
CONSULTATION PAPER
ON
TRUST LAW
GENERAL PROPOSALS

(LRC CP 35– 2005)

IRELAND

The Law Reform Commission
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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date, the Commission has published seventy one Reports containing proposals for reform of the law; eleven Working Papers; thirty four Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty five Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix to this Consultation Paper.

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NOTE

The Law Reform Commission's Second Programme for examination of certain branches of the law with a view to their reform: 2000-2007 identified the law of trusts including the law of charities for examination.

Given the considerable interaction between general trust law and the law relating to charitable trusts, the Commission decided to cover both of these topics in one Consultation Paper. Each chapter begins by setting out the general trust law position and then addresses any particular issues relating to charitable trusts. A separate paper, *Charitable Trust Law – General Proposals* (LRC CP 36-2005), is being published at the same time containing a summary of the recommendations made in this paper in relation to charitable trusts.

The Consultation Papers examine some specific areas of the Law of Trusts and the Law of Charities and do not purport to represent a comprehensive review of either topic. The proposals put forward are designed to clarify the law and bring it up to date rather than to effect fundamental changes to the existing law. Further issues in relation to trust law and charity law will be addressed by the Commission in the future.

INTRODUCTION

The Law of Trusts

1. The general principles of trust law derive from case law as developed by the courts over many centuries. The role of statute in the law of trusts was aimed at facilitating the efficient administration of trusts. In Ireland, the principal legislation governing trusts is the *Trustee Act 1893*. This Act is not a codification of the law of trusts and its short title was “An Act to consolidate Enactments relating to Trustees”. The legislation was designed primarily to facilitate the creation and administration of trusts, particularly where the trust instrument was silent or deficient in some respect. The only significant amendments since 1893 have been the *Trustee Act 1931* which made provision, *inter alia*, for the appointment of new trustees in place of the holder of an extinct office and the *Trustee (Authorised Investments) Act 1958* which amended the law in relation to the investment of trust funds.

2. Trustee legislation has not kept up to date with the changing economic and social nature of trusts. The purpose of this review is to examine some of the existing legislative provisions, make suggestions for reform and bring them up to date where necessary. The aim is to modernise the legislation to accommodate contemporary needs and practice.

3. To be a trustee involves time, understanding and effort. The roles, duties, powers and responsibilities of trustees can sometimes be difficult to determine and may vary depending on the size of the trust involved. The position of trustee (particularly that of a charity trustee) is normally undertaken without any remuneration, and while this may allow some scope for a more lenient attitude towards behaviour and actions of trustees, it cannot be used as a basis for neglecting the proper administration of the trust. A trustee must be prepared to participate actively in the administration of the trust to ensure that high standards are maintained. The role of trustee should

not be undertaken lightly and it is important that before accepting such a position, the individual involved should fully consider and reflect upon the objectives of the trust and the nature of the duties and responsibilities to be undertaken.

4. Charitable trusts are simply a particular type of trust which are formed for charitable purposes. Charitable trusts are, to a large extent, governed by the same principles and body of case law as general trusts. The distinguishing features are that charitable trusts are not subject to the same extent as other trusts to the requirement of certainty of objects and they may be of perpetual duration. In Ireland, the principal legislation governing charities is to be found in the *Charities Acts 1961 and 1973*, both of which are largely devoted to conferring many wide enabling and facilitative functions and powers on the Commissioners of Charitable Donations and Bequests for Ireland.

5. In December 2003, the Department of Community, Rural and Gaeltacht Affairs published a consultation paper entitled “*Establishing a Modern Statutory Framework for Charities*”. This was followed up by the publication of a *Report on the Public Consultation* in September 2004.¹ The Law Reform Commission agreed to assist and advise the Department on addressing issues raised in chapter 8 (entitled *Governance*) of the Consultation Paper as these relate to charitable trusts.

6. The following proposals are contained in chapter 8 of the Department’s Consultation Paper:

“The law would be codified so that the role, duty of care, responsibilities and duties of charity trustees, officers or directors would be confirmed as being the same no matter what form of legal structure or governing instrument was used.

¹ Both papers are available from the Department’s website www.pobail.ie/en/CharitiesRegulation. The Commission also notes that, in 2002, the Law Society of Ireland published a report entitled *Charity Law: The Case for Reform* (July 2002). The recommendations in that report are discussed throughout this paper. For a general overview of the area, see also O’Halloran, *Charity Law* (Round Hall Sweet & Maxwell, 2000).

A statutory exoneration would be provided for lay trustees against liabilities arising out of acts committed honestly, reasonably and in good faith.

Default administrative powers (particularly in relation to investment) would be updated to assist in the administration of charities with unwritten or incomplete/deficient constitutions.”²

7. Given the considerable interaction between general trust law and the law relating to charitable trusts, the Commission decided to cover both of these topics in one Consultation Paper. Each chapter begins by setting out the general trust law position and then addresses any particular issues relating to charitable trusts. A separate paper, *Charitable Trust Law – General Proposals* (LRC CP 36-2005) is being published at the same time containing a summary of the recommendations made in this paper in relation to charitable trusts.

8. Charities currently operate under various different legal structures and each of these structures has a separate body of law governing its operation. The traditional legal structures used by charities are the charitable trust, the unincorporated association or a company – usually the company limited by guarantee.³ Charitable trusts are subject to general trust law, charitable companies are subject to company law and unincorporated associations are subject to general contract law as well as to the law in respect of charities. This creates obvious difficulties in any attempt to codify any set of rules to apply across all of the different legal structures. Difficulties relating to the interaction of charity and trust and company law have also been encountered in other jurisdictions.⁴

² *Establishing a Modern Statutory Framework for Charities* (Department of Community, Rural and Gaeltacht Affairs 2003) at 16.

³ There are also other charitable bodies such as societies incorporated by charter (for example, the Royal College of Surgeons in Ireland), or created by statute or under other legislation (such as the industrial and provident societies legislation).

⁴ In England, the *Trustee Act 2000* does not apply to charitable companies – the Law Commission having come to the conclusion that “it had become apparent in finalising the recommendations that there would be considerable technical difficulties in doing so... [c]haritable corporations are not necessarily subject to all the rules applicable to trustees, and it is by no means clear that it would be appropriate for some of the proposed

9. The Department's Consultation Paper, referred to above, envisages a new regulatory framework to deal with charities.⁵ The Department's Paper notes that the current institutional arrangements are spread through a number of entities and bodies.⁶ The Attorney General has a role as the protector of charities. The Revenue Commissioners have a role in the administration of the charity tax exemptions under the *Taxes Consolidation Act 1997*, the *Stamp Duties Consolidation Act 1999* and the *Capital Acquisitions Tax Consolidation Act 2003*.

10. The Commissioners of Charitable Donations and Bequests for Ireland, a collegiate body established in the mid-19th century,⁷ also have a wide role as an enabling body, rather than as a regulatory body with investigative or punitive powers. The Board of the Commissioners includes a wide range of professional persons of experience, including members of the judiciary (both serving and former), the legal profession, senior clerics, and the accounting and banking professions. The Commissioners exercise their mainly facilitative functions on a voluntary basis. In light of the composition and enabling role of the Board of the Commissioners, it would be inappropriate for the Board to take on or perform a regulatory role of a strongly investigative or punitive nature. Under the diverse statutory powers currently conferred on the Commissioners by the Oireachtas in the *Charities Acts 1961 and 1973*, they may assist charitable trustees where the trust deed does not provide sufficient powers, for example, by the approval of voluntary dispositions for less than market value, the approval of proposed compromises of litigation, and in giving approvals in respect of the exercise of powers of sale and the application of the proceeds therefrom; and also giving approvals in respect of the exchange of land when for the benefit of the charity. They also have a wide power to frame a *cy-près* scheme

provisions (such as those relating to powers of delegation) to be applied to them.”

⁵ *Establishing a Modern Statutory Framework for Charities* (Department of Community Rural and Gaeltacht Affairs 2003) Chapter 5.

⁶ *Establishing a Modern Statutory Framework for Charities* (Department of Community Rural and Gaeltacht Affairs 2003) Chapter 5 at 10-11.

⁷ The Commissioners of Charitable Donations and Bequests were originally established by statute enacted in 1844.

(now without a financial ceiling),⁸ thus giving a means at minimal cost of applying a gift to an alternative charitable purpose. This important function was exercised more usually by the courts until 1961. They are also empowered to approve a scheme for the establishment of a common investment fund for charities, which has been done and is of benefit to many charities with limited funds. They also give trustees advice on difficult charity problems and, where trustees act on this advice and in good faith, the trustees are personally indemnified. The Commissioners may also certify certain charity cases to the Attorney General for his attention as the protector of charities. The Commissioners perform some supervisory and admonitory tasks by, for instance, warning trustees of concerns about a transaction or even very occasionally applying to the High Court to deal with a supposed breach of a trust for charitable purposes.

11. The Director of Corporate Enforcement and the Registrar of Companies also have a role where a charity is a limited company. While these and other bodies⁹ play important and valuable roles, it is clear that the existing arrangements, in particular the absence of a regulatory body, are not sufficiently comprehensive to meet current needs. A decision has not yet been taken by the government or the Oireachtas as to the proposed format of the new regulatory body.

12. The Commission expresses no view in this Consultation Paper on the issue of the format of the proposed regulatory body, but the Commission notes that the Department refers in its Consultation Paper to the various bodies currently having a role in this area. The current role and composition of these bodies and the need for timely liaison between them will, no doubt, be taken into consideration in discussions about the format of any proposed regulatory body. This Consultation Paper uses the term “the Registrar of Charities” where necessary to refer to the proposed regulatory body. This is without

⁸ See section 16 and Part 2 of the Schedule to the *Social Welfare (Miscellaneous Provisions) Act 2002*, which repealed the previous financial ceiling on the Commissioners powers in *cy-près* schemes. This ceiling had been progressively increased over the previous 50 years.

⁹ The Department’s Consultation Paper *Establishing a Modern Statutory Framework for Charities*, above, noted that the Garda Síochána, the Valuation Office and the Probate Office also currently play certain roles in the context of charities: see Chapter 5 at 11.

prejudice to which body or bodies will ultimately carry out the registration and regulatory tasks and various other functions referred to in this Paper.

13. The reader is also alerted to the various uses of the terms Commission and Commissioners in this paper in order to avoid confusion:

- The Law Reform Commission of Ireland – an independent statutory body established in 1975 whose main aim is to keep the law under review and to make practical proposals for its reform;
- The Law Commission for England and Wales - an independent body established by Parliament in 1965 to keep the law of England and Wales under review and to recommend reform when it is needed;
- The Scottish Law Commission – also established in 1965 to recommend reforms to improve, simplify and update the law of Scotland;
- The Commissioners of Charitable Donations and Bequests for Ireland – originally established by statute in 1844 and is predominantly an enabling, rather more than a regulatory, body – see paragraph 10 above;
- The Charity Commissioners for England and Wales – established by law as the Registrar of Charities and registrar for charities in England and Wales.

14. Throughout the paper references are made to the English *Charities Bill*¹⁰ and the Scottish *Charities and Trustee Investment (Scotland) Bill*.¹¹ The provisions of these Bills are included for comparison purposes and to indicate the proposed reforms in other jurisdictions. However, because these Bills have yet to be passed into law, the provisions are liable to be amended prior to enactment.

15. It should be noted that implementation of the recommendations in this paper may be achieved in different ways.

¹⁰ The English *Charities Bill* was introduced in the House of Lords on 20 December 2004 [HL Bill 15].

¹¹ The Scottish Bill was introduced to Parliament on 15 November 2004 [SP Bill 32].

Implementation may take the form of primary legislation, that is by way of amendment to existing general trust law or charity law, or by way of Ministerial Regulations, or by means of best practice guidelines or codes of practice, depending on the appropriate context. Some of the recommendations relate to general trust law and will therefore be applicable to charities operating as charitable trusts only.

16. The paper begins in Chapter 1 by looking at the office of trustee including such matters as capacity, numbers, appointment, removal, retirement, disqualification and suspension. The overall aim is to facilitate the efficient management and administration of trusts. A further purpose is to reduce the need for recourse to the courts in relation to matters which should be capable of being resolved by the trustees themselves.

17. Chapter 2 considers the question of trustee remuneration and the policy issues associated with any proposal to introduce a statutory charging clause. The distinction between lay and professional trustees is discussed noting the difficulty that if a trust instrument does not contain a charging clause, no professional trustee is likely to be willing to administer the trust. In relation to remuneration of charity trustees, the danger of eroding confidence in the voluntary ethos of charities is discussed.

18. The need for greater supervision of the activities of trustees is examined in Chapter 3. The standard and duty of care expected of trustees is considered together with the instances in which the duty of care should apply. The question of whether the duty should be of uniform application or be more flexible to take account of the differences between lay and professional trustees is also addressed. In relation to charity trustees, an added concern is not to set standards so high as to discourage individuals from becoming involved in voluntary activities. At the same time it is important to ensure that public confidence in the charity sector is maintained.

19. Chapter 4 considers the powers of investment available to trustees and outlines some new developments in this regard such as the “modern portfolio” theory of investment and the need to have regard to “standard investment criteria”. The desirability of obtaining and considering professional advice prior to exercising a power of investment is discussed. Finally, the question of ethical investment policy is considered and the extent to which trustees may allow non-financial considerations to inform their investment decisions.

20. The ability of trustees to deal with trust property by way of purchase or sale and the power to issue receipts is considered in Chapter 5. However, the myriad issues not only of trust law, but also of land law, which arise in this context, mean that this is a topic ultimately beyond the scope of the present paper. For that reason, the Commission proposes to reserve the subject of powers of sale, including issues in respect of trusts for sale and settlements of land, to a further paper to be worked on in the future.

21. The desirability on occasions for trustees to be able to delegate some particular aspects of the administration of the trust is considered in Chapter 6. The differences between individual and collective delegation are explained and the duty of care required of trustees when exercising their powers of delegation is outlined.

22. Chapter 7 considers the issue of trustees' liability for breach of trust and in this context examines the extent to which trustees can exclude or restrict their liability for breach of trust. The need for regulation of trustee exemption clauses is considered, the aim being to ensure that trustees cannot exclude liability for breach of the irreducible core obligations of trustees. Again the distinction between professional and lay trustees arises amidst the discussion as to whether there is any justification for drawing a distinction for the purposes of trustee exemption clauses, or whether there should be a single, universally applicable standard. The role of the courts in examining and perhaps exonerating charitable trustees from liability for certain breaches of trust is also discussed.

23. The need for more expansive powers of insurance is dealt with in Chapter 8 and the question of whether the insurance may be paid for out of income or capital is discussed.

24. Chapter 9 reviews the existing power to compound liabilities and recommends that any new legislative code on trustees' powers and duties should simplify and clarify the power to compound liabilities.

25. Chapter 10 addresses the dual concepts of power of maintenance and advancement. The need for a revised statutory power of maintenance is considered as is the need to address the issue of accumulation of income. The criteria for the exercise of the statutory power of advancement are also discussed. Finally, the duty of trustees in relation to powers of maintenance and advancement is addressed.

26. Chapter 11 deals with the variation and termination of trusts. In this regard the paper points out that the Commission has already published reports on the topics of variation of trusts¹² and the rule against perpetuities.¹³ The Chapter then proceeds to address the issues of winding-up or merger of charities. Finally, Chapter 12 summarises the provisional recommendations of the Commission.

27. The Commission usually publishes in two stages: first, a Consultation Paper and then a Report. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation. Submissions on the provisional recommendations included in this Paper are also welcome. The Report gives an opportunity, which is especially welcome with the present subject, for further thoughts on areas covered in the Paper. In order that the Commission's Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing or by e-mail to the Commission by **29 April 2005**.

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¹² (LRC 63-2000).

¹³ (LRC 62-2000).

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CHAPTER 1	THE OFFICE OF TRUSTEE	

A Introduction

1.01 Trusts are created for a variety of purposes but those purposes cannot be fulfilled without persons who are prepared to act as trustees by managing the trust and carrying out the wishes of the settlor. The office of trustee is an onerous one.¹⁴ In the performance of the office, a trustee must act exclusively in the interest of the trust. The success of the trust administration often turns upon the energy and conscientiousness, not to mention expertise and wisdom of the trustee.¹⁵

1.02 In Ireland, the office of trustee is still governed, to a large extent, by the *Trustee Act 1893*. While this legislation may, at first glance, seem somewhat antiquated, some of its provisions are still as relevant today as when it was first enacted. In other areas the Act is clearly out of date and in need of reform. The only significant amendments since 1893 have been the *Trustee Act 1931* which made provision, *inter alia*, for the appointment of new trustees in place of

¹⁴ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 497.

¹⁵ Waters *Law of Trusts in Canada* (2nd ed Carswell Company Limited 1984).

the holder of an extinct office and the *Trustee (Authorised Investments) Act 1958* which amended the law in relation to the investment of trust funds.

1.03 In England, the *Trustee Act 1893* was replaced by the *Trustee Act 1925* which brought the earlier legislation up to date and further substantial changes have been enacted as a result of the *Trustee Act 2000*. The *Trustee Act (Northern Ireland) 1958* broadly follows the English 1925 Act and the provisions of the *Trustee Act 2000* have been largely mirrored in the *Trustee Act (Northern Ireland) 2001*. Trusts have developed in Scotland in different ways and from different sources than those in England. The *Trusts (Scotland) Acts 1921* and *1961* set up a basic framework of trustees' powers, made provision for removal and resignation of trustees and stipulated permissible trustee investments. Australia and New Zealand¹⁶ have incorporated the English reforms of 1925 but in Canada only Manitoba¹⁷ has done so. Ontario, Saskatchewan and British Columbia are all currently engaged in reviewing the law of trusts.

1.04 A trust may continue for lengthy periods of time and so provision has to be made for the appointment, retirement and removal of trustees. A trustee may die or become incompetent or incapable of carrying out the duties of trustee under the trust. In other instances trustees may simply not be prepared to continue to devote their time and energy to the trust and may wish to retire. The *Trustee Act 1893* contains provisions relating to the appointment, retirement and removal of trustees and the purpose of this chapter is to examine the extent to which these particular provisions need to be modernised and brought up to date. The overall aim is to facilitate efficient management and administration of the trust.

