id.* at 12 (Lord Atkin).

188. Printing & Numerical Eng'g Co. v. Sampson, 19 L.R.-Eq. 462, 465 (1875).

189. Janson v. Driefontein Consol. Mines, Ltd., [1902] App. Case. 484, 507 (P.C.) (appeal taken from Eng.) (Lord Lindley).

190. *See generally* UNDERHILL & HAYTON, *supra* note 96, at art. 11.

191. *See* Accumulations Act, 39 & 40 Geo. 3 (1800) (Eng.); Perpetuities and Accumulations Act, 1964, ch. 55 (Eng.).

192. *See* LAW COMMISSION REPORT NO. 251, *The Rules against Perpetuities and Excessive Accumulations*, para. 10.15 (1998).

193. *See id.* para. 8.13.

194. *See In re* Neeld, [1962] Ch. 643 (holding that the "name and arms clauses" were valid as they were not void for uncertainty).

195. *See* Blathwayt v. Cawley, [1976] App. Cas. 397 (holding that a forfeiture clause which cast off a beneficiary if he was or became a Catholic was not void for uncertainty or as against public policy). The Race Relations Act 1976, like the Sex Discrimination Act 1975, does not apply to private trusts.

196. *See In re* Gape, [1952] Ch. 418, 426 (upholding clause that required beneficiary to permanently reside in England).

the same sex or opposite sex. Conditions which seek to undermine marriage[197] (but not remarriage)[198] are void for public policy, as are conditions designed to separate parent from child.[199]

In the case of charitable trusts where, except for trusts for the relief of poverty, the test of public benefit must positively be satisfied, there is more scope for judicial intervention, at least in regard to educational trusts and miscellaneous trusts for the public good. Thus, an alleged charitable trust for a museum or gallery of objects that were mainly "junk" was held non-charitable and void,[200] but in the case of religious charitable trusts it seems impossible to challenge allegedly religious writings as junk unless subversive of all morality.[201]

In the case of private trusts complying with the rule against perpetuity, the beneficiary principle, and the three certainties, freedom of trust, like freedom of contract, is a sacred principle so that the judiciary should not make the trust or a provision thereof void unless there is a clear public policy justification indicated by Parliament[202] or by earlier caselaw not based on obsolete social attitudes.[203]

Recently, in *Armitage v. Nurse*,[204] it was submitted that "a trustee exemption clause which purports to exclude all liability except for actual fraud is void, either for repugnancy or as contrary to public policy."[205] Millett L.J. (as he then was) rejected this assertion in a reserved judgment in which the two other Lords Justices simply concurred:

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197. *See In re* Hope Johnstone, [1904] 1 Ch. 470; *In re* Lovell, [1920] 1 Ch. 122, 126 (stating that "the law of England does not allow provisions made in contemplation of a future separation between husband and wife"); *In re* Johnson's Will Trusts, [1967] Ch. 387, 395 (invalidating a clause in a will that would "tend to encourage the daughter to separate from her husband" or to divorce him).

198. *See* Allen v. Jackson, 1 Ch. D. 399 (1875).

199. *See In re* Sandbrook, [1912] 2 Ch. 471; *In re* Borwick, [1933] Ch. 657; Blathwayt v. Cawley, [1976] App. Cas. 397.

200. *See In re* Pinion, [1965] Ch. 85.

201. *See* Thornton v. Howe, 31 Beav. 14 (1826); *In re* Watson, [1973] 1 W.L.R. 1472 (Ch.). This is a hangover from the old Mortmain Acts that ensured charitable religious trusts made on death or within a year of death were void (not valid as they are today), thereby encouraging the judges so to find, and so to benefit the deceased's family.

202. Indeed Parliament sometimes expressly abolishes public policy rules, including, for example, those voiding trusts for future illegitimate children. *See* Family Law Reform Act 1969, ch. 46, § 15(7) (Eng.).

203. "Only in a case where there is still a generally accepted moral code can the court refuse to enforce rights in such a way as to offend that generally accepted code." Stephens v. Avery, [1988] 2 All E.R. 477, 481; *see also* Tinsley v. Milligan, [1994] 1 App. Cas. 340.

204. [1998] Ch. 241 (C.A.).

205. *Id.* at 251.

> [There] is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts . . . . [It] must be acknowledged that the view is widely held that these clauses have gone too far, and that trustees . . . should not be able to rely on a trustee exemption clause which purports to absolve a trustee from liability for his own fraud, wilful misconduct or gross negligence . . . . If such clauses . . . are to be denied effect . . . this should be done by Parliament.[206]

Parliament had already legislated that trustees of unit trusts and of debenture trusts (and pension trustees in their investment function)[207] could not exempt themselves from liability for negligence, but it would have been open to the Court of Appeal to find that ordinary trustees as a matter of public policy could not exempt themselves from liability for gross negligence, as opposed to ordinary negligence.