B Capacity and Suitability to Act as a Trustee

(1) The Position in Ireland

(1) General

¹⁶ *New Zealand Trustee Act 1956*.

¹⁷ *Trustee Act 1987*.

1.05 In Ireland any person may be appointed to act as a trustee, including a minor. A beneficiary or a relative of a beneficiary¹⁸ may be appointed as a trustee but in some cases this may be inappropriate due to the potential conflict of interest which may arise. A company may act as a trustee either solely or jointly with another person (whether an individual or another company) provided its memorandum and articles of association provide express authority to carry out such a role. As Keane J (as he then was) writing extra-judicially states: “[w]ith one exception, anyone can be appointed a trustee. The exception is a corporation which is prohibited by its constitution from being a trustee.”¹⁹

1.06 There are no provisions in the *Trustee Act 1893* regarding who may act as a trustee. Because there are no specific qualifications required, or criteria set down, the type and expertise of trustees varies from what may be termed non-professional trustees, sometimes referred to as lay trustees, (for example, family members or friends of the settlor or testator) to professional trustees (for example, individuals or financial institutions who specialise in providing trust services).

(II) *Charities*

1.07 There are no provisions in the *Charities Acts 1961* and *1973* regarding who may act as a trustee. In the case of charities or trusts operating through a company, the provisions of the *Companies Acts 1963-2001* as to who can be a director of a company will apply. Generally, any person may become a director unless disqualified under Part VII of the *Companies Act 1990*.²⁰

1.08 There are no residence requirements in relation to trustees and a person resident outside the jurisdiction may act as trustee for an Irish trust.²¹ However, for the purposes of granting charitable tax

18 *Re Jackson's Trusts* (1874) 8 ILTR 174.

19 Keane *Equity and the Law of Trusts in the Republic of Ireland* (1st ed Butterworths 1988) at 100.

20 See further Keane *Company Law* (3rd ed Butterworths 2000), Forde *Company Law* (3rd ed Round Hall Sweet and Maxwell 1999) and Courtney *Law of Private Companies* (2nd ed Butterworths 2002).

21 However, see further at 1.110-1.111 as to the consequences of a trustee being outside the jurisdiction for more than 12 months. There may also be tax consequences for the residence of the trust if the trustees are non-resident.

exemption, the Revenue Commissioners specify that there should be a minimum of three trustees or officers or directors the majority of whom must be resident within the State.²²

1.09 Unless certain specified criteria are met, every Irish registered company must have at least one Irish resident director.²³

1.10 The Company Law Review Group recommended that:

“No individual shall become a director or secretary of a company unless such individual has attained the age of 18 years;

Any purported appointment of an individual before having attained the age of 18 years shall be ineffective and void as between the company and the individual under 18. However, third parties would not be required to enquire as to the age of a director and the rules of ostensible authority of an individual to represent a company would apply.

The implementing legislation should provide for an 18-month time period within which directors would be obliged to ensure that all directors are aged 18 years or more.”²⁴

1.11 This recommendation has been incorporated into the general scheme of the new *Companies Bill*. Section 4 of Part IV provides that “[n]o person shall be appointed a director or, in the case of an individual, secretary unless he has attained the age of 18 years”.

(2) Other Jurisdictions

(a) England and Wales

1.12 Section 20 of the *Law of Property Act 1925* provides that the appointment of a minor to be a trustee in relation to any settlement or trust shall be void. The restriction only applies in respect of express trusts so if a minor receives property in circumstances giving rise to a resulting or constructive trust, the minor will become a trustee of the property.²⁵ However, section 1(6) of the *Law of*

²² *Applying for relief from tax on the income and property of Charities* (Leaflet CHY1 May 2003).

²³ Section 43 of the *Companies (Amendment) (No 2) Act 1999*.

²⁴ Company Law Review Group *First Report* (31 December 2001) at 250.

²⁵ *Re Vinogradoff* [1935] WN 68.

Property Act 1925 further provides that a minor cannot hold a legal estate in land so a minor can only act as trustee in relation to personalty.

(I) *Charities – England and Wales*

1.13 A person under the age of eighteen cannot be appointed as a charity trustee except that a person under eighteen can be the director of a charitable company.²⁶ A person may be disqualified from being a director by order of the court under the *Company Directors Disqualification Act 1986* on various grounds.

1.14 By virtue of section 72(1) of the *Charities Act 1993*, certain persons are disqualified from acting as charity trustees. These are:

anyone who has a previous conviction for any offence involving dishonesty or deception, unless the conviction is spent;²⁷

an undischarged bankrupt;

anyone who has been removed from the office of charity trustee by an order of the Charity Commissioners or by the court for misconduct or mismanagement in the administration of a charity;

anyone who has been disqualified from serving as a company director under the *Company Directors' Disqualification Act 1986*.

1.15 With regard to the selection of charity trustees the Charity Commissioners for England and Wales²⁸ provide the following guidance:

“Trustees must be selected for what they can contribute to the charity. They should not be appointed for their status or position in the community alone; this is the function of patrons. Trustees must be able – and willing – to give time to the efficient administration of the charity and the fulfilment of its trusts. They should be selected on the basis

²⁶ The UK Companies Acts set no minimum age for serving as a director but Companies House guidance is that no one under the age of sixteen should be appointed.

²⁷ For the purposes of the *Rehabilitation of Offenders Act 1974*.

²⁸ Hereinafter referred to as the Charity Commissioners.

of their relevant experience and skills and must be prepared to take an active part in the running of the charity.”²⁹

(b) *Northern Ireland*

1.16 A minor can be a trustee of land or other property in Northern Ireland. A bankrupt can be a trustee, though not the director of a charitable company unless the court gives its consent.³⁰ A trustee need not be resident within the jurisdiction.³¹

1.17 There are no equivalent legislative provisions to section 72 of the English *Charity Act 1993* which renders certain persons ineligible to act as charity trustees.

(c) *Australia*

1.18 The appointment of a minor as trustee is void in New South Wales and the Australian Capital Territory, whereas in other Australian states such a minor as trustee is merely subject to replacement by the court. Any company may act as trustee without being specifically authorised by statute or otherwise, provided that it has power to do so under its memorandum of association. In each of the Australian states and territories, certain companies are recognised for the purposes of providing trust services and provision is made that they may charge regulated commission for their services.

(d) *Canada*

1.19 In the provinces and territories, a minor may be named as trustee but may be replaced under the statutory provisions, if necessary. In Manitoba, a minor is expressly replaceable by those nominated in the trust instrument to appoint new trustees or by those who have the statutory power. In Prince Edward Island, the court is empowered to deal with the situation where a minor is appointed as trustee.³²

(e) *New Zealand*

1.20 In New Zealand, generally any person capable of holding property as of right may act as a trustee. A minor may act as a trustee

²⁹ *Responsibilities of Charity Trustees* leaflet CC3 (March 2002).

³⁰ Article 94(1) of the *Companies (NI) Order 1989*.

³¹ *Crofton v Crofton* (1913) 47 ILTR 24.

³² Section 4 of the *Trustee Act 1974*.

but is liable to be replaced by the court on application until the minor comes of age. A corporation, whether or not a trust corporation, may act as trustee if it has the requisite power conferred by its constitution or by law. Legislation provides for the creation and operation of statutory trustee companies.³³ Certain restrictions apply to corporations which do not have trustee corporation status.³⁴

1.21 New Zealand's draft *Charities Bill* (published March 2004) provides, *inter alia*, that a person who is under the age of sixteen will be disqualified from acting as an officer of a charitable entity.³⁵

(3) Options for Reform

(1) General

1.22 When considering who should be chosen to act as trustee, it may be considered that the settlor should have a choice as to whom to appoint. However, it must be borne in mind that, while the settlor may be involved in appointing the original trustees, further appointments may be made, throughout the duration of the trust, to fill a vacancy caused by the death, retirement or removal of trustees. At this stage, the settlor may have no further involvement in the trust or may, in fact, be deceased. For this reason, it may be considered appropriate to set some criteria regarding the selection of trustees so as to protect the interests of the trust and its beneficiaries.

1.23 The question of appointment of a minor to act as trustee is particularly problematic. As Wylie points out "[i]t has been held often by the courts that a minor may lack capacity to act as a trustee in terms of judgment and discretion".³⁶ While the issue may not arise frequently, it can arise, for example, where a minor is named as trustee in a will and the testator dies prematurely.³⁷

³³ *Trustee Companies Act 1967*.

³⁴ Section 48 of the *Trustee Act 1956*.

³⁵ Clause 15(2)(b) of the *Charities Bill*.

³⁶ Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 1112.

³⁷ It should be noted that section 32 of the *Succession Act 1965* expressly prohibits a minor from acting as sole executor of an estate. When the minor reaches majority the minor may apply for a grant of probate of the will.

1.24 Many common law jurisdictions either prohibit the appointment of a minor as a trustee or provide that he or she may be replaced by the court or otherwise. In Ireland, while there is no express statutory provision in relation to the replacement of a minor trustee, it is always possible to make an application to court to have a minor trustee replaced, but this may prove cumbersome and costly. It is generally felt that the non-statutory power to replace trustees under section 10 of the 1893 Act³⁸ (on the grounds of unfitness or incapacity) could not be used to replace a minor trustee and that an application to the court is necessary. Where a trustee is a minor, the court will generally appoint another trustee in the minor's place, but without prejudice to any application by the minor on coming of age to be restored to the trusteeship.³⁹

1.25 The Oireachtas has seen fit to set the age of majority at eighteen.⁴⁰ General law imposes restrictions on the contracting power of minors which also indicates the general view that minors should be protected in their dealings with others. Some contracts entered into by minors are void and some are voidable, that is, they are binding on the minor unless and until repudiated by the minor.

1.26 In its review of the law of trusts, the Ontario Law Reform Commission was of the opinion that if the settlor has seen fit to select a minor as trustee, then the minor should only be removed at the discretion of the court.⁴¹ The Law Reform Commission of Saskatchewan took the opposite view and recommended that it should be possible to remove a minor trustee expeditiously.⁴²

1.27 The Commission is of the view that it is not advisable for a minor to be appointed to act as trustee. Being a trustee involves duties and responsibilities which a minor may lack the ability to fulfil.

³⁸ See further paragraph 1.109.

³⁹ *Re Shelmerdine* 33 LJ Ch 474 and *Re Porter's Trust* 2 Jur NS 349.

⁴⁰ Section 2(1) of the *Age of Majority Act 1985* - following the recommendations of the Law Reform Commission set out in its *Report on the Law Relating to the Age of Majority, the Age of Marriage and some Connected Subjects* (LRC 5-1983).

⁴¹ Law Reform Commission of Ontario *Report on the Law of Trusts* (1984) at 106.

⁴² Law Reform Commission of Saskatchewan *Proposals for Reform of the Trustees Act 2002* at 4.11.

While it is accepted that some minors (particularly those close to attaining majority) may be more than capable of acting and that others may be unsuitable even though they have come of age, it is felt that, on balance, some minimum age must be set so as to protect the trust and the interests of the beneficiaries.

1.28 *The Commission provisionally recommends that a minor, whether married or not, should be prohibited from acting as a trustee, and that any purported appointment of a minor to act as trustee in relation to any settlement or trust shall be void from when the appointment would take effect.*⁴³

1.29 The Commission notes the position under the *Succession Act 1965* whereby a minor who is appointed as executor can apply for a grant of probate on attaining majority.⁴⁴ However, the Commission does not consider it necessary to allow specifically for the appointment of a minor as trustee on attaining majority. The person or persons having the power to appoint new trustees may, when the minor attains full age, consider the appointment of the minor as a replacement or additional trustee if necessary.

1.30 The Commission has also considered the position of a minor who has married⁴⁵ but is of the view that notwithstanding the provisions of the *Age of Majority Act 1985*, a person should not be permitted to act as trustee until having attained the age of eighteen.

(II) *Charities*

1.31 One of the fundamental requirements in granting charitable status to a charity is that its purposes must possess sufficient public benefit, that is, it must benefit the community or an appreciable section of the community. There is, therefore, a public interest aspect

⁴³ In the case of a trust created during the lifetime of the settlor this will be the date of coming into effect of the trust and in the case of a trust set up under a will this will be the date on which the assets are due to be passed to the trustees.

⁴⁴ Section 32 of the *Succession Act 1965*.

⁴⁵ Section 2(1) of the *Age of Majority Act 1985* provides that a person shall attain full age when he attains the age of eighteen years or, in case he marries before attaining that age, upon his marriage. Section 1 of the *Marriages Act 1972* provides that a marriage solemnised between persons either of whom is under the age of sixteen shall, subject to some exceptions, not be valid in law.

to charities which is not a requisite for private trusts created for the benefit of identified beneficiaries or classes of beneficiaries. It may be argued that, given this public aspect, and the fact that the funds of a charity are funds in which the public have an interest, a more stringent attitude should be adopted in considering who may act as trustee of a charity, and that the State, in the interests of the public, should regulate who may act as trustees of charities.

1.32 There are many examples, based on case law, of situations where the courts have considered that certain persons should not act, or continue to act as trustees. For example, it has been held that unsoundness of mind,⁴⁶ bankruptcy and liquidation or composition,⁴⁷ or conviction for a dishonest crime⁴⁸ should disqualify a trustee.

1.33 The question arises as to whether or not qualifying criteria for trustees, including trustees of charitable organisations, should be set out in statute. As we will see, section 10 of the *Trustee Act 1893* currently provides that new trustees may be appointed, *inter alia*, where a trustee is unfit to act or is incapable of acting.⁴⁹ The court also has statutory powers under section 25 of the 1893 Act, and an inherent jurisdiction, to replace trustees.⁵⁰

1.34 The Law Society, in its report, recommended that statutory provision be made in relation to qualifications for charity trustees as follows. They recommend that trustees must:

- “be eighteen years of age or over;
- be of sound mind;⁵¹
- not have been convicted of an indictable offence;
- not be an undischarged bankrupt;

⁴⁶ *Re East* (1873) 8 Ch App 735.

⁴⁷ *Re Barker’s Trusts* (1875) 1 Ch D 43 and *Re Adams’ Trust* (1879) 12 Ch D 634.

⁴⁸ *Turner v Maule* (1850) 15 Jur 761.

⁴⁹ See paragraphs 1.109-1.116.

⁵⁰ See paragraphs 1.117 and 1.118.

⁵¹ Note the terminology used in this context is currently the subject matter of discussion and may no longer be considered appropriate.

not have been disqualified under Part VII of the *Companies Act 1990*, the *Pensions Act 1990* as amended by the *Pensions (Amendment) Act 1996*, the *Trustee Act 1893* or the proposed new legislation.”⁵²

1.35 *The Commission’s recommendation at paragraph 1.28 in relation to the issue of minors acting as trustees applies equally to charitable trusts.*

1.36 The question of establishing a person’s mental capacity may cause considerable difficulties in practice. The question of legal capacity has been examined in detail as part of the Commission’s review of Law and the Elderly⁵³ and will form the subject matter of a further consultation paper. The assessment of capacity on an issue-specific basis is known as the “functional approach”. The modern view is that capacity should be assessed and adjudicated upon on the basis of a functional approach which asks whether the individual has the capacity to carry out a particular function at a specific time. Because of the complexities involved, the Commission is of the view that, in this context, it would be inappropriate to set any qualifying criteria in relation to mental capacity in respect of trust law and that the general functional approach should apply. However, there may be some specific instances where an individual is made a ward of court or where a power of attorney comes into effect under the *Powers of Attorney Act 1996*. In the case of a ward of the court, the Committee of the ward does not automatically step in as trustee in place of the ward.⁵⁴ Where a power of attorney comes into effect, the donee or donees of the power does not take over any functions which the donor has as a trustee.⁵⁵

⁵² Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 220.

⁵³ See Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23–2003).

⁵⁴ Section 87 of the *Lunacy Regulation (Ireland) Act 1871* provides that the President of the High Court may on the application of the committee of the ward order that the committee act as trustee. It is understood that in practice such applications are rare. Section 88 of the 1871 Act provides that a committee appointed to act as trustee may also exercise a power of appointment of new trustees vested in the ward.

⁵⁵ See section 16(2) of the *Powers of Attorney Act 1996* which provides that the general power of attorney under the Act “does not apply to functions which the donor has as a trustee or personal representative or as a tenant

1.37 *The Commission considers that qualifying criteria for the appointment of charity trustees should be embodied in legislation and recommends that a charity trustee shall be disqualified from being and shall cease to be a charity trustee if that person:*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002;*
- *has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts.*

1.38 *The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities.*

1.39 The Commission is of the view that the Registrar of Charities will also have an important role to play generally in relation to assessing the capacity of persons to act as charity trustees.⁵⁶ The

for life within the meaning of the Settled Land Act 1882, or as a trustee or other person exercising the powers of a tenant for life under section 60 of that Act”.

⁵⁶ For example, in relation to assessing a person’s mental capacity under the functional approach discussed above.

Charity Commissioners for England and Wales have recently published a consultation paper on Draft Guidance on Checking the Eligibility of Charity Trustees.⁵⁷ Their policy is set out in a new draft publication “Recruitment, Selection and Appointment of Charity Trustees”.

1.40 *The Commission recommends that guidelines on checking the eligibility of charity trustees be issued by the Registrar of Charities.*⁵⁸

1.41 The Law Society also recommends that screening for a history of offences involving children be required before a person can be appointed as a trustee of a charity working with children and adolescents.⁵⁹

1.42 In England, the *Criminal Justice and Court Services Act 2000* disqualifies certain individuals from holding a range of positions in children's charities, including charity trusteeship. This ban covers, for example, anyone who commits one of a number of serious offences against children and who is subject to a disqualification order made by the Court under that Act. It is also a criminal offence for a disqualified person knowingly to seek appointment to any position covered by this ban including charity trusteeship of a children's charity. It is also an offence for someone knowingly to appoint a disqualified person to such a post.

1.43 Trustees may be appointed by the original settlor, by the other trustees, by somebody nominated to appoint new trustees or by the court. All of these persons have a general duty of care to act reasonably and prudently in all matters relating to the charity and to act in the best interests of the charity. This duty extends to ensuring that any persons appointed to the position of trustee are suitable for the post.

⁵⁷ Published 27 May 2004. Available at <http://www.charity-commission.gov.uk/enhancingcharities/cc30consintro.asp>.

⁵⁸ This corresponds with the proposal in the Department's Consultation Paper *Establishing a Modern Statutory Framework for Charities* which recommends that the Registrar of Charities' functions might include issuing Best Practice Guidelines.

⁵⁹ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 220.

1.44 As Lewin⁶⁰ states “[p]owers of appointment of new trustees are fiduciary powers. As was said by Kay J in *Re Skeats’ Settlement*:

‘The ordinary power of appointing new trustees, under a settlement such as this is, of course imposed upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose.’⁶¹

1.45 The Commission acknowledges the Law Society’s concerns with regard to screening for a history of offences involving children before a person can be appointed as a trustee of a charity working with children and adolescents. The Commission in principle supports the introduction of measures which would make it easier for charities to carry out such screening. Pending the introduction of any such measures, the Commission is of the view that charities working with vulnerable individuals should be aware of their obligations and carry out their own checks prior to appointing trustees, other officers and employees. The need to ensure the suitability and integrity of trustees is an essential part of the proper management of the charity and a matter which existing trustees should treat with care, prudence and vigilance. In this regard, the Commission notes that the Department of Health and Children has published comprehensive guidelines for community and voluntary organisations that provide services for children.⁶² The guidelines offer guidance on the promotion of child welfare and the development of safe practices in work with children. The Registrar of Charities may also have a role to play in issuing guidelines or codes of practice for the appointment of trustees in relation to specific types of charities.

⁶⁰ *Lewin on Trusts* (17th ed Sweet & Maxwell 2000) at paragraph 14-30.

⁶¹ (1889) 42 2 Ch D 522 at 526, cited in *Lewin on Trusts* (17th ed Sweet & Maxwell 2000) at paragraph 14-30.

⁶² *Children First – National Guidelines for the Protection and Welfare of Children* 1999 and *Our Duty to Care – The principles of good practice for the protection of children and young people* (2002). See also the *Report of the Working Group on Garda Vetting* February 2004 available from www.justice.ie.

C Number of Trustees

(1) *The Position in Ireland*

(a) *General*

1.46 There is no minimum number of trustees required,⁶³ and there is no upper limit on the number of trustees who may be appointed.⁶⁴ In practice however, it may be desirable to have two or more trustees. A company may act as trustee, either solely or jointly. Under section 39(1) of the *Settled Land Act 1882*, two trustees are required to give a receipt for capital money on a sale by a tenant for life, unless the settlement provides otherwise. The trust instrument may specify that one trustee can act for all purposes including the receipt of capital monies even when the one trustee is an individual.

1.47 The general rule is that where there is more than one trustee they must act jointly, unless the trust deed provides otherwise.⁶⁵ The acts and decisions of a majority of trustees cannot bind a dissenting minority or the trust. Decisions of trustees of a charity may be taken by majority and need not be unanimous.⁶⁶ The rationale behind this is that charities will often have a substantial number of trustees giving rise to difficulties in achieving total agreement. As Luxton states

⁶³ But see section 10(2)(c) of the *Trustee Act 1893* which specifies that, except where only one trustee was originally appointed, a trustee shall not be discharged unless at least two trustees remain to perform the trust, and section 11 which requires the consent of two trustees to the discharge of a trustee who wishes to retire from the trust.

⁶⁴ It is only on the appointment of new trustees that the numbers may be increased and there is no limitation on the numbers which may be added – see paragraph 1.110 below.

⁶⁵ By contrast, in the civil law regimes, fiduciaries are usually bound by majority rule rather than unanimity. The *American Uniform Trustee's Powers Act 1964* has also adopted majority rule if there are more than two trustees.

⁶⁶ *Re Whiteley* [1910] 1 Ch 600.

“[w]here it is envisaged that there will be a large number of charity trustees, the advantages of majority rule are manifest”.⁶⁷

(I) *Charities*

1.48 There are no specific provisions in the *Charities Acts 1961* and *1973* as to the minimum or maximum number of trustees required. Section 56 of the *Charities Act 1961* makes provision for a body corporate to act as sole trustee in certain circumstances. Section 43(8) of the *Charities Act 1961*⁶⁸ also provides that where the Commissioners of Charitable Donations and Bequests appoint a body corporate to act as a sole trustee or where a body corporate appointed under the section becomes a sole trustee of a trust which originally by its terms required more than one trustee, then the terms of the trust shall be deemed to require the appointment of one trustee only and one trustee shall be deemed to have been originally appointed.

1.49 The power to deal with charity property is conferred on a majority of two-thirds of the trustees assembled at a meeting of their body duly constituted.⁶⁹

1.50 In the case of charities or trusts operating through a company, the provisions of the *Companies Acts 1963-2003* apply.⁷⁰ Every company must have at least two directors.⁷¹ This may be contrasted with the position in England where only one director is required in the case of a private company. As Keane J (as he then was) writing extra-judicially has pointed out, “[t]he retention of the requirement that there be at least two directors is somewhat anomalous, having regard to the fact that, since 1994, a company may consist of only one member.”⁷² A body corporate cannot act as a

⁶⁷ Luxton *The Law of Charities* (1st ed Oxford University Press 2001) at 258.

⁶⁸ As substituted by section 14 of the *Charities Act 1973*.

⁶⁹ Section 55 of the *Charities Act 1961*.

⁷⁰ See further Keane *Company Law* (3rd ed Butterworths 2000), Forde *Company Law* (3rd ed Round Hall Sweet and Maxwell 1999) and Courtney *Law of Private Companies* (2nd ed Butterworths 2002).

⁷¹ Section 174 of the *Companies Act 1963*.

⁷² Keane *Company Law* (3rd ed Butterworths 2000) at 335.

director.⁷³ Except in certain specified circumstances at least one of the directors must be resident in Ireland.⁷⁴ A company limited by guarantee may have unlimited membership but must have a minimum of not less than seven members and it must have at least two directors.

1.51 The Company Law Review Group recommended that private companies limited by shares (the new model company envisaged by the group) need only have one director.⁷⁵ This recommendation has been incorporated into the general scheme of the new *Companies Bill*.

1.52 For the purposes of granting charitable tax exemption, the Revenue Commissioners specify that there should be a minimum of three trustees or officers or directors, who are not related and the majority of whom must be resident within the State.⁷⁶

(2) Other Jurisdictions

(a) England and Wales

(1) General

1.53 There is no limit to the number of trustees that may be appointed to hold personal property,⁷⁷ but section 34(2) of the *Trustee Act 1925* restricts the number of trustees of trusts of land to four. Where additional trustees are appointed under the statutory power,⁷⁸ appointments may only be made up to a total of four.⁷⁹ A sole individual trustee may act but cannot give a valid receipt for the

⁷³ Section 176 of the 1963 Act.

⁷⁴ Section 43 of the *Companies Amendment (No 2) Act 1999*.

⁷⁵ Company Law Review Group *First Report* (31 December 2001) at 250.

⁷⁶ *Applying for relief from tax on the income and property of Charities* (Leaflet CHY 1 May 2003).

⁷⁷ But see section 37(1)(c) of the *Trustee Act 1925* which specifies that, except where only one trustee was originally appointed, a trustee shall not be discharged unless at least two trustees or a trust corporation remain to perform the trust and section 39 which requires the consent of two trustees or a trust corporation to the discharge of a trustee who wishes to retire from the trust.

⁷⁸ Section 36 of the *Trustee Act 1925* - see further paragraph 1.122 below.

⁷⁹ Section 36(6) of the *Trustee Act 1925*.

proceeds arising from the sale of land. A corporate trustee can act as sole trustee but must be a trust corporation⁸⁰ if it wishes alone to give a valid receipt for capital monies.

1.54 Where personal representatives appoint trustees of a minor's property they must appoint a trust corporation or two or more individuals not exceeding four.⁸¹

1.55 Section 37(1) of the *Trustee Act 1925* provides that, when new trustees are being appointed, the power of appointment express or statutory may be used to increase the number of trustees, providing the maximum number is not exceeded. Section 36(6) provides that additional trustees may be appointed at any stage, providing the maximum number is not exceeded.

(II) *Charities*

1.56 There are no restrictions on the number of charity trustees either minimum or maximum. The limit on the number of trustees imposed by section 34 of the 1925 Act does not apply in the case of land or the proceeds of land held for charitable purposes.⁸² A recommendation contained in "*Charities: A Framework for the Future*"⁸³ that the Charity Commissioners should be given a discretion to require that a charity have at least three trustees was not enacted. The Charity Commissioners' view is that the desirable minimum number of trustees is three and this is reflected in the provisions of their recently updated model governing documents. But this is a practical view rather than a reflection of the legal requirements.

1.57 In the case of charities or trusts operating through a private company, there must be at least one director⁸⁴ and a secretary. Unlike

⁸⁰ A trust corporation is defined in section 68(18) of the *Trustee Act 1925* as the Public Trustee or a corporation, either appointed by the court (or by the Charity Commissioners under section 35(1) of the *Charities Act 1993*) in any particular case to act as trustee or entitled by the *Public Trustee Act 1906*, to act as a custodian trustee. See also *Public Trustee (Custodian Trustee) Rules* SI 1975 No. 1189 SI 1976 No. 836 and SI 1981 No 358.

⁸¹ Section 42 of the *Administration of Estates Act 1925*.

⁸² Section 34(3)(a) of the *Trustee Act 1925*.

⁸³ (Cmd 694 1989) at paragraph 5.7.

⁸⁴ Section 282(3) of the *Companies Act 1985*.

the position in Ireland,⁸⁵ there is no prohibition on a body corporate acting as a director.⁸⁶ There are no nationality or residence requirements for directors of United Kingdom companies.

1.58 The articles of association for a charitable company limited by guarantee drafted on behalf of the Charity Law Association recommends that there should be at least three directors and the constitution for a charitable unincorporated association recommends that a committee should have at least three individuals.

(b) *Northern Ireland*

1.59 Unlike the position in England and Wales, in Northern Ireland there is no maximum limit on the number of trustees who can be appointed. There is a minimum limit of one and, in practice, there are at least two appointed. A trust corporation may act alone in any case where two trustees would otherwise be required.⁸⁷

1.60 A company limited by guarantee must have a minimum of not less than seven members and it must have at least two directors.

(c) *Scotland*

1.61 There is no minimum or maximum number of trustees required for general trusts.

1.62 As regards charities, under existing provisions⁸⁸, the trustees of a charitable trust have power to appoint such number of additional trusts as will secure that, at any time, the number of trustees shall not be less than three. The Lord Advocate may appoint new trustees if there are no trustees or if the existing trustees are unable or unwilling to ensure that the number of trustees does not drop below three.

1.63 The *Charities and Trustee Investment (Scotland) Bill* allows charities to be constituted under a new legal structure known as a Scottish Charitable Incorporated Organisation (SCIO). A SCIO's constitution must make provision for the appointment of three or

⁸⁵ Section 176 of the *Companies Act 1963*.

⁸⁶ *Re Bulawayo Market and Offices Co Ltd* [1907] 2 Ch 458.

⁸⁷ Section 14 of the *Trustee Act (Northern Ireland) 1958*.

⁸⁸ Section 13 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*.

more persons (charity trustees) who are to be charged with the general control of the SCIO's administration.⁸⁹

(d) *Australia*

1.64 Each State in Australia has its own trust legislation similar to the English *Trustee Act 1925*. In each of the States and territories, at least two trustees, or in some cases a trust corporation or the Public Trustee, must remain to act before a trustee may retire unless only one trustee was originally appointed or the terms of the trust allow it.

1.65 In all jurisdictions except Queensland and Victoria, there is no limit on the number of trustees that may be appointed pursuant to an express power of appointment. In Queensland and Victoria the number of trustees in a private trust is limited to four (in Victoria the limitation only applies to trustees of a settlement of land). In the Australian Capital Territory, New South Wales and Western Australia, the number of trustees is limited to four but this limit only applies to the statutory power of appointment.

1.66 There is no restriction on the number of charity trustees who may be appointed whether at the creation of the trust or pursuant to an express power of appointment. The statutory power to appoint cannot be exercised to increase the number of trustees beyond four in the Australian Capital Territory, New South Wales and Western Australia.

1.67 A company incorporated in Australia must have at least three directors and at least two of them must ordinarily reside in Australia. This requirement does not apply to a proprietary company. A proprietary company must have one director who ordinarily resides in Australia. A director must be a natural person.

(e) *Canada*

1.68 In the Canadian jurisdictions there is no restriction on the number of trustees that may be appointed. The legislation generally provides for the appointment of only one trustee where only one was appointed originally.⁹⁰ Where more than one was appointed originally, a trustee may not be discharged unless at least two trustees

⁸⁹ Section 50(2)(b).

⁹⁰ As is the position in Ireland – see section 10(1)(c) of the *Trustee Act 1893*.

remain. Only Ontario and Manitoba allow for a trust corporation acting alone.

(f) New Zealand

1.69 In New Zealand, on the appointment of a trustee or trustees it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where more than two were originally appointed, but, except where only one trustee was originally appointed, a trustee cannot be discharged unless there will either be a trustee corporation or at least two trustees left to act.⁹¹

1.70 There is no restriction on the number of charity trustees who may be appointed.

1.71 The trustees of a charitable trust or the members of an unincorporated society that exists, exclusively or principally for charitable purposes may incorporate as a board under the *Charitable Trusts Act 1957*. There must be more than one trustee in the case of a charitable trust and a minimum of five members in the case of a society. Every corporate body that is a member shall be taken as the equivalent of three members.⁹²

1.72 Section 10 of the *Companies Act 1993* sets out as one of the “essential requirements” of a company that there must be one or more directors.

(g) United States

1.73 In the United States, there is generally no restriction on the number of trustees required.

(3) Options for Reform

(I) General

1.74 Most of the provisions regarding the appointment of trustees indicate a preference for two trustees or a trust corporation unless only one trustee was originally appointed. This formula was modelled on replacement and removal clauses in 19th century trust instruments. It was perhaps appropriate in settlements of land, which were then the most important class of trust in England. More than

⁹¹ Section 43(5) of the *Trustee Act 1956*.

⁹² Section 31 of the *Incorporated Societies Act 1908*.

one trustee was the rule in settlements. Management of the family's assets was usually placed in the hands of one of a panel of trustees, the "first beneficiary" and head of the family. He was, however, subject to the control of the other trustees, who ensured that the current head of the family did not squander the assets to the detriment of other family members and future generations. The character of such a trust would be changed substantially if all the trustees except for the first beneficiary retired. Thus the policy against reduction of the number of trustees, and especially reduction to a sole trustee.⁹³

1.75 In its report, the Saskatchewan Law Reform Commission pointed out that:

"The modern trust bears little resemblance to the English settlement. If more than one trustee is now appointed, it is likely to ensure continuity in administration or to share the burden. Occasionally, a family member, most likely a principal beneficiary and a trust company may be jointly appointed. In this case, the family member provides insight into the beneficiaries' needs, and the corporate trustee provides expertise. In any event, retirement of a trustee is unlikely to cause difficulty. If one of the trustees dies, the other takes responsibility for administration. In practice, appointment of a replacement is the exception, though of course the survivor or the court may procure a replacement if it is deemed desirable to do so".⁹⁴

1.76 Having considered the maximum number of trustees required, the Ontario Law Reform Commission recommended a maximum of four trustees regardless of any contrary expression in the trust instrument. However, it did recommend that the court should retain the power to appoint more than four if deemed necessary. The Commission recommended that a sole surviving trustee, where more than one trustee was originally appointed, who is not a trust company may not act alone without the court's approval.⁹⁵

⁹³ Under *Lord Cranworth's Act* (23 & 24 Vict. c 145), the appointment of a single trustee was not valid but, where there was a contrary intention expressed in the trust instrument, it was valid.

⁹⁴ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.15.

⁹⁵ Ontario Law Reform Commission *Report on the Law of Trusts* (1984) at 123.

1.77 Their reasoning for restricting the numbers was that “[t]o permit an unlimited number of trustees might be to encourage the appointment of persons who had no interest in the day to day management of the trust, but whose sole function would be to represent, for example, numerous beneficial interests with perceived different concerns.” They considered that “[a]n inordinate number of trustees could make such a task [unanimity amongst trustees relating to the management of the trust] difficult and render the administration of the trust unnecessarily slow, complex and expensive”⁹⁶.

1.78 In its report, the Saskatchewan Law Reform Commission saw no reason for limiting the number of trustees. They pointed out that:

“In England, settlements of land were often complicated and cumbersome. The 1925 reform was part of an effort to discourage traditional settlements and generally simplify land law. Excessive numbers of trustees was never a problem in Saskatchewan, and was unlikely to become one. In addition, there are some circumstances in which appointment of more than four trustees may be desirable. Charitable trusts and trusts for other beneficial public purposes, for example, may benefit from a large board of trustees”⁹⁷.

1.79 *The Commission agrees with the approach of the Saskatchewan Law Reform Commission and does not see any need to restrict the number of trustees.*

1.80 The question of setting minimum numbers of trustees is somewhat more problematic. The position regarding trusteeship in Ireland has been summarised by Delany⁹⁸ as follows:

⁹⁶ Ontario Law Reform Commission *Report on the Law of Trusts* (1984) at 122. The Queensland Law Reform Commission, in its *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities* (No 8 1971) at 13 stated, as the reason for recommending a limitation upon the number of trustees, that “in practice a multiplicity of trustees is productive of considerable expense, delay and inconvenience, particularly where conveyancing is involved and where re-vesting of trust property is necessitated by successive deaths of trustees”.

⁹⁷ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.17.

⁹⁸ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round

“Traditionally, trustees have fallen into two categories: non-professional trustees, who are often family members or close associates of the settlor or testator who agree to act out of a sense of duty and professional trustees, usually banks and financial institutions who undertake the role only in circumstances where suitable provision is made for their remuneration. Arguably it is preferable when creating a trust to ensure that a combination of these categories of trustees is appointed; it is often unwise to nominate only non-professional trustees, for although they may and indeed should seek professional assistance where this is required, they may not always be aware of the circumstances in which this will be necessary.”⁹⁹

1.81 If the trust includes land, it is usual, in practice, for two trustees to be appointed.¹⁰⁰ The recommended combination is a non-professional trustee who has personal knowledge of the beneficiaries and their needs and a professional trustee who will have expertise in managing trust assets and other specialist knowledge.