There is support for this in American[208] and Scottish[209] caselaw, but Millett L.J. doubted whether any intelligible distinction existed between ordinary and gross negligence; counsel, unfortunately, failed to cite to him the English cases accepting this distinction in the law of bailment.[210] Thus, Millett L.J. considered that the Court had a stark choice between choosing either to outlaw or to accept all clauses exempting trustees from liability for negligence, because no serious consideration could be given to the option of only outlawing exemption from liability for gross negligence.

Some useful guidance does emerge from the insistence of Millett L.J. that private trusts require at their core beneficiaries with rights against the trustees, although he naturally prefers to regard this not as a matter of public policy but as inherent in the fundamental trust concept.[211] A provision purporting to oust

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206. *Id.* at 253-54, 256.

207. *See* Companies Act 1985, ch. 6, § 192 (Eng.) (discussing liability of trustees of debentures); Financial Services Act 1986, ch. 60, § 84 (Eng.) (discussing liability of trustees of unit trusts); Pensions Act 1995, ch. 26, § 33 (Eng.) (discussing liability of trustees of pension funds).

208. *See* Browning v. Fidelity Trust Co., 250 F. 321, 325 (3d Cir. 1918) ("[A] trustee cannot contract for immunity from liability for acts of gross negligence or for acts done in bad faith.").

209. *See* Lutea Trustees Ltd. v. Orbis Trustees Guernsey Ltd., [1997] SCLR 735.

210. *See* Giblin v. McMullen, [1868] 2 L.R.-P.C. 317 (discussing differing levels of negligence in bailment); Beal v. South Devon Ry. Co., 3 H&C 337 (1864).

211. *See generally* Armitage v. Nurse, [1998] Ch. 241.

such rights therefore would either be void as repugnant to the trust concept or would require the beneficiaries to be recharacterized merely as objects of a power. Thus, if a trust governed by English law stipulated that the beneficiaries had no right to see the trust accounts and no right to make the trustees account for their conduct as trustees, a court would either treat this stipulation as void for repugnancy or, more likely, would give effect to the settlor's intentions by finding there to be a resulting trust in favor of the settlor but with the trustees having power (until countermanded by the settlor) to make distributions to the beneficiaries recharacterized merely as objects of a power.

In the cases of Cayman-exempted trusts (in which all rights and remedies of "beneficiaries" are vested in the Registrar answerable to no one except the Governor)[212] and Cayman STAR trusts (in which a "beneficiary," unless appointed an "enforcer," does not have standing to enforce the trust or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property),[213] assuming no "beneficiary" is an "enforcer," the English courts are likely to find a resulting trust of English property in favor of the settlor, with the trustees having a revocable power to benefit the beneficiaries as objects of a power. Thus, there arises the concept of a "limping trust" valid as a proper trust for beneficiaries in one jurisdiction, but ranking as a resulting trust for the settlor with a power to benefit beneficiaries as objects in another jurisdiction.

A "limping trust" can also arise in respect of trusts of some English property governed by a foreign law which permits a settlor to create a protective trust for himself where the bankruptcy of the settlor is allowed to determine his life interest and trigger discretionary trusts in favor of himself and his family.[214] Under the foreign law there will be valid discretionary trusts, while under English Law the trustee in bankruptcy will surely have a life interest in the English assets for the benefit of the settlor's creditors.

Indeed, public policy considerations favoring creditors are so strong that it seems likely that if an English trust instrument expressly excludes the right of the trustee to an indemnity for expenses and liabilities it incurs, so as to prevent creditors from having any derivative rights of subrogation against the trust fund if the worthless trust company cannot pay up, the courts will ignore such exclusion.[215] This also seems likely if a foreign law

212. *See* Trusts Law (1996 Revision), § 79 (Cayman Is.).
213. *See* Special Trusts (Alternative Regime) Law 1997, § 7(I) (Cayman Is.).
214. *See, e.g.*, Belize Trusts Act 1992, § 12(4).
215. *See In re* Johnson, 15 Ch. D. 548, (1880).

governs the trust. The Hague Convention on Trusts incorporated into English Law by the Recognition of Trusts Act 1987 allows non-recognition and non-application of the provisions of the Convention "when their application would be manifestly incompatible with public policy."[216]

To have English trustees hold English assets for English beneficiaries,[217] but to purport to make the trust endure forever simply by choosing a foreign governing law that has no rule against perpetuities, is likely to be manifestly incompatible with public policy. However, if the trust governed by the foreign law has a perpetuity period no more extensive than a permitted English period and then provides a trust or power of accumulation coextensive with such foreign period, but larger than the twenty-one-year accumulation period permitted by English law, the English court probably will not reduce the foreign accumulation period. Perpetuity and accumulation periods were coextensive in British jurisdictions until the Accumulations Act of 1800 reduced the accumulation period for England, but other jurisdictions like Ireland and the Isle of Man were unaffected. The Law Commission recently recommended that the period should once again be coextensive, since there is no justification for separating the periods and plenty of justification for the periods being coextensive.[218]

One area where the courts will soon be called upon to take a public policy view involves flee clauses (sometimes known as "flea" clauses or "grasshopper" clauses because they make the trust jump from one jurisdiction to another). Clearly, such clauses can operate to frustrate international and national measures tackling the laundering of the proceeds of drug-trafficking, of terrorism and of other serious criminal offences.[219] Thus, the English courts will almost certainly hold flee clauses to be ineffective where the English authorities take steps against the trustees in respect of trust assets believed to be laundered assets, so that the English trustees remain trustees and are not replaced by Suntopian trustees as provided in the trust instrument.