1.82 While it may be desirable to have two trustees, it must be acknowledged that, in practice, there are many situations where only one is appointed. For example, parents often wish to settle property on their children¹⁰¹ and in these instances the trust deed or will may provide for the appointment of a sole trustee (usually the other spouse). In many instances it is also common to appoint a corporate trustee as sole trustee, *e.g.* a bank.

1.83 The *Trustee Act 1893* did not include the concept of a trust corporation acting alone which, as seen above, is now catered for in many jurisdictions. The term trust corporation is not defined in Ireland except for the purposes of the *Succession Act 1965*¹⁰² which

Hall 2003).

⁹⁹ *Ibid* at 385.

¹⁰⁰ See paragraph 1.46 above - under section 39(1) of the *Settled Land Act 1882*, two trustees are required to give a receipt for capital money on a sale by a tenant for life, unless the settlement provides otherwise.

¹⁰¹ But note that the *Taxes Consolidation Act 1997* contains anti-avoidance provisions in relation to settlements on children – see Chapter 2 of Part 31. Settlements on children are generally ineffective for tax purposes unless made on foot of an irrevocable instrument.

¹⁰² Section 30(4) of the *Succession Act 1965* provides that a trust corporation

defines the term in relation to the appointment of a trust corporation as an executor.

1.84 The *Succession Act 1965* provides that where a minor is entitled to any share in the estate of a deceased person and there are no trustees of such share able and willing to act, the personal representatives of the deceased may appoint a trust corporation or any two or more persons (who may include the personal representatives or any of them or a trust corporation) to be trustees of such share for the minor.¹⁰³ This provision obviously indicates a preference for two trustees or a trust corporation where the beneficiary is a minor.

1.85 The Commission is particularly concerned about the protection of minors' interests. For example, one spouse may die and leave his or her estate to the surviving spouse and child(ren). In such circumstances the surviving spouse will act as trustee for the children's share and should transfer the property when the children become of full age. In such circumstances, because there are no control procedures in place, if the property is not eventually transferred, the children may never become aware of their entitlement. The consequences of divorce and re-marriage may also affect the entitlements of children of the original marriage.

is (a) a corporation appointed by the High Court in any particular case to be a trustee; (b) a corporation empowered by its constitution to undertake trust business, and having a place of business in the State or Northern Ireland, and being; (i) a company established by Act or charter, or (ii) an Associated Bank under the *Central Bank Act 1942*, or (iii) a company (whether registered with or without limited liability) within the definition contained in the *Companies Act 1963*, or within the meaning of the corresponding law of Northern Ireland, having a capital (in stock or shares) for the time being issued of not less than £250,000, of which not less than £100,000 has been paid up in cash, or (iv) a company (registered without limited liability) within the definition contained in the said Companies Act or within the meaning of the said law of Northern Ireland, one of the members of which is a corporation within any of the previous provisions of this paragraph; or (c) a corporation which satisfies the President of the High Court that it undertakes the administration of any charitable, ecclesiastical or public trust without remuneration, or that by its constitution it is required to apply the whole of its net income for charitable, ecclesiastical or public purposes and is prohibited from distributing, directly or indirectly, any part thereof by way of profits, and is authorised by the President of the High Court to act in relation to such trusts as a trust corporation.

¹⁰³ Section 57(1) of the *Succession Act 1965*.

1.86 Apart from the situation as regards minors, the Commission is generally of the view that, in most instances, the proper administration of trusts will benefit from having more than one trustee.

1.87 *The Commission recommends that, in the case of non-charitable trusts, two trustees or a corporate trustee should be required.*

(II) *Charities*

1.88 When it comes to charities it may be argued that more stringent controls should be put in place, given the public aspect to their activities and that they are effectively managing funds in which the public have an interest. Increased numbers of trustees should enhance internal accountability and safeguard the assets and funds of the charity against possible fraud.

1.89 In considering whether any minimum or maximum number of trustees should be imposed, it must be remembered that charities operate within many different legal structures, the main ones being; the charitable trust, the unincorporated association and the company limited by guarantee without a share capital. A corporate body may also act as trustee of a charitable trust, either solely or jointly.

1.90 As regards charitable trusts, the Ontario Law Reform Commission recommended that there should be a minimum of at least three trustees and that it should be permissible for a charitable trust to have up to ten trustees.¹⁰⁴ They stated that “[t]his requirement would enhance the internal accountability of the charitable trust and it would reduce the likelihood that the charitable trust form will be abused by disponents with ulterior motives.”¹⁰⁵ They also recommend a minimum of three directors for charitable corporations.¹⁰⁶

1.91 *In line with its recommendation at paragraph 1.79, the Commission does not consider it necessary to impose any maximum number of trustees in the case of charitable trusts. However, see paragraph 1.203 where it is recommended that the power to appoint additional charity trustees (where not specifically provided for in the*

¹⁰⁴ Ontario Law Reform Commission *Report on the Law of Charities* (1996) at 424-425.

¹⁰⁵ *Ibid* at 425.

¹⁰⁶ *Ibid* at 494.

trust instrument) is to be subject to the consent of the Registrar of Charities.

1.92 The Law Society, in its report, recommends a statutory requirement for a minimum of two trustees.¹⁰⁷

1.93 As part of their review of charity law,¹⁰⁸ Arthur Cox and the Centre for Voluntary Action Studies carried out a survey of the community and voluntary sector in Ireland but there was no specific comment on the minimum number of officers required for a charity.¹⁰⁹

1.94 As indicated above, the Revenue Commissioners require a minimum of three trustees or officers or directors if a charity is to be granted charitable status and related tax exemptions.¹¹⁰

1.95 The Commission is of the view that the Law Society recommendation does not go far enough and supports the Revenue requirement for three trustees¹¹¹ and recommends that it be put on a statutory footing.

1.96 *The Commission recommends that a minimum of three trustees be required to act for a charitable trust or three officers in the case of an unincorporated association. A corporate trustee may act as sole trustee but in such circumstances the Commission recommends that there should be at least three directors on the board of directors. If the numbers fall below three, and the person or persons having power to appoint new trustees are unable or unwilling to do so, the Registrar of Charities should have power to appoint additional trustees to bring the numbers back up to the statutory requirement. This is without prejudice to the existing powers of the Commissioners of Charitable Donations and Bequests under section*

¹⁰⁷ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 221.

¹⁰⁸ Arthur Cox and Centre for Voluntary Action Studies *Charity Law Review* (November 2002).

¹⁰⁹ *Ibid* at 8 of the Irish Sector Study.

¹¹⁰ At paragraph 1.52.

¹¹¹ Older authority in support of the requirement for at least three trustees of a charitable trust may be found in the case of *Re Bergholt* 2 Eq Rep 90. In the case of a charity where there were ten trustees, the court on appointing that number directed that when they became reduced to three they should apply in chambers for an appointment of others to fill up the number.

43 of the Charities Act 1961, as amended by section 14 of the Charities Act 1973 and to the need for timely liaison with the Commissioners.

1.97 In the case of a charity operating through a company, the Commission also recommends that there should be at least three directors on the board of directors. However, the Commission notes that any legislation in this regard will need to form part of the current review and consolidation of company law and would ask the Company Law Review Group to consider this recommendation as part of its proposals.

D Disclaimer

1.98 No one is bound to accept the office of trustee.¹¹² A prospective trustee may disclaim appointment at any time before acceptance of the appointment takes place. Such disclaimer should be clear and unambiguous and preferably in writing. As Delany comments “[w]hile disclaimer may be implied, in view of the limited circumstances in which a trustee may retire, it is preferable that an intention to disclaim should be unambiguously expressed”.¹¹³ The disclaimer should be made as soon as possible.¹¹⁴ However, it seems that mere inaction over a long period may, in itself, be evidence of disclaimer.¹¹⁵ If one trustee disclaims, the trust is administered by the remaining trustees.

1.99 Where a minor is entitled to any share in the estate of a deceased person, and there are no trustees, the personal representatives¹¹⁶ of the deceased may appoint a trust corporation, or any two or more persons (who may include the personal representatives or any of them or a trust corporation) to be trustees of

¹¹² *Robinson v Pett* (1734) 3 P Wms 249, 2 White & Tud LC 605.

¹¹³ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 388 fn 15.

¹¹⁴ *Doe d. Chidgey v Harris* (1847) 16 M & W 517.

¹¹⁵ *Re Clout & Frewer's Contract* [1924] 2 Ch 230.

¹¹⁶ The section refers to personal representatives in the plural. According to Spierin “[n]otwithstanding this, the generally accepted view is that a sole personal representative can appoint trustees under this section”. - see Spierin *The Succession Act 1965 and Related Legislation* (3rd ed Butterworths 2003) at 171.

such share for the minor. In default of appointment the personal representatives shall be trustees for the purposes of the section.¹¹⁷

1.100 In the case of a trust in a will, the personal representatives of the deceased will normally appoint the assets to the trustees. If a sole trustee disclaims, the property reverts on trust to the settlor or to the settlor's personal representatives. If a sole trustee disclaims and land is settled by the will, the personal representatives proving the will shall for all purposes be deemed to be trustees of the settlement until trustees of the settlement are appointed.¹¹⁸ A sole personal representative shall not be deemed to be a trustee for the purposes of the *Settled Land Acts 1882 to 1890* until at least one other trustee is appointed. It is not entirely clear whether a sole personal representative has the power to appoint trustees or whether a court application is required.¹¹⁹

1.101 *The Commission is of the view that sections 50(3) and 57 of the Succession Act 1965 should be amended to make it clear that a sole personal representative has the power to appoint trustees under the relevant provisions.*

1.102 As we will see below,¹²⁰ section 10(1) of the *Trustee Act 1893* contains provisions for the appointment of new trustees where a trustee, *inter alia*, "refuses to act therein". This refusal to act may occur either before a person assents to become a trustee or after assenting. If a person refuses to act before assenting to becoming a trustee this situation is the same as a disclaimer and section 10(1) therefore applies as in the case of a disclaimer.¹²¹

1.103 The Commission considered putting the requirement for a disclaimer to be made in writing on a statutory footing; however, it was felt that this may give rise to difficulties in practice where a trustee has failed to act and has thus disclaimed by implication or where a trustee cannot be found.

¹¹⁷ Section 57(1) of the 1965 Act.

¹¹⁸ Section 50(3) of the *Succession Act 1965*.

¹¹⁹ See Spierin *The Succession Act 1965 and Related Legislation* (3rd ed Butterworths 2003) at 133 and Wylie *Irish Land Law* (3rd ed Butterworths 1997) at paragraph 8.037.

¹²⁰ At paragraphs 1.109-1.116.

¹²¹ See *D'Adhemar v Bertrand* (1865) 35 Beav 19.

E Appointment

(1) The Position in Ireland

1.104 Apart from the initial appointment of trustees to facilitate the management of a trust, new trustees may be required at various stages throughout the lifetime of the trust to cater for appointments required because of death, retirement or removal of trustees. Questions arise as to who should make these appointments and when they may be made? Currently trustees may be appointed in the following ways:

(a) Trust Instrument

1.105 The trust instrument normally provides for the appointment of initial trustees and usually makes provision for the appointment of additional or replacement trustees. Unless the trust instrument so specifies the settlor does not have the power to appoint new trustees or to appoint himself or herself as trustee. This follows from the fact that the legal title becomes vested in the trustees and the settlor loses all rights to the trust property. Any powers retained by the settlor may jeopardise the tax benefits, if any, of setting up the trust and calls into question whether it is a mere sham.¹²² However, the power to appoint new trustees by the settlor may be important when dealing with incapacitated beneficiaries and in such circumstances the settlor may wish to retain some control over the trust.

1.106 The power to appoint new or additional trustees is normally vested in persons nominated for that purpose in the trust instrument. However, matters relating to resignation are not usually covered in the trust instrument and this may give rise to difficulties.

(b) By the Beneficiaries

1.107 New trustees may be appointed by the beneficiaries, provided they are all *sui juris* and between them absolutely entitled to the entire beneficial interest in the trust.¹²³ Such beneficiaries may assume total control of the trust and bring it to an end altogether, if they so wish under what is known as the rule in *Saunders v Vautier*.¹²⁴

¹²² See for example Part 31 of the *Taxes Consolidation Act 1997*.

¹²³ *Re Miller* [1897] 1 IR 290.

¹²⁴ (1841) Cr & Ph 240.

This ability of the beneficiaries to appoint or remove trustees, without bringing the trust to an end and setting up a new trust, has been brought into question in England following the decisions in *Re Brockbank*¹²⁵ and *Stephenson v Barclays Bank*¹²⁶ and this issue is discussed in detail at paragraphs 1.192-1.197.

(c) *Statutory Provisions*

1.108 The statutory provisions in the *Trustee Act 1893* provide for both non-judicial and judicial appointment of trustees.

(I) *Non-Judicial Appointment*

1.109 Section 10(1) of the *Trustee Act 1893* contains a statutory power to appoint new trustees. It should be noted, at the outset, that the intervention of the court is not required in relation to appointments made under section 10. It should also be noted that section 10 applies only if and insofar as a contrary intention is not expressed in the trust instrument.¹²⁷

1.110 The power to appoint a new trustee may be exercised where a trustee is dead, remains out of the jurisdiction for more than twelve months, desires to be discharged from the duties of trustee, refuses to act, is unfit to act or is incapable of acting. The power is a power to appoint *replacement* trustees only and facilitates the replacement of an original or substituted trustee, whether the original or substituted trustee was appointed by the court or otherwise. Section 10(2)(a) of the 1893 Act provides that on the appointment of a new trustee the number of trustees may be increased. There is no power to appoint additional trustees unless an existing trustee is retiring or being removed and such trustee must be replaced.¹²⁸ Section 10(2)(c) provides that it is not necessary to appoint more than one trustee as a replacement but, except where only one trustee was originally appointed, a trustee shall not be discharged unless at least two trustees

¹²⁵ [1948] Ch 206.

¹²⁶ [1975] STC 151.

¹²⁷ Section 10(5) of the *Trustee Act 1893*.

¹²⁸ This position may be contrasted with the court's power under section 25 which allows for the appointment of additional trustees – see paragraph 1.117 below.

remain to perform the trust.¹²⁹ Retirement without replacement may be permitted under section 11 if certain requirements are met.¹³⁰

1.111 The exercise of the power in circumstances where a trustee is deceased, remains outside the jurisdiction, or wishes to retire, does not pose any particular difficulties. The phrase “refuses to act” extends to the case of a disclaimer,¹³¹ that is, where a person has not agreed to accept trusteeship in the first place. The more difficult position, in practice, is where a trustee, having been appointed, refuses to act and also refuses to resign making it difficult to appoint a replacement. In such circumstances an application to court for directions will usually be required.

1.112 With regard to the phrase “unfit to act”, Underhill and Hayton¹³² note that:

“...bankruptcy (at all events where the trust property consists of money or other property capable of being misappropriated and where the beneficiaries desire his removal)¹³³ and liquidation or composition, or conviction of a dishonesty crime, are grounds for removal by the court under section 41 of the *Trustee Act 1925*.¹³⁴ It thus seems likely that they would enable a donee of a power of appointing new trustees to displace him in hostile proceedings on the ground of unfitness....With regard to ‘incapacity’, the word is strictly limited to incapacity of the trustee arising from some personal defect, as illness, physical or mental, or infancy”.¹³⁵

¹²⁹ See fn 50 above.

¹³⁰ See paragraph 1.205 below.

¹³¹ *Re Birchall* (1889) Ch D 436; *Re Hadley* (1851) 5 De G & Sm 67 and paragraph 1.102 above.

¹³² Underhill and Hayton *Law of Trusts and Trustees* (16th ed Butterworths 2003).

¹³³ *Re Barker's Trusts* (1875) 1 Ch D 43 and *Re Adams' Trust* (1879) 12 Ch D 634.

¹³⁴ Equivalent to section 25 of the 1893 Act.

¹³⁵ Underhill and Hayton *Law of Trusts and Trustees* (16th ed Butterworths 2003) at 753.

1.113 In practice, where it is proposed to remove a trustee out of court for unfitness, the trustee will usually retire voluntarily. The case will then fall under the heading of a trustee being desirous of retiring. If the trustee is unwilling to retire, an application to court may have to be made to resolve the issues.

1.114 The power to appoint new trustees may be exercised by the person or persons nominated to appoint new trustees by the trust instrument¹³⁶ or if there is no such provision or the person nominated is unable or unwilling to act¹³⁷ then the power may be exercised by the surviving or continuing¹³⁸ trustee or trustees for the time being or the personal representative of the last surviving or continuing trustee.¹³⁹

1.115 The section authorises the person to appoint “another person or other person to be a trustee or trustees”. This implies that the person exercising the power ought not to appoint himself or herself.¹⁴⁰

1.116 In the case of an express power of appointment, the trust instrument will normally set out the formalities required. As regards the statutory power of appointment, section 10(1) of the 1893 Act only requires the appointment to be “in writing”. If the appointment is made by way of deed, a vesting declaration in the trust instrument is sufficient so as to vest the trust property in the new trustee without the need for any conveyance or assignment.¹⁴¹ Certain types of

¹³⁶ If the settlor wishes to retain the power to appoint new trustees, this must be expressly provided for in the trust instrument.

¹³⁷ If the person nominated declines to act or cannot agree to appoint.

¹³⁸ “Continuing trustee” includes a refusing or retiring trustee, if willing to act in the appointment – section 10(1)(4). It does not include a trustee who is being removed and replaced. See *Re Stoneham Settlement Trusts* [1953] Ch 59, where Danckwerts J stated that “It seems to me, in the absence of any authority which binds me to decide otherwise, that a person who is compulsorily removed from a trust is not a person who retires and is not a retiring trustee”.

¹³⁹ Where no such person is available to exercise the power of appointment the court will make the appointment – see paragraph 1.117.

¹⁴⁰ By contrast section 36(1) of the English *Trustee Act 1925* provides for the appointment of one or more other person (whether or not being the persons exercising the power).