However, if no trust assets can be found in England, nothing can be done except to charge the trustees (and perhaps their

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216. Recognition of Trusts Act 1987, ch. 14, sch., art. 18 (Eng.).

217. The same would apply if Cayman STAR law were chosen so as purportedly to create a valid non-charitable purpose trust of English assets held by English trustees, whether or not perpetual.

218. *See* LAW COMM'N REPORT NO. 251, *supra* note 192.

219. Two acts that contain such clauses are the Drug Trafficking Act 1994, ch. 37 (Eng.), and the Criminal Justice Act 1988, ch. 33 (Eng.), *amended by* Criminal Justice Act 1993, ch. 36 (Eng.).

advisors) with any appropriate criminal offenses.[220] Normally, the assets are held outside the trustees' jurisdiction (although some underlying assets may perhaps be traced to such jurisdiction) so that the crucial issue is whether the "asset jurisdiction" recognizes as trustees the English trustees or the Suntopian trustees. International action seems necessary to make flee clauses ineffective to the extent that they interfere with the administration of justice, although national measures could make it a crime for a trustee to accept trusteeship of a trust containing a flee clause purporting to make the trust fund free from attack by the relevant law enforcement authorities.

C. *Termination of Trusts*

A trust may terminate naturally upon expiration of its prescribed duration (e.g., for A for life, remainder to B or to accumulate the income for a valid perpetuity and accumulation period and then to distribute the capital equally *per stirpes* between the descendants of the settlor). A trust of particular property may terminate prematurely to the extent that such property is the subject matter of the exercise of a settlor's power of revocation or of a fiduciary or personal donee's power to transfer or appoint trust property to persons absolutely or as trustees for others.

Where beneficiaries of full capacity are between themselves (whether concurrently or consecutively) collectively the absolute equitable owners of property held in trust for them, they can prematurely terminate the trust if they all agree, even if the settlor wanted the trust to continue for a longer period for some material purpose for which he created the trust.[221] The

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220. Bankers, lawyers, and accountants who suspect they are assisting the laundering of proceeds of criminal conduct commit an offence unless they tip off the authorities (but not the client). "Criminal conduct" means conduct which would constitute an offence if it had occurred in England, Wales, or Scotland. *See* Criminal Justice Act, 1993, ch. 36, § 29 (Eng.). On a narrow view, this does not cover defrauding a *foreign* revenue authority, but the English Government takes the broader view that defrauding the revenue authority is the relevant conduct, and defrauding the English national revenue authority would be criminal. *Cf.* R. v. Chief Metro. Stipendiary Magistrate, [1988] 1 W.L.R. 1204 (Q.B.) (granting extradition to Norway of a Norwegian convicted of crimes connected with evading Norwegian taxes).

221. *See* Stephenson v. Barclays Bank Trust Co., [1975] 1 W.L.R. 882 (Ch.); Saunders v. Vautier, [1841] Cr. & Ph. 240; Wharton v. Masterman, [1895] App. Cas. 186; *In re* Smith, [1928] Ch. 915; Hunt-Foulston v. Furber, 3 Ch. D. 285 (1876); *In re* Bowes, [1896] 1 Ch. 507. Under the Variation of Trusts Act 1958, the court on behalf of persons "who cannot themselves give their approval" (e.g., because unborn), can approve arrangements varying trusts even if contrary to the wishes of the settlor. *See Goulding v. James*, [1997] 2 All E.R. 239.

justification for this position is that by transferring the property to trustees, the settlor divested himself of all beneficial ownership in the property. The trustees then carry out *his* purposes until such time as beneficiaries of full capacity become collectively beneficial owners of the property. As the collective absolute property owner, the beneficiaries can then absolutely decide for themselves *their* purposes for the trustees to implement, for example, transferring to each of them his proportionate share as absolute legal owners matching the absolute equitable ownership of each. Purported restraints imposed by the settlor on the use an absolute owner makes of the absolutely owned property are rejected as repugnant to the concept of absolute ownership.[222]

Thus, a settlor simply must take care not to create vested absolute deferred interests but to create contingent interests. Take the case of a testator, T, who had founded a family company of which at his death his second child, B, is the managing director with a twenty-six percent shareholding. By his will T bequeaths his own fifty-one percent shareholding to B as trustee to hold and manage it for the benefit of T's unbusinesslike other children A, C, and D equally, such shareholding not to be sold until B sells his own shareholding or retires as managing director or dies, whichever first occurs. Here, if A, C, and D want their fifty-one percent shareholding to be transferred to themselves so they can sell it then, if all are of full capacity, they can insist on this transfer out of spite, so as to sell the company to an outsider and frustrate the settlor's purposes. Those purposes would have been achieved if the interests of A, C, and D had been made contingent on being alive on the occurrence of the first of the three specified events, with their issue to take *per stirpes* the share the parent would have taken if surviving until such time.

Intriguingly, if A, C, and D were not unanimous so that, say, only D wanted his proportionate seventeen percent share, the English court would probably not apply the normal "*aliquot* principle" that someone entitled to a specific fraction of assets (other than land or mortgage debts) is entitled to have an amount of assets representing such fraction to be transferred to him. Exceptional circumstances would preclude such entitlement.[223] There is the settlor's material purpose coupled with the fact that a seventeen percent shareholding and the remaining thirty-four percent shareholding in a private company are not worth one-third and two-thirds respectively of a fifty-one percent

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222. *See* Gosling v. Gosling, [1859] John 265; Weatherall v. Thornburgh, 8 Ch. D. 261, 270 (1878); *In re* Dugdale, 38 Ch. D. 176 (1888); Metcalfe v. Metcalfe, 43 Ch. D. 633 (1889).

223. *See* Crowe v. Appleby, [1975] 1 W.L.R. 1539 (Ch.); *In re* Weiner, [1956] 1 W.L.R. 579 (Ch.); Lloyds Bank v. Duker, [1987] 1 W.L.R. 1324 (Ch.).

shareholding, so that the conduct of D in cutting off his nose to spite his face should not be allowed to have a detrimental effect on the interests of A and C which the testator would not have intended.

Just as this exception to the "*aliquot* principle" has developed in the twentieth century, the House of Lords could have some scope to develop an exception to the collective termination rights of beneficiaries where necessary to give effect to a material purpose of the settlor-testator. However, the House of Lords is unlikely to be prepared to make inroads into such a well-established principle of property law.[224] Presumably, they would not allow an English settlor of English assets for English beneficiaries to evade this fundamental principle merely by choosing, as the law governing the trust, the law of an American State which does not allow termination if it would defeat a material purpose of the settlor.

D. *Problems in Creating Proper Valid Trusts*

1. Certainty of Subject Matter

No problems arise if a settlor, S, gratuitously declares himself to hold a particular asset of his in trust for himself as to one quarter and for B as to three quarters. What if, instead, he declares that he holds twenty cases of Chateau Lafite or twenty gold bars or twenty tons of gravel or twenty gallons of petrol or £20 or twenty shares in XYZ Co. Ltd. in trust for B, when S owns eighty units of the relevant assets and has not separated twenty units from the rest of the units? In the case of contracts for the sale of unascertained goods out of a larger pool of goods owned by the vendor, statute can intervene where the purchase price has been paid so as to treat the vendor as having an intention to hold the pool on trust for himself and the purchaser in proportionate shares as equitable tenants in common.[225] Equity cannot, however, treat S's intention to become trustee of twenty units out of a pool of eighty units as effective until the twenty units have been separated from the rest, S not intending forthwith to become an equitable tenant in common with B, but

224. *See* Rhone v. Stephens, [1994] 2 App. Cas. 310.

225. *See* Sale of Goods Amendment Act 1995, ch. 28, § 1(3) (protecting purchasers who have paid the purchase price against the insolvency of the vendor).

intending B to be sole equitable owner of twenty units.[226] While S may intend B to become immediately sole equitable owner of twenty units, this is legally impossible before segregation of such units from the remaining units. As Lord Mustill said, "[i]t makes no difference what the parties intended if what they intend is impossible, as is the case with an immediate transfer of [legal and equitable] title to goods whose identity is not yet known."[227]

Most surprisingly, in *Hunter v. Moss* [228] the Court of Appeal upheld a gratuitous declaration of trust of fifty shares in MEL for B where S was legal owner of 950 shares on the basis that "just as a person can give, by will a specified number of his shares in a specified company, so equally he can declare himself a trustee of fifty of his shares in MEL, and that is effective to give a beneficial proprietary interest to the beneficiary under the trust."[229]

This crucially overlooks a fundamental distinction between *inter vivos* and testamentary dispositions. By dying, a testator does everything necessary to divest himself of all his legal and beneficial title in all his assets in favor of his executor, who is then obliged to implement his testamentary dispositions after payment of debts, expenses and taxes. In his lifetime, a settlor-donor only divests himself of his beneficial entitlement to his assets when he has done everything necessary to identify those assets in which he has relinquished his beneficial interest. If S, the legal owner of 950 shares, wants to hold fifty on trust for B alone (rather than 950 on trust for S and B as equitable tenants in common as to eighteen nineteenths and one nineteenth), he should send his share certificate to the registrar of the company requesting that he be issued share certificates for nine hundred shares and for fifty shares.