¹⁴¹ Section 12(1) of the *Trustee Act 1893*.

property are expressly excluded from the automatic vesting provisions.¹⁴²

(II) *Judicial Appointment*

1.117 Section 25 of the *Trustee Act 1893* grants power to the court to appoint a new trustee or new trustees¹⁴³ whenever it is expedient to do so and it would be inexpedient, difficult or impracticable to do so without the assistance of the court.¹⁴⁴ The appointment can be of a new trustee or new trustees either *in substitution for or in addition to* any existing trustee or trustees or where there is no existing trustee. This power will generally only be exercised where appointment cannot be made under the trust instrument or by using the statutory power contained in section 10 of the 1893 Act. The application may be made by a trustee or beneficiary.¹⁴⁵

1.118 Apart from the specific statutory provisions, the court also has an inherent power to appoint trustees where none are appointed or where those nominated predecease the testator or refuse to act.¹⁴⁶ The court's inherent jurisdiction to appoint new trustees is most frequently used when it is removing trustees in cases of dishonesty or incompetence and appointing replacements.¹⁴⁷

(d) *Commissioners of Charitable Donations and Bequests*

1.119 Under Section 43 of the *Charities Act 1961*¹⁴⁸ the Commissioners of Charitable Donations and Bequests have power to

¹⁴² Section 12(3) of the *Trustee Act 1893*, such as any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust.

¹⁴³ The *Trustee Act 1931* extended the court's powers to include the appointment of a new trustee in place of the holder of an extinct office and the appointment of a new trustee where the appointor under the trust instrument is the holder of an extinct office.

¹⁴⁴ Where there is a valid existing power of appointing new trustees, and a person willing to exercise it, the court will generally not exercise the power conferred by this section – *Re Sutton* (1885) WN 122 and *Re Gibbon's Trusts* (1882) 30 WR 287.

¹⁴⁵ Section 36(1) of the *Trustee Act 1893*.

¹⁴⁶ *Pollock v Ennis* [1921] 1 IR 181.

¹⁴⁷ See paragraph 1.237.

¹⁴⁸ As substituted by section 14 of the *Charities Act 1973*. The section as originally enacted only applied where the property consisted of land. The

appoint a new trustee or trustees either *in substitution for or in addition to* any existing trustee or trustees or where there is no existing trustee. This broad power may be exercised on the application of the trustee or trustees of the charity, on the application of any person having an interest (if there are no trustees of the charity, or they cannot be found), or of the Commissioners' own motion.

1.120 In the case of charities or trusts operating through a company, the provisions of the *Companies Acts 1963-2003* relating to the appointment of directors and other officers will apply. The articles of association will normally provide for the appointment of additional or replacement directors and for the retirement of directors by rotation.¹⁴⁹

1.121 In the case of charities operating through an unincorporated association, its constitution or rules will normally provide for appointment of its office holders.

(2) Other Jurisdictions

(a) England and Wales

(1) General

1.122 Section 36 of the *Trustee Act 1925* contains similar provisions to section 10 of the 1893 Act regarding the appointment of new trustees but, in addition, the statutory power can be exercised where the trustee appointed is a minor.¹⁵⁰ Provision is also made for the exercise of the power where a trustee is removed under a power in the trust instrument,¹⁵¹ and where a corporation being a trustee has been dissolved.¹⁵² The power of appointment given to the personal representatives of a last surviving or continuing trustee is deemed to be exercisable by the executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by

amendment extended the section also to cover situations where the property consists of cash or securities.

¹⁴⁹ See further Keane *Company Law* (3rd ed Butterworths 2000), Forde *Company Law* (3rd ed Round Hall Sweet and Maxwell 1999) and Courtney *Law of Private Companies* (2nd ed Butterworths 2002).

¹⁵⁰ Up to the age of eighteen.

¹⁵¹ Section 36(2) of the *Trustee Act 1925*.

¹⁵² Section 36(3) of the 1925 Act.

the administrators for the time being of several trustees, without the concurrence of any executor who has renounced.¹⁵³ The power of appointment is also available to a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce.¹⁵⁴

1.123 Unlike the Irish position, the English legislation also provides at section 36(6) for the appointment of additional trustees. Section 36(6) authorises appointment of “another person or persons” and it has been held that this excludes the appointor appointing himself which is possible under section 36(1).¹⁵⁵ Section 37(1) of the *Trustee Act 1925* provides that a power of appointment express or statutory may be used to increase the number of trustees, providing the maximum number is not exceeded. The appointment of a new trustee is not a delegable function, so the trustees may not delegate the power to any other person to exercise on their behalf.¹⁵⁶

1.124 Section 41 of the 1925 Act provides for the appointment of new trustees by the court, either in addition to or in substitution for existing trustees, whenever it is expedient to do so and it would be inexpedient, difficult or impracticable to do so without the assistance of the court. A corporation appointed by the court to act as a trustee ranks as a trust corporation¹⁵⁷ and so is able on its own to give a valid receipt for capital moneys derived from land.

1.125 Sections 19 and 20 of the *Trusts of Land and Appointment of Trustees Act 1996* make provision, in certain circumstances, for the appointment of trustees at the instance of the beneficiaries where they are of full age and capacity and together absolutely entitled to the trust property. Prior to the passing of this Act, the beneficiaries, even if between them they were entitled to bring the trust to an end under the principles of *Saunders v Vautier*,¹⁵⁸ had no power to appoint new

¹⁵³ Section 36(4) of the 1925 Act.

¹⁵⁴ Section 36(5) of the 1925 Act.

¹⁵⁵ *Re Power's Settlement Trusts* [1951] Ch 1074; [1951] 2 All ER 513 (CA). This may be contrasted with the Irish position under section 10(1) of the 1893 Act.

¹⁵⁶ Section 11 of the *Trustee Act 2000*.

¹⁵⁷ Section 68(18) of the *Trustee Act 1925*.

¹⁵⁸ (1841) 4 Beav 115.

trustees or to compel retirement of any or all of the trustees; their only remedy being an application to the court.¹⁵⁹ In *Re Brockbank* it was held by Vaisey J that beneficiaries who are together entitled to trust property were not entitled to control the exercise by their trustees of the fiduciary power of appointing new trustees; they had either to keep the trusts on foot, in which case the power of appointing new trustees remained in those given such power by the settlement, or they had to bring the settlement to an end. The intention of section 19 was to reverse the *Brockbank* decision. As Underhill and Hayton comment:

“The purpose of the provision is to save those beneficiaries who have collective *Saunders v Vautier* rights from having to terminate the trust (with disadvantageous tax consequences) and create a new trust on the same terms where they simply want to replace the trustees”.¹⁶⁰

1.126 The powers in sections 19 and 20 of the 1996 Act may only be exercised where the settlement does not nominate a person to appoint new trustees or if it does not specifically provide that the provisions of the sections are not to apply.

1.127 In England and Wales it is also possible to appoint a Judicial Trustee or the Public Trustee to act as trustee.¹⁶¹

(II) *Charities*

1.128 Charity trustees may be appointed in the same way as general trustees under the statutory provisions of the *Trustee Act 1925*.

1.129 Section 83 of the *Charities Act 1993* provides that if the constitution of the charity empowers the charity trustees, members of the charity or other people, by resolution at a meeting to appoint or discharge trustees, a memorandum declaring a trustee to have been

¹⁵⁹ *Re Brockbank* [1948] Ch 206.

¹⁶⁰ Underhill & Hayton *Law of Trusts and Trustees* (16th ed Butterworths 2003) at 748.

¹⁶¹ The public trustee is a public official so designated to whom property may be given upon specified trusts. The court may appoint a judicial trustee upon whom the administration of an estate or trust fund may be conferred when particular circumstances warrant the appointment. The Public Trustee in Ireland under the *Land Commission Act 1903* has no jurisdiction as regards trust matters.

appointed or discharged shall be sufficient evidence of that fact if it is signed by the person presiding at the meeting (or is signed as directed at the meeting) and is attested by two persons present at the meeting.

1.130 Section 16(1)(b) of the *Charities Act 1973* provides that the Charity Commissioners may, by order, exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for the purposes of appointing, discharging or removing a charity trustee or trustee for a charity, or removing an officer or employee. The Charity Commissioners also have powers to appoint charity trustees under section 18(5) of the 1973 Act and to appoint additional trustees under section 18(1)(ii) as part of their temporary and protective powers after an inquiry.

1.131 The appointment and removal of directors of charitable companies is largely governed by the *Companies Act 1985* and the *Company Directors Disqualification Act 1996* and the terms of the company's memorandum and articles of association.

1.132 The powers of the Charity Commissioners under the *Charities Act 1993* extend to directors of charitable companies and members of charitable unincorporated associations by virtue of the definition of a charity trustee under section 97(1) of the Act.

(b) *Northern Ireland*

1.133 Section 35 of the *Trustee Act (Northern Ireland) 1958* contains similar provisions to section 10 of the *Trustee Act 1893* regarding appointment of replacement trustees but, unlike the English legislation, does not provide that the power can be exercised where the trustee appointed is a minor. Like the English legislation, provision is made for the exercise of the power where a trustee is removed under a power in the trust instrument, where a corporation being a trustee has been dissolved and where an executor intends to renounce the office of executor but wishes to exercise the power of appointment of trustees. The Northern Ireland legislation also provides at section 35(6) for the appointment of additional trustees.

1.134 Section 40 of the 1958 Act grants power to the court to appoint new trustees whenever it is expedient to do so and it would be inexpedient, difficult or impracticable to do so without the assistance of the court.

1.135 Sections 34 and 35 of the *Trustee Act (Northern Ireland) 2001* contain provisions which correspond to Part II of the English

Trusts of Land and Appointment of Trustees Act 1996 regarding the appointment of new trustees by the beneficiaries.

1.136 Section 12 of the *Charities Act (Northern Ireland) 1964* provides for the appointment of new charity trustees by the Charities Branch. This power may be exercised if it is necessary in the interests of the proper administration of the charity and if appointment cannot conveniently be made otherwise.

(c) *Scotland*

1.137 Section 3(b) of the *Trusts (Scotland) Act 1921* provides that, unless the contrary is expressed, all trusts are held to include power to the trustees to assume new and further trustees. This is additional to any power of appointment conferred by the trust deed. Section 22 of the 1921 Act provides for appointment of new trustees by the court.

1.138 As regards charities, under existing provisions¹⁶², the trustees of a charitable trust have power to appoint such number of additional trusts as will secure that, at any time, the number of trustees shall not be less than three. The Lord Advocate may appoint new trustees if there are no trustees or if the existing trustees are unable or unwilling to ensure that the number of trustees does not drop below three.

1.139 Under the *Charities and Trustee Investment (Scotland) Bill* the Office of the Scottish Charity Regulator (OSCR) has no direct power to appoint new trustees. The court can appoint trustees under section 22 of the 1921 Act or, on an application by the OSCR, following an inquiry, the court can appoint a trustee to a charitable trust.

(d) *Australia*

1.140 The position regarding appointment of trustees in each Australian state is similar to English law. In the Australian Capital Territory, New South Wales, Queensland, Victoria and Western Australia a twelve month absence does not afford grounds for a new appointment where the trustee has properly delegated the execution of the trust. In New South Wales and the Australian Capital Territory a trustee who has remained outside the jurisdiction for more than two years may be replaced even though the trustee has properly delegated

¹⁶² Section 13 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*.

the duties of the trust. In South Australia and Tasmania mere absence from the State for more than one year will suffice. In New South Wales, Victoria, Western Australia and Queensland, a trustee may be appointed in place of a minor, as it is a ground for replacement under the equivalent of the provisions of section 10 of the Irish *Trustee Act 1893*. Except for the Northern Territory, South Australia and Tasmania, the legislation provides that a new trustee may be appointed where the trustee, being a corporation, is dissolved.

1.141 The legislation in each jurisdiction provides that a continuing trustee includes a refusing or retiring trustee if willing to act in the appointment.

1.142 In Victoria, Queensland and Western Australia a power to appoint is also given expressly where a trustee is removed under a power in the trust instrument (similar to section 36(2) of the English 1925 Act).

1.143 Each Australian state and territory allows for the appointment of additional trustees, subject to restrictions on numbers. In New South Wales, Victoria, Queensland, South Australia, Western Australia and Australian Capital Territory the appointment of additional trustees is allowed at any time, but in Tasmania and the Northern Territory, the appointment of additional trustees may only occur at the time of appointment of a new trustee.

1.144 Each jurisdiction also makes statutory provision for appointment of trustees by the court whenever it is expedient to do so and it is found inexpedient, difficult or impracticable to do so without the assistance of the court. The Australian Capital Territory and New South Wales legislation further provides that in the case of charitable trusts, the court may make an order for the appointment of a new trustee on such evidence in relation to the trust as the court deems sufficient.

(e) *Canada*

1.145 A statutory power of appointment, without application to the court, was introduced in the *Ontario Trustee Act 1877* and is found in all of the common law provinces except New Brunswick, and Prince Edward Island and the Yukon and Northwest Territories. If the trust does not contain an express power of appointment of substitute trustees, New Brunswick, and Prince Edward Island require an application to the court. Manitoba and Prince Edward Island

specify infancy as a ground for the exercise of the statutory power of appointment. Of the eleven common law jurisdictions, only Manitoba has adopted a provision allowing for the appointment of additional trustees, as provided for in section 36(6) of the *English Trustee Act 1925*.

1.146 The Trustee Acts of the provinces and territories all contain statutory provision for the appointment and removal of trustees by the courts. The legislation is based, to a large extent, on that of England.

(f) New Zealand

1.147 Section 43(1) of the *Trustee Act 1956* is broadly similar to section 35(1) of the *English Trustee Act 1925* but does not include infancy as a ground for the exercise of the statutory power to appoint a new trustee. This statutory power is exercisable where a company which is acting as trustee has ceased to carry on business, is in liquidation, or is dissolved. It restricts the absence from the jurisdiction ground to cases where no delegation remains in operation under section 31 of the Act.

1.148 The legislation provides that a continuing trustee includes a refusing or retiring trustee if willing to act in the appointment.¹⁶³

1.149 Section 43(5) of the 1956 Act provides for the appointment of additional trustees where a sole trustee was appointed or where, in the case of a trust, there are not more than three trustees. It should be noted that this power may not be exercised without the consent of the trustee or trustees for the time being or the court.

(3) Options for Reform

(1) General

1.150 Summary of statutory provisions

The statutory provisions may be summarised as follows:

- Non-judicial¹⁶⁴ replacement or removal by appointment of substitute trustees under section 10 of the *Trustee Act 1893* – note the numbers may be increased.

¹⁶³ Section 43(7) of the *Trustee Act 1956*.

¹⁶⁴ That is, where the replacement or removal can be done otherwise than by order of the Court.

- Non judicial retirement¹⁶⁵ without replacement – section 11 of the *Trustee Act 1893* (provided two trustees remain) – see section F.
- Judicial appointment, replacement and removal of trustees – section 25 of the *Trustee Act 1893* – see paragraphs 1.117 and 1.236.

1.151 In this section we will concentrate on the reforms, if any, required in relation to section 10. Proposals for the reform of sections 11 and 25 are considered at paragraphs 1.218-1.232 and 1.254-1.263 below respectively.

1.152 The purpose of the statutory provisions in relation to the appointment of trustees is to facilitate the administration of the trust, in circumstances where the trust instrument may be silent or deficient. In providing for both judicial and non-judicial appointment of trustees, the 1893 Act¹⁶⁶ recognised that there may be certain defined circumstances where recourse to the courts might not be necessary¹⁶⁷ and other situations where the assistance of the court might be required. Applications to court may prove time consuming and expensive but may in some cases be expedient and necessary to bring about the resolution of an impasse and to obtain directions. It appears that in this jurisdiction, in practice, the majority of appointments are made using the non-judicial powers in section 10 and that the court’s jurisdiction under section 25 is rarely used. This may be contrasted with the situation in other jurisdictions such as Ontario and Saskatchewan where the non-judicial powers are rarely employed¹⁶⁸ and the assistance of the court is almost always sought.¹⁶⁹ Authority

¹⁶⁵ That is, where retirement can take place otherwise than by order of the Court.

¹⁶⁶ Which consolidated various earlier statutes governing trusts and trustees.

¹⁶⁷ The non-judicial power of appointment was first introduced in England in 1860 by *Lord Cranworth’s Act*.

¹⁶⁸ Law Reform Commission of Ontario *Report on the Law of Trusts* (1984) at 86.

¹⁶⁹ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.8 noting that “[t]his state of affairs results from uncertainty about the effect of section 15 [similar to section 10 of the 1893 Act]. Rather than attempt to make sense of the statutory power to replace trustees, most legal practitioners rely on the courts to ensure valid appointment of trustees.”

to suggest that where there is a valid existing power of appointment and a person willing to exercise it, the court will not exercise its power may be found in *Re Gibbon's Trusts*¹⁷⁰ and *Re Higginbottom*¹⁷¹ which indicate that the court should not be asked to exercise its jurisdiction where a statutory power can be exercised without recourse to the court.¹⁷²

1.153 Before looking at the need for reform of the existing provisions, the question arises as to whether or not the settlor should have the power to oust the application of the provisions. The provisions of section 10 of the 1893 Act apply only if a contrary intention is not expressed in the trust instrument. Given the facilitative nature of the powers, the Commission see no need to change the existing situation whereby the statutory powers are subject to a contrary intention in the trust instrument.

1.154 In considering reform of the existing provisions it may be helpful to look at them under the following headings:

- when can the powers of appointment be exercised;
- who may exercise the powers;
- how should the powers be exercised.

(II) *When can the powers of appointment be exercised?*

1.155 Under the existing provisions, the non-judicial power of appointment under section 10 may only be exercised where a vacancy is created by death, retirement or removal. There are no provisions relating to the appointment of additional trustees where a replacement is not being sought, and in these circumstances a court application must be made. There may be many instances where it might be considered desirable to appoint additional trustees, for example, due to an increase in the workload of the trust or the need to appoint a professional trustee with some specific expertise. The power to appoint additional trustees was introduced in England in the *Trustee*

¹⁷⁰ (1882) 30 WR 287.

¹⁷¹ [1892] 3 Ch 132.