A true analogy with the testamentary position would have arisen if S had declared himself trustee of fifty shares for B and of the remaining nine hundred shares for C. Here S has divested himself of all his beneficial interest in favor of B and C, who collectively, under the principle of *Saunders v. Vautier*,[230] can terminate the trust for themselves and require S to send the 950-

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226. *See In re* Goldcorp Exch. Ltd., [1995] 1 App. Cas. 74 (P.C.) (appeal taken from N.Z.); *Re* Stapylton Fletcher Ltd, [1995] 1 All E.R. 192 (Ch.); *In re* London Wine Co. Shippers, [1986] Palmer's C.C. 121.

227. *Goldcorp*, [1995] 1 App. Cas. at 90.

228. [1994] 1 W.L.R. 452 (C.A.). The decision was criticized in David Hayton, *Uncertainty of Subject-Matter of Trusts*, 110 LAW Q. REV. 335 (1994), but followed at first instance by Neuberger J. in *In re* Harvard Securities, [1997] 2 BCLC 369, on the basis that the law relating to intangibles is different from that relating to tangibles, although accepting that Australian law was contrary to *Hunter v. Moss*.

229. *Hunter*, [1994] 1 W.L.R. at 459.

230. 4 Beav. 115 (1841).

share certificate and a share transfer form to the company registrar, so that B and C become legal registered shareholders of fifty and nine hundred shares respectively.

Hunter v. Moss arguably was incorrectly decided, so that S cannot create a valid trust simply by declaring he holds fifty shares for B or £50 for C where at that time S was owner of one hundred shares or had £100 in his bank account.[231] If correctly decided, it leads to convenient results[232] in the share markets where a custodian purchases shares for itself and its customers, allocating numbers to each, or where a person purports to sell or declare a trust of a certain number of shares forming part of a larger shareholding.

However, even if incorrectly decided, the application of correct principles should not lead to inconvenient results in the share markets. After all, except for shares in private companies as in *Hunter v. Moss*, S will normally not be a registered shareholder with legal title to shares. Where Nominee plc is a registered shareholder of ten million shares in Bigg plc and Sub-Custodian plc is interested in two million of such shares, out of which it sells 100,000 shares to S, S has an equitable interest as tenant in common with a one-twentieth equitable interest in Sub-Custodian's interest in one-fifth of Nominee's interest, so having a one-hundredth equitable interest. If S then purports to sell, or to declare himself trustee of "50,000 of my Bigg plc shares," this is a legal nonsense because in the stock market the system prevents S from becoming legal or equitable owner of 50,000 Bigg shares. It must surely follow that S must be understood to have intended to sell, or to have declared himself trustee of, one-twentieth of his interest in Sub-Custodian's interest or one-hundredth of his interest in Nominee's shareholding: he can only sell, or declare trusts of, what he actually has and must be taken to intend to deal with what he has.

Essentially, S's interest is merely a book entry or computer entry in the books of Sub-Custodian plc, so that the courts will likely consider equitable title to pass merely by such entry rather than fall within the formalities requirement of Law of Property Act 1925 section 53(1)(c), "a disposition of an equitable interest subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent

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231. *Cf.* Mac-Jordan Constr. Ltd. v. Brookmount Erostin Ltd, [1992] BCLC 350.

232. *See* Ho v. Chan (unreported decision of Yuen J. in Hong Kong High Court, Dec. 17, 1998, accepting *Hunter v. Moss*).

thereunto lawfully authorised in writing or by will."[233] It is unfortunate that Parliament when disapplying section 53(1)(c) for transfers of securities within the CREST system did not go further.[234] For the present, reliance must be placed on the argument that joining and leaving a class of co-owners in a pool of assets should fall outside section 53(1)(c).[235]

The pool of assets approach also avoids certainty problems where a custodian buys 15,000 shares in XYZ plc, intending to buy 9,000 for itself, 4,000 for B, and 2,000 for C. No problem arises if the custodian allocates 6,000 shares for B and C to a larger segregated pool of such shares held for clients as equitable tenants in common in proportionate shares.[236] Where, however, the custodian in breach of its obligations under the Financial Services Act regime does not separate fungible assets into those that are its own and those that are its clients, but where the clients accept that their assets are pooled or that the nature of the asset requires this (as where the custodian is a sub-custodian with an equitable interest), then the pool of fungible assets should be regarded as belonging proportionately to the providers of the purchase money in the proportions that the shares they purchased bear to each other.

2. The Constitution of Trusts

In *Re Pagarini* [237] the Court of Appeal of the British Virgin Islands held that no trust arose where shortly before his death the deceased said "I give all my wealth to the Foundation" (a trust he had set up a little earlier) and then instructed his accountant, Mr. Param, to transfer all his wealth to the trustees of the Foundation. The court held that "wealth," comprising the patrimony owned after payment of debts, was an inchoate concept not capable of ascertainment and so not capable of being gifted.[238] It further held that the intention to make a gift precluded the circumstances from constituting a declaration of the settlor as himself trustee, and that

233. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 53(1)(c) (Eng.). See the pragmatic approach in *Vandervell v. Inland Revenue Comm'rs*, [1967] 2 App. Cas. 291 (a helpful decision for stock markets).

234. *See* Uncertificated Sec. Regulations, S. I. 1995, No. 73, § 32(5). Section 53(1)(c) is disapplied to transfers of gilt-edged securities through the Central Gilts Office by Stock Transfer Act 1982, ch. 41, § 1(2).

235. Becoming, and ceasing to be, a member of an unincorporated society is regarded as outside § 53(1)(c). Ashby v. Blackwell & Million Bank (1765) Amb. 503; Neville Estates Ltd. v. Madden, [1962] Ch. 832; *In re* Bucks Constabulary Fund (No. 2), [1979] 1 W.L.R. 936.

236. R. v. Clowes (No. 2), [1994] 2 All E.R. 316, 325-27 (C.A.).

237. [1998/99] 2 O.F.L.R. 1.

238. *See id.*

the fact that the administrator owning the deceased's estate was one of the trustees and that relevant shares had been registered, on the initiative of the directors, in the names of trustees of the Foundation did not perfect the trust.[239]

The court notably refused to follow two English High Court cases: *Re James*,[240] a case that erroneously extended the *Strong v. Bird*[241] principle beyond executors (for whose appointment the deceased was responsible) to administrators (for whose appointment the deceased is not responsible), and *Re Ralli's W.T.*[242] which erroneously extended *Re James* so that if, somehow (even by reason of matters wholly extraneous to the settlor) legal title to property intended to be held in trust happens to become vested in the intended trustee this perfects the trust of such property, for example, if the settlor's trustee happens later to be appointed trustee of the settlor's father's will trusts, so having title to assets, which are later appointed by the settlor's mother as donee of a special power and which fall within the settlor's covenant to transfer to his trustee any such appointed property. In such circumstances, the better view is that only the settlor or his authorized agent can perfect a trust by completing a gift to his trust, so the settlor can choose to keep for himself the property appointed to him.[243]

Strong v. Bird is concerned with the rule that an executor who is a debtor of the testator must account in equity for the amount of the debt as part of the testator's estate even though at common law the appointment of the testator's debtor as executor automatically released the debt because the executor could not sue himself. Exceptionally, *Strong v. Bird* laid down that the executor did not have to account to the estate for the debt if the testator had manifested an intent to forgive the debt in his lifetime and this intent had continued until his death. It was probably a mistake in *Re Stewart*[244] to extend *Strong v. Bird* (which *negatively* left the position as at common law) so as *positively* to justify treating an imperfect lifetime gift as effective in equity if the intended donee became the donor's executor, with the intention to give continuing unchanged until death. Equity

239. *See id.*
240. [1935] Ch. 449.
241. 18 L.R.-Eq. 315 (1874).
242. [1964] Ch. 288 (where *In re* Brooks' Settlement Trusts, [1939] Ch. 993 was overlooked).
243. *See In re* Brooks' Settlement Trusts, [1939] Ch. 993.
244. [1908] 2 Ch. 251.

would then have been anchored to fundamental principle and not left "adrift and aimless."[245]

3. Proper Trust or Sham Trust in Form

Leaving aside whether, as a question of fact, in substance a trust is run by the settlor and not by the trustees, the question arises, as a matter of law, whether the provisions in the trust instrument really have the effect that the underlying beneficial interest remains in the settlor so that the trustee holds the property as trustee or agent for the settlor absolutely, rather than for the apparent beneficiaries.

In English law there is a fine line (recognized by the Revenue in the taxation of capital gains of trusts)[246] between a trustee holding property to the order of the settlor as sole beneficiary and a trustee holding to the order of the settlor only if the settlor orders it and until then on trust for various beneficiaries.[247] An example of the former trust for the settlor, S, is where T holds property in trust during S's lifetime to pay the income or capital to S, or at his direction, and after his death, to hold the capital equally for S's children or for such of S's relatives in such shares as S may designate in signed writing in his lifetime or by will. Since S has the full equitable ownership, the purported disposition of the capital after his death is a testamentary disposition requiring compliance with the detailed formalities of the Wills Act of 1837.[248]

If, however, S had divested himself of his beneficial ownership by having T hold the property on fixed or discretionary trusts for various beneficiaries, but had reserved to himself a power of revocation or a general power of appointment, then T would hold on proper trusts for the beneficiaries and not to the order of T until T chose to exercise his power, which would require T to do as ordered by S.[249] Such powers have adverse tax consequences in England, and in most jurisdictions expose the trust fund to claims of creditors, spouses, heirs, and other dependants. In these jurisdictions, powers to appoint to the

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245. RODERICK PITT MEAGHER ET AL., EQUITY: DOCTRINES AND REMEDIES 740 (3d ed. 1992).