¹⁷² But in cases where there is a doubt whether the power of appointment applies, the court will appoint new trustees – *Re Woodgate's Settlement* 5 WR 448.

*Act 1925*¹⁷³ and has been followed in many other jurisdictions which have updated their trust legislation since then.

1.156 *The Commission is of the view that a non-judicial power to appoint additional trustees would be useful in practice and would reduce the need for recourse to the courts. Accordingly, it is recommended that such a power be introduced.*

1.157 The next question to be considered is as to who should exercise the power to appoint additional trustees and whether any restrictions or control should be imposed on the exercise of the power. In England the power is reserved to the person or persons nominated for that purpose by the trust instrument or, failing such a person, the trustee or trustees for the time being. The Commission is satisfied that these persons are appropriate and recommends that they be given the power.

1.158 The existing circumstances in which the power of appointment of replacement trustees may be exercised can be summarised as being where a trustee:

1. is dead;¹⁷⁴
2. remains out of the jurisdiction for more than twelve months;
3. desires to be discharged from his or her duties;
4. refuses to act;
5. is unfit to act;
6. is incapable of acting.

1.159 The first matter to be considered is whether the grounds as enumerated are still relevant and whether they are sufficiently clear so as to facilitate the purpose of the section. We will then consider whether or not the grounds should be supplemented to cover other eventualities which may arise.

1.160 Categories 1 (death) and 3 (desires to be discharged) are self explanatory and category 4 (refusal) has been discussed earlier in the

¹⁷³ Section 36(6) - but note that the number of trustees of trusts of land is restricted to four.

¹⁷⁴ By virtue of section 10(4) this includes the case of a person nominated trustee in a will but dying before the testator.

context of disclaimer but this category also includes a situation where a trustee who has taken up office refuses to act during tenure of the office. In this situation an application to court may prove necessary.

1.161 Where a trustee “remains out of the jurisdiction for more than twelve months”, a distinction must be drawn between a situation where the trustee has abandoned his or her duties and one where the trustee is actively administering the trust from outside the jurisdiction.¹⁷⁵ The former situation clearly warrants the replacement of the trustee, whereas the latter situation, given the advances and increased use of modern technology and communications systems, should not give rise to any particular difficulties. The Ontario Law Reform Commission, in considering this issue agreed “that any trustee who leaves the jurisdiction and, implicitly, the administration of the trust for an extended period of time should be removed from office. However, they saw “little objection to a trustee actively administering the trust from outside the jurisdiction”.¹⁷⁶

1.162 The Scottish Law Commission in its recent discussion paper on *Trustees and Trust Administration*¹⁷⁷ also takes a similar view and states that a similar statutory provision “looks dated in today’s world of rapid global communications. Trustees should be judged by their attendance to trust business rather than by their physical location.”¹⁷⁸

1.163 There may be many reasons why a trustee is absent from the jurisdiction but may have no intention of abandoning the administration of the trust. If a settler or testator wishes the trustees to reside in a particular jurisdiction or to specify that the trustees should not be absent from the jurisdiction, the trust instrument may so provide. If no such provision is made and a trustee is absent from the State for a considerable period, in circumstances where such absence amounts to an abandonment of his or her duties as trustee, an

¹⁷⁵ There may, of course, be tax consequences where the trustees become non-resident, for example, section 579B of the *Taxes Consolidation Act 1997* in relation to the deemed disposal of defined assets where the trustees of a settlement become neither resident nor ordinarily resident in the State.

¹⁷⁶ Ontario Law Reform Commission *Report on the Law of Trusts* (1984) at 109.

¹⁷⁷ (No 126 December 2004)

¹⁷⁸ *Ibid* at 39.

application to court may be made to determine whether or not the trustee should be replaced.

1.164 *The Commission is of the view that the statutory provision regarding the removal of a trustee on the ground of absence from the jurisdiction for twelve months or more should be deleted as it is no longer an appropriate ground for the replacement of a trustee under the non-judicial power of appointment.*

1.165 Categories 5 and 6 are more problematic. As discussed above, the terms “unfit to act” and “incapable of acting” have been interpreted by the courts on many occasions, but obviously the determination of status will depend on the facts of the particular case involved. The terms involve subjective judgment and may give rise to conflict between trustees. The Ontario Law Reform Commission was of the view that the non-judicial removal of trustees should be limited to objectively ascertainable circumstances,¹⁷⁹ and similarly the Saskatchewan Law Reform Commission was of the opinion that “[t]he grounds for non-judicial removal of a trustee under statutory authority should be expressly stated in clear language”.¹⁸⁰ The Commission agrees with these views and considers that the phrases as they stand are somewhat vague and may be open to a broad interpretation. One person’s view of what constitutes “unfitness” or “incapacity” may vary greatly from another’s. Accordingly, the Commission recommends a clear and exhaustive list of the circumstances in which the non-judicial power may be exercised.

1.166 The question of minors has already been considered and, following on from the Commission’s recommendation as to the invalidity of the appointment of a minor to act as trustee the non-

¹⁷⁹ Ontario Law Reform Commission *Report on the Law of Trusts* (1984) at 107.

¹⁸⁰ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.11. The Commission proposed to confine non-judicial replacement of trustees to cases in which a trustee (i) desires to retire from the trust; (ii) refuses to act as trustee (iii) has been declared mentally incompetent; (iv) is an infant; (v) has been convicted of an indictable offence; (vi) is a person against whom a receiving order is in force, or who has made an assignment or proposal under the Bankruptcy Act (Canada), (vii) is a corporate trustee that is dissolved or in liquidation – see recommendation 4.5(1)(a). The Ontario Law Reform Commission proposed a similar list with the exclusion of the infancy ground.

judicial power of replacement should be capable of being exercised where a minor is appointed as trustee.

1.167 The issue of mental capacity was discussed earlier in the context of the initial appointment of trustees. Again, the question of mental capacity is a subjective judgment and the Commission is of the view that the inclusion of mental capacity as a ground for appointment of new trustees is not appropriate, given that one or more trustees (or a person given a power of appointment under the deed) may not be in a position to judge the mental capacity of a co-trustee. However, there may be some specific instances where an individual is made a ward of court or where a power of attorney comes into effect under the *Powers of Attorney Act 1996*. In the case of a ward of the court, the Committee does not automatically step in as trustee in place of the ward.¹⁸¹ Where a power of attorney comes into effect, the donee or donees of the power does not take over any functions which the donor has as a trustee.¹⁸²

1.168 *The Commission is of the view that instances where a trustee is made a ward of court or a power of attorney comes into effect should be specifically included as grounds for the exercise of the non-judicial power of appointment.*

1.169 It has long been accepted that bankruptcy amounts to unfitness and that a trustee who is a bankrupt can be called upon to resign.¹⁸³ Bankruptcy is also specifically mentioned, without prejudice as to other situations which may arise, as one of the instances where the court may appoint new trustees.¹⁸⁴

¹⁸¹ See fn 41.

¹⁸² See section 16(2) of the *Powers of Attorney Act 1996* which provides that the general power of attorney under the Act “does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life within the meaning of the Settled Land Act, 1882, or as a trustee or other person exercising the powers of a tenant for life under section 60 of that Act”.

¹⁸³ See *Re Barker's Trusts* (1875) 1 Ch D 43 where Jessel MR stated that: “A necessitous man is more likely to be tempted to misappropriate funds than one who is wealthy; and besides, a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.”

¹⁸⁴ Section 25(1) of the *Trustee Act 1893*.

1.170 *The Commission is of the view that bankruptcy of a trustee¹⁸⁵ should be specifically included as a ground for the exercise of the non-judicial power of appointment.*

1.171 A company may be appointed as trustee either solely or jointly with another person. A company's legal existence may come to an end for various reasons. As Keane states; "A company may in theory live forever. It may also, however, have its legal existence cut short in two ways: by being wound up or by being removed from the register."¹⁸⁶ The English *Trustee Act 1925* provides that where a corporation is dissolved it is deemed to be incapable of acting as trustee from the date of dissolution.¹⁸⁷

1.172 *The Commission believes that where a corporate trustee is in liquidation or has been wound-up, an application to court should not be necessary. It is recommended that in such circumstances, the corporate trustee may be subject to replacement under the non-judicial statutory power.* The question of whether the liquidator of the company should be involved in appointing a replacement is discussed separately at paragraph 1.198 below.

1.173 One final point, on which the 1893 Act is silent, is the situation which arises where a trustee is removed pursuant to a power in the trust instrument, but the trust instrument makes no provision for the appointment of a replacement. In such circumstances an application to court will be required. Section 36(2) of the English *Trustee Act 1925* overcame this difficulty by providing that where a trustee has been removed under a power contained in the trust instrument and the trustee is an individual that individual is treated as deceased, and if the trustee is a corporate trustee, as if it is desirous of being discharged from the trust.¹⁸⁸

1.174 *The Commission is of the view that section 36(2) of the English Trustee Act 1925 is a useful provision which supplements an apparent deficiency in the drafting of the trust instrument.*

¹⁸⁵ Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

¹⁸⁶ Keane *Company Law* (3rd ed Butterworths 2000) at 493.

¹⁸⁷ Section 36(3). The *Trustee Act (Northern Ireland) Act 1958* also contains a similar provision at section 35(3).

¹⁸⁸ See also section 35(2) of the *Trustee Act (Northern Ireland) Act 1958*.

Accordingly it is recommended that where a trustee has been removed under a power contained in the trust instrument, that trustee may be subject to replacement under the non-judicial statutory power.

1.175 To summarise, therefore, the occasions giving rise to the non-judicial appointment of trustees under the general trust law provisions would be as follows; where a trustee:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is dead;
- desires to be discharged from the duties;
- refuses to act;
- is bankrupt;¹⁸⁹
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up.

(III) Who may exercise the powers?

1.176 We next come to consider the persons entitled to appoint new trustees under the existing statutory powers. These are currently listed as the person or persons nominated to appoint new trustees by the trust instrument, or if there is no such provision or the person nominated is unable or unwilling to act, then the power may be exercised by the surviving or continuing trustee or trustees for the time being or the personal representative of the last surviving or continuing trustee.¹⁹⁰ We will look at each of these three categories in turn and then consider if the powers should be exercisable by any further categories not currently included.

(aa) Persons nominated in the Trust Instrument

1.177 The settlor may, in the trust instrument, nominate persons other than the trustees to make decisions regarding replacement and

¹⁸⁹ Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

¹⁹⁰ Section 10(1) of the *Trustee Act 1893*.

removal and these are the first persons with power to act under section 10 of the *Trustee Act 1893*.

1.178 If there is no such provision or the person nominated is unable or unwilling to act, the power moves on to the trustees. If the person is “unable to act” this will presumably be due to some incapacity. The situation may also arise where more than one person is given the power and they decline to appoint or cannot agree on the person to be appointed.¹⁹¹

1.179 The phrase “unwilling to act” is somewhat ambiguous and this has been highlighted by both the Ontario and Saskatchewan Law Reform Commissions. It is thought that a distinction needs to be drawn between the situation where the person refuses to exercise the authority and a situation where the person actively considers the matter but ultimately decides that the appointment of a new trustee is not warranted. In the latter circumstance the beneficiaries or trustees may not be happy with the decision reached but this is no reason why the power should pass to those next entitled thereby overriding the wishes of the person nominated to appoint.

1.180 The Saskatchewan Law Reform Commission recommends clarifying the position by adopting clearer language to ensure that a person nominated to remove and replace trustees should not lose the authority conferred by the trust instrument unless he or she (1) refuses to exercise the authority, or (2) lacks the capacity to exercise the authority.¹⁹²

1.181 The Ontario Law Reform Commission is also of the same view, but recommended no change in the phrase “able and willing to act”. This conclusion rested on the observation that the phrase was retained in the *English Trustee Act 1925*, and did not appear to have caused difficulty in practice.¹⁹³

1.182 *The Commission recommends that a person nominated to remove and replace trustees should not lose the authority conferred*

¹⁹¹ As in *Re Sheppard's Settlement Trusts* (1888) WN 234 Ch D, where a husband and wife were living apart and refused to concur in appointing a new trustee.

¹⁹² Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.13.

¹⁹³ Ontario Law Reform Commission *Report on the Law of Trusts* (1984) at 98.

by the trust instrument unless that person (1) refuses to exercise the authority, or (2) lacks the capacity to exercise the authority.

(bb) Surviving or continuing trustees or trustee for the time being

1.183 The next persons entitled to exercise the powers are the “surviving or continuing trustees or trustee for the time being”. This must be read in conjunction with section 10(4) of the 1893 Act which clarifies that a “continuing trustee” includes a refusing or retiring trustee, if willing to act for the purposes of the section.¹⁹⁴ “Continuing trustee” means one who is to continue to act in the trust after the completion of the appointment,¹⁹⁵ and does not include a trustee who has decided to retire,¹⁹⁶ unless he or she is willing to act for the purpose of filling up the impending vacancy. It has also been held that the last surviving or continuing trustee includes a sole trustee.¹⁹⁷ These provisions therefore facilitate retirement where all of the trustees or the last remaining trustee wish to retire and obviates the need for a court appointment in such circumstances.

1.184 As discussed earlier, the term “refusing” trustee includes a trustee who disclaims the trust. Refusal arises where the trustee has been active and now refuses to act, whereas with disclaimer the trustee has never acted and refuses to act. It is unlikely that the legislature would have wished to allow an individual who had never acted as trustee to become involved in appointing new trustees. *The Commission recommends that any new legislative provision governing the appointment of trustees should make clear that any person who has disclaimed the trust is excluded from the definition of “refusing trustee”.* A distinction may need to be drawn where the trust property has actually vested in the individual who is disclaiming. In such circumstances the individual is effectively a “refusing trustee”.

1.185 The question of whether a trustee who was removed for cause is included in the term “refusing trustee” was considered in *Re*

¹⁹⁴ A similar provision is contained in section 36(8) of the English *Trustee Act 1925*.

¹⁹⁵ *Re Coates to Parsons* (1886) 34 Ch D 370 where it was held that a trustee who was abroad for more than twelve months was not a “refusing or retiring trustee”.

¹⁹⁶ *Re Norris, Allen v Morris* (1884) 27 Ch D 333.

¹⁹⁷ *Re Shafto’s Trusts* (1885) 29 Ch D 247.

Stoneham Settlement Trusts.¹⁹⁸ In that case it was held that a trustee who had to be removed for cause against his will could not block the removal when it was agreed to by the other trustees. The Commission is of the view that this interpretation is sufficiently clear and does not require any further elaboration.

(cc) Personal representatives of the last surviving or continuing trustee

1.186 The final category of persons with a power to appoint are the personal representatives of the last surviving or continuing trustee. In this regard, the English Trustee Act 1925 contains two supplementary provisions which are additions to those included in the 1893 Act.

1.187 Firstly, section 36(4) of the 1925 Act provides that the power of appointment given to the personal representatives of a last surviving or continuing trustee is deemed to be exercisable by the executors for the time being of such surviving or continuing trustee, who have proved the will of their testator, or by the administrators for the time being of such trustee, without the concurrence of any executor who has renounced or has not proved. This subsection was inserted to ensure that any executor who had not proved the will would not have to join in the replacement of a trustee. This subsection appears to have been inserted as a result of the decision in *Re Pawley and London and Provincial Bank*,¹⁹⁹ which had held that the term “personal representatives” as it appeared in the *Land Transfer Act 1897*, included all those answering to that description whether or not they had obtained a grant of probate.

1.188 *While the Commission is not aware that the lack of a similar provision to section 36(4) of the Trustee Act 1925 has caused any difficulties in this jurisdiction, it is of the view that to put the matter beyond doubt, a provision should be inserted indicating that the power of appointment given to the personal representatives of a last surviving or continuing trustee is deemed to be exercisable by the executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by the administrators for*

¹⁹⁸ [1953] Ch 59; [1952] 2 All ER 694.

¹⁹⁹ [1900] 1 Ch 58.

*the time being of such trustee, without the concurrence of any executor who has renounced or has not proved.*²⁰⁰

1.189 Secondly, the other additional provision in the *Trustee Act 1925* is section 36(5), which provides that where a sole or last surviving executor intends to renounce the office of executor, or all of the executors where they all intend to renounce, but are willing to act for the purpose of exercising the power of appointment of trustees, they may act for that purpose without accepting the office of executor.

1.190 The Commission is not convinced of the merits of this provision. It is of the view that this situation mirrors that of a disclaiming trustee and it does not consider that a sole or last surviving executor who intends to renounce the office of executor, or all of the executors where they all intend to renounce, should not be in a position to exercise the power of appointment of a trustee.²⁰¹

1.191 Having looked at the existing categories of persons with a power to appoint, we now come to consider whether the non-judicial power of appointment should be extended to include any further categories of persons.

1.192 An important matter to be addressed is the extent to which the beneficiaries themselves should play any role in the appointment or removal of trustees. As noted above, the question of the powers of beneficiaries who are all *sui juris* and absolutely entitled to the trust property was discussed in the English case of *Re Brockbank*.²⁰² As a result of that decision, the view was taken that the beneficiaries could not force a removal and replacement of trustees without bringing the existing trust to an end and resettling the property on identical trusts, but with their own choice of trustees; but as Whitehouse and

²⁰⁰ This corresponds with sections 17 and 20 of the *Succession Act 1965* which provide that once an executor renounces probate his rights in respect of the executorship ceases and that the proving executors may exercise all the powers conferred on the personal representatives.

²⁰¹ This view also corresponds with section 17 of the *Succession Act 1965* whereby a person who renounces probate is treated as if that person had not been appointed executor.

²⁰² *Re Brockbank, Ward v Bates* [1948] Ch 206; 1 All ER 287.

Hassall²⁰³ caution “the price in fiscal terms [of taking such a course] is likely to be considerable”.²⁰⁴

1.193 The English Law Commission in its report,²⁰⁵ while not specifically mentioning the case of *Re Brockbank*, recommended that where the beneficiaries are ascertained, *sui juris* and unanimous, they should be able to exercise the right of appointment (to replace an existing trustee or in addition to existing trustees) exercisable by the remaining trustees.

1.194 The intention of section 19 of the *Trusts of Land and Appointment of Trustees Act 1996* was to reverse the *Brockbank* decision, at least partially. If the trust instrument nominates a person with the power to appoint new trustees, or provides that the provisions of the section are not to apply, then the beneficiaries have no power to appoint their nominees. If there is no such person or provision, the beneficiaries may force one or more trustees to retire, nominate their successor(s) and add further trustees.

1.195 Section 20 of the 1996 Act extends the powers conferred on the beneficiaries by section 19 to deal with the case where a trustee is incapable of exercising his or her functions as a result of a mental disorder.²⁰⁶ This section only applies if there is no person entitled and willing to make such an appointment under section 36(1) of the 1925 Act.

1.196 Unfortunately, there is no case law in this jurisdiction to indicate whether or not the Irish courts would adopt a similar approach to that taken in *Re Brockbank*. However, the reasoning of Vaisey J is compelling and his ultimate view was that:

“[t]he claim of the beneficiaries to control the exercise of the defendant’s [trustee’s] fiduciary power of making or compelling an appointment of the trustees is, in my

²⁰³ Whitehouse and Hassall *Trusts of Land, Trustee Delegation and the Trustee Act 2000* (2nd ed Butterworths 2001).

²⁰⁴ *Ibid* at 97, highlighting the tax consequences of winding up one trust and replacing it with another.

²⁰⁵ *Transfer of Land: Trusts of Land* (Law Com No. 181) 1989

²⁰⁶ Note a new Mental Capacity Bill was introduced in the House of Commons on 17 June 2004 and this legislation when enacted will shift the focus from “mental disorder” to “mental capacity”.

judgment, untenable. The court itself regards such a power as deserving of the greatest respect and as one with which it will not interfere”.²⁰⁷

1.197 *Bearing in mind the overall aim of facilitating non-judicial appointments, the Commission is of the view that winding up of the trust is not the answer and that to put the matter beyond doubt, a clear statutory power of appointment by sui juris beneficiaries who are absolutely entitled to the entire beneficial interest in the trust should be introduced along similar lines to that contained in the English Trusts of Land and Appointment of Trustees Act 1996.*

1.198 As discussed above, the Commission recommends that where a corporate trustee is in liquidation or has been wound-up, it may be subject to replacement under the non-judicial statutory power. In such circumstances, the question arises as to whether the liquidator of the company should be involved in the appointment of a replacement trustee. This situation might be considered analogous to that of the personal representatives of the last surviving or continuing trustee exercising the power of appointment.

1.199 *The Commission is of the view that, where a corporate trustee is in liquidation or has been wound-up, the liquidator should be allowed to exercise the power of appointment of a new trustee if there is no person nominated for that purpose in the trust instrument. If there are other remaining trustees the liquidator should join in the appointment (if there is no person nominated in the trust instrument with power to appoint) and if the corporate body was a sole trustee the liquidator may make the appointment solely.*

(IV) *How are the powers be exercised?*

1.200 Section 10(1) of the *Trustee Act 1893* provides that the appointment of new trustees must be “in writing”. This may be contrasted with section 11 which requires the retirement of trustees to be “by deed”.²⁰⁸ Wylie suggests that “in most cases it is desirable to make the appointment by deed because this makes it possible to use

²⁰⁷ *Re Brockbank, Ward v Bates* [1948] Ch 206 at 208.

²⁰⁸ The format and requirements in relation to deeds forms part of the Commission’s Consultation Paper on *Reform and Modernisation of Land Law and Conveyancing Law* (November 2004) and the proposals made in that context will apply similarly to any formal documents required in relation to appointment and retirement of trustees.

the special statutory provisions²⁰⁹ for vesting the trust property in the new trustees²¹⁰. Where a deed is used to appoint a new trustee and the deed contains a declaration vesting the trust property in the new or continuing trustees, that declaration will operate to vest the property, without any conveyance or assignment.²¹¹

1.201 The Commission is currently reviewing the question of conveyancing and deeds and the proposals made will apply similarly in relation to these provisions.

(4) Charities

1.202 The recommendations made in section 3 above should apply similarly to charitable trusts and will benefit the administration of charitable trusts in the same way as general trusts. However, there are a few matters which require further consideration.

1.203 *The Commission is of the view that in relation to the appointment of new trustees of charitable trusts, even where such trusts have the power to appoint new trustees, the Registrar of Charities will have an important role to play. This is particularly important in the protection of the public interest in respect of such trusts. The Commission therefore recommends that:*

- *The Registrar of Charities should have power to appoint replacement or additional charity trustees. This power is currently exercisable by the Commissioners of Charitable Donations and Bequests under section 43 of the Charities Act 1961, as amended by section 14 of the Charities Act 1973.*
- *The non-judicial statutory power to appoint additional charity trustees²¹² should be subject to the consent of the Registrar of Charities before any such appointment.*
- *Any change in charity trustees made pursuant to the non-judicial powers of appointment should be notified immediately*

²⁰⁹ Section 12 of the *Trustee Act 1925*.

²¹⁰ *Wylie Irish Land Law* (3rd ed Butterworths 1998) at 600.

²¹¹ Section 12(1) of the 1925 Act.

²¹² As recommended at paragraph 1.156 above.

*to the Registrar of Charities. This could form part of the periodic return to the Registrar of Charities.*²¹³

The Commission would welcome further submissions on the role of the Registrar of Charities in relation to the appointment of charity trustees.

F Retirement

(1) The Position in Ireland

1.204 A trustee who has taken up office may only retire if the trust instrument permits retirement, or under the relevant statutory provisions,²¹⁴ or, if all of the beneficiaries consent and they are *sui juris* and entitled to the full beneficial interest in the trust property.²¹⁵

1.205 Section 11 of the *Trustee Act 1893* provides that where there are more than two trustees, one of them may retire if the co-trustees and any person empowered by the trust instrument to appoint trustees consent. The declaration seeking discharge and the consent to discharge must be by way of deed. Two trustees are required to give a discharge to the retiring trustee. A trustee who “desires to be discharged” may also retire under section 10 of the 1893 Act but in this case a new trustee must be appointed to replace the trustee. Except where only one trustee was originally appointed, a trustee will not be permitted to retire unless at least two trustees remain to administer the trust.

1.206 If the deed by which a retiring trustee is discharged contains a declaration vesting the trust property in the continuing trustees, that declaration will operate to vest the property, without any conveyance or assignment.²¹⁶

1.207 A trustee who wishes to retire may also seek the assistance of the court under section 25 of the 1893 Act which provides that the court may appoint new trustees in substitution for existing ones

²¹³ The Registrar of Charities may set different requirements for returns depending on the size of the charity involved.

²¹⁴ Section 10 or 11 of the *Trustee Act 1893*.

²¹⁵ In this instance the trust may have to be wound up – see discussion at paragraphs 1.192-1.197 above.

²¹⁶ Section 12(2) of the 1893 Act.

whenever it is expedient to do so and it is inexpedient, difficult or impracticable to do so without the assistance of the court.

1.208 While there are no specific provisions in the *Charities Acts 1961* and *1973* with regard to the retirement of charity trustees, section 43 of the *Charities Act 1961*²¹⁷ gives the Commissioners of Charitable Donations and Bequests power to appoint a new trustee or trustees either *in substitution for or in addition to* any existing trustee or trustees or where there is no existing trustee. In the case of charities or trusts operating through a company, the articles of association and the *Companies Acts 1963-2003* make provisions for the retirement of directors.

(2) Other Jurisdictions

(a) England and Wales

1.209 The English provisions regarding retirement are similar to those in Ireland. A trustee may retire under an express or implied power in the trust instrument. A trustee may retire under the statutory powers conferred by the *Trustee Act 1925*, either on the appointment of a new trustee²¹⁸ or if at least two trustees will continue in office or if the continuing trustee is a trust corporation.²¹⁹ The court may also make an order in relation to the retirement of a trustee.

1.210 Under section 19 of the *Trusts of Land and Appointment of Trustees Act 1996*, if all of the beneficiaries are of full age and capacity and, taken together, are absolutely entitled to the trust property they can compel a trustee to retire provided the power to appoint new trustees is not reserved to other persons. Prior to this, the rule in *Saunders v Vautier*²²⁰ was used by the beneficiaries to bring the trust to an end and for settling the property on new trusts. However this required a transfer of the legal title to the trust property from the original trustees to the beneficiaries, and then from the beneficiaries to the new trustees. This process was costly and inefficient. Section 20 extends the powers conferred on beneficiaries to deal with the case where a trustee is incapable of exercising his functions as trustee as a

²¹⁷ As substituted by section 14 of the *Charities Act 1973*.

²¹⁸ Section 36(1) of the *Trustee Act 1925*.

²¹⁹ Section 39(1) of the *Trustee Act 1925*.

²²⁰ (1841) Beav 115.

result of mental disorder.²²¹ The provisions of sections 19 and 20 can be expressly excluded by an express exclusion clause in the trust instrument.²²²

(b) *Northern Ireland*

1.211 Section 38 of the *Trustee Act (Northern Ireland) 1958* allows a trustee to retire by execution of a deed provided that after discharge from office there will be either a trust corporation or at least two trustees remaining to administer the trust. A trustee who wishes to retire may also seek the assistance of the court under section 40 of the 1958 Act.

1.212 Sections 34 and 35 of the *Trustee Act (Northern Ireland) 2001* contain provisions which correspond to Part II of the English *Trusts of Land and Appointment of Trustees Act 1996* regarding the powers of the beneficiaries to force the retirement of trustees.

(c) *Scotland*

1.213 Section 3(a) of the *Trusts (Scotland) Act 1921* provides that, unless the contrary is expressed in the trust deed, all trusts are held to include power to any trustee to resign the office of trustee.

(d) *Australia*

1.214 The trustee legislation in each jurisdiction broadly provides that a trustee may retire, with the consent of the co-trustees, provided that there are two trustees or a trust corporation left.

(e) *Canada*

1.215 Almost all the provinces and territories provide by statute for retirement of trustees.²²³ All the common law jurisdictions require the consent of the other trustees to a retirement if there is to be no replacement. There must be more than two trustees so that when retirement takes place at least two remain. Ontario and Manitoba permit retirement if the remaining trustee is a trust corporation. Alberta permits a retirement and discharge only with the consent and an order of the court, whether or not a new trustee is being appointed.

²²¹ Note a new *Mental Capacity Bill* was introduced in the House of Commons on 17 June 2004 and this legislation when enacted will shift the focus from “mental disorder” to “mental capacity”.

²²² Section 21(5) of the *Trusts of Land and Appointment of Trustees Act 1996*.

²²³ The position in New Brunswick is not clear.

With the exception of Manitoba, a contrary intention in the trust instrument will override the statutory provisions.

(f) New Zealand

1.216 Section 45(1) of the 1956 Act provides that a trustee may retire with the consent of the co-trustees and the person, if any, empowered to appoint trustees. Except where only one trustee was appointed a trustee may not retire unless there will either be a trustee corporation or two trustees remaining to perform the trust.²²⁴

(g) United States

1.217 In the United States, the courts take the approach that trustees are not permitted to retire if retirement would prejudice the beneficiaries' interests.

(3) Options for Reform

(I) General

1.218 The aim of the non-judicial statutory powers in relation to retirement should be to make it easy for trustees to retire but not so easy that it will jeopardise the administration of the trust.

1.219 The first matter to be considered is to what extent, if any, the trust instrument should be allowed to exclude the statutory provisions regarding retirement. Section 11(3) of the 1893 Act provides that the section applies only if and insofar as a contrary intention is not expressed in the trust instrument. If the trust instrument is allowed to oust the ability to retire the inevitable result is that an application to the court will be required and that this will invariably be granted. It is generally accepted that a trustee who wishes to withdraw should not be forced to continue in office as a trustee.²²⁵ It is difficult to envisage circumstances in which the court would refuse to discharge a trustee and force a trustee to act under duress.

1.220 *The Commission is of the view that nothing in the trust instrument should be capable of restricting the right of a trustee to retire from the trust or a part thereof and that any such provision should be invalid.*

²²⁴ Section 45(3) of the *Trustee Act 1956*.

²²⁵ *Forshaw v Higginson* (1855) 20 Beav 485.

1.221 A related but slightly different matter is the requirement in section 11 for the consent of the co-trustees and any person empowered by the trust instrument to appoint trustees. The English *Trustee Act 1925* retains the requirement for consent and the Ontario Law Reform Commission,²²⁶ having considered the matter agreed. The Saskatchewan Law Reform Commission took the view that since the court will not deny a trustee the right to retire, they could not see any purpose in forcing the retirement issue into court.²²⁷

1.222 While, on one view, the Saskatchewan arguments are persuasive, the Commission is concerned that allowing a trustee to perhaps simply walk away from the trust may be going a step too far. The object of the provision is to facilitate retirement but at the same time to ensure that the trust continues to be properly administered. If a trustee wishes to retire, the matter should be discussed and agreed with the co-trustees and properly documented to ensure proper vesting of the trust property in the co-trustees. Accordingly, the Commission recommends the retention of the consent of co-trustees to retirement and if same is not forthcoming then the matter will have to be dealt with by the courts.

1.223 *The question of appointment of trustees by sui juris beneficiaries was discussed at paragraphs 1.192-1.197, and the Commission is again of the view that winding up of the trust is not the answer and that to put the matter beyond doubt, sui juris beneficiaries who are absolutely entitled to the entire beneficial interest in the trust should have power to direct a trustee or trustees to retire from the trust.*²²⁸

1.224 Section 11 of the *Trustee Act 1893* speaks in terms of retirement from “the trust” which could be construed as indicating that it does not permit retirement from part of the trust. The English *Trustee Act 1925* is similarly worded. This may be contrasted with section 38 of the *Trustee Act (Northern Ireland) 1958* Act which allows “retirement from the trust or a severable part thereof”. By

²²⁶ Law Reform Commission of Ontario *Report on the Law of Trusts* (1984) at 90.

²²⁷ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.19.

²²⁸ See sections 19-21 of the *Trusts of Land and Appointment of Trustees Act 1996*.

contrast also when a new trustee is being appointed under section 10 “a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property...”.²²⁹ By further contrast section 10 allows for the appointment of a new trustee “[w]here a trustee...desires to be discharged from all or any of the trusts or powers reposed or conferred on him...”. This enables a trustee to retire from part only of the trusts and the omission of this option from section 11 seems incongruous.

1.225 *The Commission is of the view that there is an anomaly between the appointment and retirement provisions and recommends that the retirement provisions should be clarified to make it clear that a trustee can retire from part of a trust where any part of the trust property is held on trusts distinct from those relating to any other part or parts of the trust property.*²³⁰

1.226 The final matter for consideration is the current requirement that retirement can only take place if there are two trustees remaining. This is necessarily linked to the earlier discussion regarding the numbers of trustees required. The Ontario Law Reform Commission recommended changing this provision to a trust company remaining or two trustees.²³¹ They considered allowing one trustee to remain but decided against it and were of the view that the court may allow for one trustee to remain if deemed necessary. The Saskatchewan Law Reform Commission recommended that retirement should be allowed even if only one trustee remains.²³² They did not believe that a reduction to a single trustee is a problem in the vast majority of cases. On balance, they concluded that non-judicial removal of a trustee should not require appointment of a replacement, even if only a sole trustee is left.

1.227 *In view of the recommendation at paragraph 1.87, the Commission recommends that a trustee should not be permitted to retire unless at least two trustees or a corporate trustee remains.*

²²⁹ Section 10(2)(b) of the *Trustee Act 1893*.

²³⁰ That is, where there is a clearly defined sub-fund or sub-trust.

²³¹ Law Reform Commission of Ontario *Report on the Law of Trusts* (1984) at 90.

²³² Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.18.

(II) *Charities*

1.228 *The recommendations made at paragraphs 1.220 and 1.225 should apply equally to charitable trusts and will benefit the administration of charitable trusts in the same way as general trusts.*

1.229 *In view of the recommendation at 1.96, the Commission recommends that a trustee should not be permitted to retire from a charitable trust or an unincorporated association unless at least three trustees or officers of an unincorporated association or a corporate trustee remains.*

1.230 The Law Society in its report²³³ recommends “that a charity trustee must vacate office or resign if that person:

- becomes of unsound mind;²³⁴
- becomes an undischarged bankrupt;
- is convicted of an indictable offence;
- is absent from meetings of the trustees for more than twelve months or is absent from the jurisdiction for twelve months and the remaining trustees resolve that the trustee should vacate the office;
- becomes disqualified under Part VII of the *Companies Act 1990*, the *Pensions Act 1990* as amended by the *Pensions (Amendment) Act 1996*, the *Trustee Act 1893* or the proposed new legislation.”

1.231 These criteria are similar to the qualifying criteria discussed earlier and the Commission’s views expressed earlier apply equally in this regard. *The Commission recommends that a charity trustee must vacate office if that person:*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*

²³³ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 224.

²³⁴ Note the terminology used in this context is currently the subject matter of discussion and may no longer be considered appropriate.

- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002;*
- *has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts.*

1.232 *The Law Society further recommends that a trustee of a charity should be able to resign at any time by notice in writing.*²³⁵ *The Commission does not agree and is of the view that, as in the case of general trusts, the consent of co-trustees to retirement should be obtained but that if same is not forthcoming the trustee wishing to retire should be able to apply to the Registrar of Charities for assistance.*

G Removal

(I) The Position in Ireland

(I) General

1.233 There is a certain overlap between the question of appointment, retirement and removal of trustees. Often the appointment of new trustees is consecutive to efforts to remove or the retirement of a trustee.

1.234 A trustee may be removed from office if the trust instrument makes specific provision for removal or may be removed by the beneficiaries if they are *sui juris* and entitled to the full beneficial interest in the trust property.²³⁶ A trustee may also be removed as a

²³⁵ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 224.

²³⁶ In this instance the trust may have to be wound up – see full discussion at paragraphs 1.192-1.1997 above.

result of the exercise of the statutory power of appointment of a new trustee under section 10 of the 1893 Act, in other words the trustee is effectively being removed by way of replacement.