246. Trusts to the order of the settlor as sole beneficiary are taxed differently from proper trusts for beneficiaries. *See* Taxation of Chargeable Gains Act 1992, ch. 12, §§ 5, 60(2), 70 (Eng.).

247. *See* David Hayton, *When is a Trust not a Trust?*, 1 J. INT'L TR. & CORP. PLAN. 3 (1992); UNDERHILL & HAYTON, *supra* note 96, at 46.

248. *See, e.g., Re* Pfrimmer [1936] 2 D.L.R. 460; *Re* Beardmore Trusts [1952] 1 D.L.R. 41; Anderson v. Patton [1948] 2 D.L.R. 202, 203-08 (Parlee J.A., dissenting).

249. *See* Young v. Sealey, [1949] Ch. 278, 284, 294.

settlor are vested in trustees who are usually authorized to have exclusive regard to the settlor's interests (thus ignoring the interests of the beneficiaries or other objects of the power of appointment), but alternately may be vested in a protector.

One needs not only to consider the main beneficial provisions of the trust instrument but also the effect of clauses excluding traditional rights of beneficiaries. After all, if the beneficiaries have no rights, then the trustees owe no duties to any beneficiaries[250] and so must owe their duties to the settlor (or to no one, so as to be absolute beneficial owners), albeit empowered, until countermanded by the settlor, to benefit the beneficiaries, recharacterized as objects of powers with the property held on resulting trust for the settlor who alone has rights against the trustees.

Would not this be the position if the trust instrument provided that no accounts are to be provided for the beneficiaries until the death of the settlor, at which time only are the beneficiaries to be informed that they are beneficiaries, and at which time no beneficiary can bring an action for a breach of trust in respect of any conduct of the trustees during the settlor's lifetime? Does this not mean that the settlor is the beneficial owner of income and capital held to his order, so that the rights of the beneficiaries arising only on his death are obtained under a testamentary disposition requiring compliance with the Wills Act 1837 if the instrument is to be effective? On the other hand, a provision that the trustees are not to be liable for any conduct requested or instigated by the settlor essentially means that the trust fund is held to the settlor's order only if he orders it.

Finally, while accountability of trustees to the beneficiaries is crucial to the existence of a proper trust[251] (as made clear in *Armitage v. Nurse*),[252] continuous accountability is not necessary. It is sufficient that there be retrospective accountability ultimately to some beneficiary. Thus, one can create confidential "blackhole trusts," although in England only for the twenty-one-year accumulation period and any extra period of minority provided for in section 31 of the Trustee Act 1925.

E. *"Blackhole Trusts"*

Settlors and trustees can exploit the position of confidentiality and secrecy to the limit in a "blackhole trust." A

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250. As a result, there can be no trust for the "beneficiaries" as emphasized by Millett L.J. in *Armitage v. Nurse*, [1998] Ch. 241, 253 (C.A.).

251. This requirement does not extend to charitable purpose trusts enforceable by the Attorney General or the Charity Commissioners.

252. [1998] Ch. at 253.

trust is set up (e.g., under Jersey law) for a valid perpetuity and accumulation period of one hundred years and the income is directed to be accumulated throughout the period, upon the expiration of which the capital is to be distributed to the youngest then-living descendant of X born after eighty-two years have elapsed from creation of the trust.[253] However, upon expiration of the hundred-year period, if no such descendant of X exists, then the capital is to be distributed among such charitable companies (incorporated in, say, Barbados after the said eighty-two years and operating in such jurisdiction at the end of the hundred-year period) as the trustees shall select in their absolute discretion, but only to the extent that capital has not been distributed by the trustees under a power of appointment in favor of any descendants of X at any time before the expiration of the hundred-year period. There is both a power to add to this class of object of a power any person (other than the settlor, his spouse, and the trustees) nominated in writing to the trustees by any adult object or by the settlor, and a power to delete any object from the class of objects.

The objects are expressly excluded from having any right to be informed that they are objects,[254] while the trustees have a power to create a structure (e.g., British Virgin Island international business companies or Liechtenstein Anstalts) enabling property appointed by them to an object to reach such object by indirect means, thus ensuring that the object does not learn of the trust. Of course, a further provision excludes the objects (if, somehow, they learn they are objects) from having any right to see the trust instrument, trust accounts, or the letter of wishes.[255]

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253. Contingent beneficiaries (even, it seems, if the contingency is as remote as some of the far-fetched possibilities taken into account by Equity for the purposes of the rule against remoteness of vesting) are entitled under the general law to see the trust accounts, *In re* Tillott, [1892] 1 Ch. 86; Attorney-General of Ontario v. Stavro (1995) 119 D.L.R. (4th) 750, so descendants born in the first eighty-two years are excluded from such category.

254. Often objects (e.g., the settlor's issue but not employees of the settlor's companies who are also objects) will be intended by the settlor to have such right, but such right can be excluded, with the beneficiary-trustee right-duty relationship sufficing on its own for a valid trust. *See In re* Manisty's Settlement, [1974] Ch. 17, 25; Armitage v. Nurse, [1998] Ch. 241, 253 (C.A.); Hayton, *supra* note 102.

255. This reinforces Lord Hodson's dicta in *McPhail v. Doulton*, [1971] App. Cas. 424, 441, that "[t]he trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power by the donee," and the view of Evershed MR in *In re Greaves*, [1954] Ch. 434, 447 (C.A.), that "[t]he only relevant duty which he [the donee] owes is to the persons designated by the donor of the power

In the recitals to the trust instrument, the settlor, X, recites both his intention to create a true trust in form and in substance and his appreciation that while the existence of a company can clearly be established by registration, this is not true of a trust. He also recites his intent that after expiration of the hundred-year period, his trustees will be made to account for their stewardship of the trust assets by his youngest descendant (not ascertainable until the expiration of the hundred year period and not in existence, at the earliest, until eighty-two years have elapsed) or, otherwise, by those recently incorporated charitable companies then in existence who receive the capital. To make this clear, provisions in the main body of the trust instrument will require the accounts to be audited annually by ABC Accountants and placed in a safety deposit box in the vaults of Megabank plc and that apart from payment of their fee for such services, the trustees are to pay £100 p.a. to ABC Accountants and to Megabank plc as beneficiaries having all the usual rights as beneficiaries for the duration of the trust. Finally, X recites that his intention is for the trustees to distribute all the capital (by exercising their power of appointment) before expiration of the one hundred-year period as is normally intended for most discretionary trusts, but even if this happens the trustees should deliver the accounts to his descendant who would otherwise have received the capital, or in default of such defendant, to the state official responsible for charities.

As a matter of form, this is a true trust under which the settlor is excluded from benefiting, so it cannot be regarded as a sham trust of assets held for the settlor until he orders otherwise. Meanwhile, the involvement of ABC Accountants and Megabank should serve to give substance to the trust (assuming they are informed of the trust so the trustees use their services and pay them £100 p.a. as beneficiary).

"Methinks the settlor doth protest too much" in such artificial creation may be an understandable reaction, but the counter-argument is that the apparently artificial structure is necessary to give substance to the settlor's real intentions (to protect, preserve, and develop his family nest-egg in the best interests of his dynasty as he sees it, wanting his descendants to work hard and not be "trustafarians" or "trust babes" concentrating their energies on getting money out of the trustees) with sufficient substance given to the artificial structure to ensure that a true trust exists.

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to take in default of appointment," so the fraud on a power doctrine does not apply to releases of powers.

When the settlor and the trust company have gone to such lengths, using the services of learned Chancery counsel and relying on his opinion, it is likely indeed that the trust company will consciously exercise its discretion, minute its deliberations and decisions, and keep proper accounts so that the trust should not be regarded as in substance a sham. Indeed, the precautions of involving ABC Accountants and Megabank as beneficiaries throughout the one hundred years need not be taken; designating an individual throughout the period with a current right to make the trustees account is not required. Accountability at some stage, if only at the end of the trust period, suffices as where income is accumulated throughout and the capital with accumulations is subsequently to be distributed to a person satisfying a contingency at the end of the period and unascertainable until then; or where a politician or anti-fraud official transfers his portfolio of shares to trustees to administer it, keeping him in the dark until he ceases to be Chief Finance Minister or a Cabinet Minister or Chief of the Serious Fraud office.

Of course, if ABC Accountants and Megabank are not involved, or even if only Megabank is involved, there is scope for the trustee to be dishonest and to appropriate all the trust property for himself once the settlor has died and then to fail to tell the ultimate default beneficiary of the trust. Thus the settlor may wish to have a protector to monitor the trust accounts and look after the interests of the ultimate beneficiaries.[256] Even where the trustee acts properly, the "blackhole trust" helps put the beneficial ownership into suspense or abeyance for the lengthy trust period and makes life difficult for revenue authorities and for creditors of objects of the trust. Purpose trusts may also be exploited for the same purposes. Hence, there are no plans to introduce legislation to validate non-charitable purpose trusts in English law, for example, where there is an "enforcer" named in the trust instrument[257] or an "interested" person.[258]

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256. An interesting question is whether to avoid the risks inherent in "blackhole trusts" legislation should require trustees to account to a minimum of two or three objects of full capacity whenever no beneficiary of full capacity subsists. *See* REVIEW OF FINANCIAL REGULATION IN THE CROWN DEPENDENCIES, 1998 Cmnd. 4109, ch. 12.

257. As in Jersey under its Trusts (Amendment No. 3) Jersey Law 1996 and the Isle of Man under its Purpose Trusts Act 1996.

258. As in Bermuda under its Trusts (Special Provisions) Amendment Act 1998.

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TOPIC II

U.S. Taxation of Foreign Trusts

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