1.235 A trustee may also be removed by the court pursuant to its powers under section 25 of the *Trustee Act 1893* when exercising its jurisdiction to appoint new trustees. The power is exercisable by the court “whenever it is expedient to appoint a new trustee or new trustees and it is found inexpedient, difficult or impracticable” to act without the assistance of the court. In *Spencer v Kinsella*,²³⁷ Barron J declined to exercise the powers of the court to appoint trustees and adjourned the case to enable the administration of the trust to be placed on a proper footing. In adjourning the matter, Barron J indicated that the court would only considering exercising its powers to alleviate the situation if the trustees could not resolve the matter.

1.236 Section 25 provides that “[i]n particular and without prejudice to the generality of the provisions, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of a felony, or is a bankrupt.” The section refers to the substitution of a trustee so a trustee cannot be removed under this section unless a replacement trustee is appointed.

1.237 Apart from this statutory power, the court also has an inherent jurisdiction to remove a trustee from office, without necessarily appointing a replacement. This jurisdiction will generally be exercised where a trustee acts dishonestly or incompetently or wilfully obstructs the objects of the trust.²³⁸ The court will also remove a trustee where there is a clear conflict of interest between the trustee’s personal position and that of the trust.²³⁹ In exercising its jurisdiction to remove trustees the overriding principle to which the court has regard is the welfare of the beneficiaries.²⁴⁰

(II) Charities

1.238 While the Commissioners of Charitable Donations and Bequests have no express powers to remove a trustee from office,

²³⁷ [1996] 2 ILRM 401.

²³⁸ *Arnott v Arnott* (1924) 58 ILTR 145.

²³⁹ *Moore v McGlynn* [1894] 1 IR 74. See also *Dunne v Heffernan* Supreme Court 26 November 1997 and *Spencer v Kinsella* [1996] 2 ILRM 401.

²⁴⁰ See Barron J’s judgment in *Spencer v Kinsella* [1996] 2 ILRM 401.

section 43 of the *Charities Act 1961*²⁴¹ gives the Commissioners power to appoint a new trustee or trustees either *in substitution for or in addition* to any existing trustee or trustees or where there is no existing trustee. Section 51 of the *Charities Acts 1961* also provides that the Commissioners of Charitable Donations and Bequests, or any person, with the consent of the Attorney General may apply to the High Court for relief where there is a breach or supposed breach of any trust for charitable purposes or whenever the direction or order of the Court is considered necessary for the administration of any trust for charitable purpose. This could include or lead to a request to the court that a trustee be removed from office.

1.239 In the case of charities operating through a company, section 182 of the *Companies Act 1963* applies in relation to the removal of directors. This section, the provisions of which cannot be removed or abridged by the articles, provides that the directors of a company may be removed at any time by ordinary resolution of the company in general meeting.²⁴²

(2) Other Jurisdictions

(a) England and Wales

(I) General

1.240 A trustee may be removed from office under an express power in the trust instrument or by all of the beneficiaries being of full age and capacity and absolutely entitled to the trust property. A trustee may also effectively be removed where the statutory power of appointment under section 36 of the *Trustee Act 1925* is exercised.

1.241 A trustee may be removed by the court under section 41 of the *Trustee Act 1925* when exercising its jurisdiction to appoint new trustees. The section specifically provides for the appointment of a new trustee in substitution for a trustee, who is incapable by reason of mental disorder within the meaning of the *Mental Health Act 1983*,²⁴³

²⁴¹ As substituted by section 14 of the *Charities Act 1973*.

²⁴² See further Keane *Company Law* (3rd ed Butterworths 2000), Forde *Company Law* (3rd ed Round Hall Sweet and Maxwell 1999) and Courtney *Law of Private Companies* (2nd ed Butterworths 2002).

²⁴³ Note a new Mental Capacity Bill was introduced in the House of Commons on 17 June 2004 and this legislation when enacted will shift the focus from “mental disorder” to “mental capacity”.

or is a bankrupt, or is a corporation which is in liquidation or has been dissolved. The court also has an inherent jurisdiction to remove a trustee.

1.242 The powers conferred by sections 19 and 20 of the *Trusts of Land and Appointment of Trustees Act 1996* may be used by the beneficiaries to remove a trustee.

(II) *Charities*

1.243 Section 16(1)(b) of the *Charities Act 1993* provides that the Charity Commissioners have the same jurisdiction and powers as the High Court to remove or discharge a charity trustee²⁴⁴ or trustee for a charity²⁴⁵, or to remove an officer or employee. The Charity Commissioners also have powers of removal under section 18 of the 1993 Act. Section 18(2) allows for removal, as part of the Commissioners' permanent and remedial powers after an inquiry, where they are satisfied that there is or has been any misconduct or mismanagement in the administration of the charity. Section 18(4) allows the Commissioners to remove a charity trustee where the charity trustee:

- is a bankrupt;
- is a corporation in liquidation;
- is incapable of acting by reason of mental disorder;
- has not acted and will not declare a willingness or unwillingness to act; or
- is outside England and Wales or cannot be found or does not act and the absence or failure to act impedes the proper administration of the charity.

1.244 The Charity Commissioners' powers under the *Charities Act 1993* extend to directors of charitable companies and members of

²⁴⁴ Charity trustees are defined as the persons having the general control and management of the administration of a charity – section 97 *Charities Act 1993*.

²⁴⁵ The term “trustee for a charity” is not defined in the Act of 1993 – but as Luxton indicates that it would seem an appropriate term to describe the ‘trustee’ of an unincorporated charity who holds the assets but has no management powers which would make the trustee a ‘charity trustee’ for the purposes of the Act – Luxton *The Law of Charities* (1st ed Oxford University Press 2001) at 338.

charitable unincorporated associations by virtue of the definition of a charity trustee under section 97(1) of the Act.

1.245 The appointment and removal of directors of charitable companies is largely governed by the *Companies Act 1985* and the *Company Directors Disqualification Act 1996* and the terms of the company's memorandum and articles of association. A director of a charitable company may be removed at any time by ordinary resolution, notwithstanding anything in the articles or in any agreement between the director and the company.²⁴⁶

(b) *Northern Ireland*

1.246 A trustee may be removed by the court under section 40 of the *Trustee Act (Northern Ireland) Act 1958* when exercising its jurisdiction to appoint new trustees. The section specifically provides for the appointment of a new trustee in substitution for a trustee who is a bankrupt or is a corporation which is in liquidation or has been dissolved or who for any reason whatsoever appears to the court to be undesirable as a trustee. The court also has an inherent jurisdiction to remove trustees where they behave incompetently or dishonestly or obstruct the purposes of the trust.

1.247 The Charities Branch²⁴⁷ has no power to remove a trustee whose actions are demonstrably damaging to the interests of a charitable trust.

(c) *Scotland*

1.248 Section 23 of the *Trusts (Scotland) Act 1921* empowers the court to remove a trustee who is or becomes insane or incapable of acting by reason of physical or mental disability, or who is absent from the United Kingdom continuously for at least six months, or who has disappeared for the same period.

1.249 The Court of Session currently has power to deal with the management of Scottish charities including a power to remove a

²⁴⁶ Section 303 of the *Companies Act 1985*.

²⁴⁷ The Department for Social Development is the charity authority for Northern Ireland. The Charities Branch of its Voluntary and Community Unit handles the normal day-to-day work.

person from being concerned with the management or control of the charity.²⁴⁸

1.250 The *Charities and Trustee Investment (Scotland) Bill* grants power to the Court of Session, following an application by the Office of the Scottish Charity Regulator, to remove any person concerned in the management or control of the charity.

(d) *Australia*

1.251 Apart from removal under an express power contained in the trust instrument, trustees may be removed by the exercise of the non-judicial statutory powers as to replacement of trustees or by the exercise of the court's powers of replacement. The court also has an inherent jurisdiction to remove trustees.

(e) *Canada*

1.252 The non-judicial statutory power of appointment can be exercised when a trustee refuses or is unfit to act, or is incapacitated. In Manitoba there is provision for the removal of a trustee, under the equivalent of section 10 of the Irish *Trustee Act 1893*, without the need to replace that trustee provided there remains at least two trustees or a trust corporation.²⁴⁹ Every jurisdiction gives statutory power to the courts to remove a trustee but only if another trustee is appointed as a replacement.

(f) *New Zealand*

1.253 Apart from removal under an express power contained in the trust instrument, trustees may be removed by the exercise of the non-judicial statutory powers as to replacement of trustees or by the exercise of the court's powers of replacement. The court also has an inherent jurisdiction to remove trustees.

(3) *Options for Reform*

(I) *General*

1.254 Because the exercise of the non-judicial powers of appointment in section 10 of the 1893 Act may operate to remove a

²⁴⁸ Section 7 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1990*.

²⁴⁹ Section 10(5) of the *Trustee Act 1970*.

trustee, the matters discussed above apply equally in the context of removal.

1.255 *The question of appointment of trustees by sui juris beneficiaries was discussed at paragraphs 1.192-1.197 and as indicated the Commission is of the view that winding up of the trust is not the answer and that to put the matter beyond doubt, a clear statutory power of removal by sui juris beneficiaries who are absolutely entitled to the entire beneficial interest in the trust should be introduced along similar lines to that in the English Trusts of Land and Appointment of Trustees Act 1996.*

1.256 Both sections 10 (non-judicial) and 25 (judicial) of the *Trustee Act 1893* only allow for removal where a replacement is appointed. The question arises as to whether there is a need for power to remove without replacement. As regards non judicial removal, the English Act allows for removal without replacement if two trustees or a trust corporation remain and the Ontario Law Reform Commission recommend a similar approach.²⁵⁰ The Saskatchewan Law Reform Commission agrees but goes further and recommends that removal should not require replacement even if only a sole trustee remains.²⁵¹ Both the Ontario and Saskatchewan Law Reform Commissions recommend allowing court removal without replacement. The Manitoba Trustee Act already allows for this.²⁵²

1.257 *In view of the recommendation at paragraph 1.87, the Commission recommends that non-judicial removal without replacement should not be permitted unless at least two trustees or a corporate trustee remains.*

1.258 While the judicial power does not allow removal without replacement it is clear that the court has inherent jurisdiction to do so if it considers that there are sufficient trustees remaining. In view of the court's inherent jurisdiction in this regard the Commission does not consider it necessary to expand the statutory power to include judicial removal without replacement.

²⁵⁰ Law Reform Commission of Ontario *Report on the Law of Trusts* (1984) at 90.

²⁵¹ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.22.

²⁵² Section 9(2) of the *Manitoba Trustee Act 1987*.

1.259 As noted above, section 25 of the 1893 Act, without prejudice to the generality of its provisions, specifies that the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of a felony, or is a bankrupt. The question arises as to whether, given the court's inherent jurisdiction, there is any ongoing need to highlight, in this way, any specific instances which would warrant the exercise of the court's powers. The Saskatchewan Law Reform Commission agreed with the Ontario Law Reform Commission that there was "no useful purpose in the adoption of a particularized approach". They were of the view that "[s]ince judicial removal is governed by well-established precedents, it would be sufficient to confer a discretionary power to remove and appoint without enumerating specific grounds".²⁵³

1.260 The Scottish Law Commission in its recent discussion paper on *Trustees and Trust Administration*²⁵⁴ is of the view that courts should be given some guidance on when the power of removal should be exercised.²⁵⁵

1.261 *The Commission is of the view that the inclusion of enumerated grounds does provide some guidance for the public as to the situations where the court will exercise its jurisdiction and recommends that bankruptcy of a trustee,²⁵⁶ liquidation of a corporate trustee, conviction of an indictable offence, or where an individual is sentenced to a term of imprisonment by a court of competent jurisdiction, should all form grounds for the removal of a trustee and the appointment of a replacement by the court. The court also has general power to appoint new trustees in any case where the court is of the view that it is necessary to do so to ensure the proper administration of the trust.*

1.262 With regard to the circumstances in which the judicial power may be exercised, the Saskatchewan Law Reform Commission was of the view that "the statutory formula should not be limited in

²⁵³ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.22.

²⁵⁴ (No 126 December 2004).

²⁵⁵ *Ibid* at 38.

²⁵⁶ Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

application to situations in which it is ‘inexpedient, difficult, or impractical’ to appoint a trustee ‘without assistance of the court’”. They argued that the inherent jurisdiction of the court is not limited in this way, nor should it be.²⁵⁷ In this regard the Commission prefers the view of the Ontario Law Reform Commission who saw some utility in retaining these phrases as a means to encourage non-judicial appointments.²⁵⁸

1.263 Section 36(1) of the 1893 Act sets out the persons entitled to apply to the court for orders. These are any person beneficially interested in land, stock or chose in action subject to a trust or any person duly appointed trustee of a trust. The section does not allow for an application to the court by a person nominated in the trust instrument for the purposes of appointing new trustees. The Commission is of the view that this section should be expanded to include such persons and also to allow for applications to the court for directions where difficulties arise in the administration of the trust.

(II) *Charities*

1.264 *The recommendation at paragraph 1.261 applies equally in the case of charitable trusts.*

1.265 *In view of the recommendation at paragraph 1.96, the Commission recommends that, in the case of charitable trusts or unincorporated associations, non-judicial removal without replacement should not be permitted unless at least three trustees or officers of an unincorporated association or a corporate trustee remain.*

1.266 With regard to charities, the Law Society recommended that the proposed Charity Regulator²⁵⁹ be given discretionary powers to petition the High Court for the removal of a charity trustee and that the power to remove a trustee (whether of a charity established by constitution, trust or company limited by guarantee) should be exercisable where:

²⁵⁷ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002) at 4.22.

²⁵⁸ Law Reform Commission of Ontario *Report on the Law of Trusts* (1984) at 118.

²⁵⁹ This is one of the terms used by the Law Society to describe the new regulatory body. In this paper the regulatory body is referred to as the Registrar of Charities.

- there is misconduct or mismanagement in the administration of the charity;
- the trustee has failed to carry out the duties imposed either by law or by the governing instrument of the charity;
- the charity is being or has been administered in such a manner as to jeopardise the charity or its property;
- it is necessary to act in order to protect the charity, its property or any property coming to the charity;
- within the previous five years, the trustee has been discharged from bankruptcy or an arrangement with creditors;
- the trustee is a company in liquidation;
- the trustee is incapable of acting by reason of mental disorder;
- the trustee has not acted, and will not declare a willingness or unwillingness to act;
- the trustee is outside the jurisdiction or cannot be found or does not act, and the absence or failure to act impedes the proper administration of the charity.

1.267 The Law Society further recommended that any trustee who is threatened with being removed should be told the grounds on which removal is sought and have a right to present reasons for opposing the removal to the body seeking such removal, whether the trustees of the charity, members of the charity or the Charities Officer.²⁶⁰

1.268 The *Charities and Trustee Investment (Scotland) Bill* grants power to the Court of Session, following an application by the Office of the Scottish Charity Regulator (OSCR), to remove any person concerned in the management or control of the charity. The OSCR itself has power to suspend but not remove charity trustees.

1.269 The question to be addressed is whether or not the Registrar of Charities should have the power to remove a trustee without recourse to the courts. It may be considered that there could be a potential conflict between the Registrar of Charities' regulatory

²⁶⁰ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 227.

functions and a power of removal.²⁶¹ On the other hand, it could be argued that the Registrar of Charities, precisely because of its regulatory and investigative functions, would be best placed to make decisions designed at protecting the property of the charity, up to and including the removal of charity trustees. The Commission is of the view that the Registrar of Charities should have power to remove charity trustees from office but that any such power must be accompanied by an appropriate appeals process to the courts taking account of Constitutional protections.²⁶² In this regard, the Commission notes that the English *Charities Bill* provides for a Charity Appeal Tribunal to consider certain decisions, directions or orders of the Charity Commission. The *Charities and Trustee Investment (Scotland) Bill* also provides for a Charity Appeals Panel to review certain decisions of the OSCR.

1.270 *The Commission, having carefully considered the matter, is of the view that the Registrar of Charities should have power to remove charity trustees from office but that this should be accompanied by an appropriate appeals process to the courts taking account of Constitutional protections. This power will form part of the Registrar of Charities' overall inquiry and investigative functions.*

1.271 *The power to remove a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee may also be removed by the Registrar of Charities if that person:*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*

²⁶¹ The Report on the Public Consultation on *Establishing a Modern Statutory Framework for Charities* at 32 indicates a split of opinion as to whether the Registrar of Charities' role should be merely regulatory or whether it should have a multi-faceted role as registrar, educator and enforcer.

²⁶² *Cf* the current appeals process to the High Court in section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973*.

- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002.*

H Disqualification

(1) The Position in Ireland

1.272 There are no provisions in the *Trustee Act 1893* or the *Charities Acts 1961* and *1973* in relation to the disqualification of trustees.

1.273 The *Companies Acts 1963-2003* provide that the following are disqualified from acting as a director:

- bodies corporate;
- undischarged bankrupts;
- auditors to the company;
- those who are expressly prohibited from acting as company directors by court order made after they were found guilty of fraud or dishonesty;
- directors of insolvent companies which are wound up, are prohibited from acting as directors for five years unless they can prove to the court that they acted honestly and reasonably.

(2) Other Jurisdictions

(a) England and Wales

1.274 Section 72(1) of the *Charities Act 1993* provides that certain individuals are disqualified from acting as charity trustees. The circumstances in which an individual will be disqualified are:

- anyone who has a previous conviction for any offence involving dishonesty or deception, unless the conviction is spent;
- an undischarged bankrupt;
- anyone who has been removed from the office of charity trustee by an order of the Charity Commissioners or by the court for misconduct or mismanagement in the administration of a charity;
- anyone who has been disqualified from serving as a company director under the *Company Directors' Disqualification Act 1986*.

1.275 Section 73 of the *Charities Act 1993* provides that any person who acts as a charity trustee while disqualified commits a criminal offence.

1.276 The Charity Commissioners maintain a register of all persons who have been removed as a charity trustee either by themselves or by the High Court.²⁶³ This register is available for inspection in each of the Commission's offices.²⁶⁴ The Registrar of Companies maintains a list of persons disqualified from acting as company directors.²⁶⁵

1.277 In addition to the disqualifications detailed in section 72(1) of the 1993 Act, which apply to trustees of all types of charities, the *Criminal Justice and Court Services Act 2000* disqualifies certain individuals from holding a range of positions in children's charities, including charity trusteeship. This ban covers, for example, anyone who commits one of a number of serious offences against children and who is subject to a disqualification order made by the Court under that Act. It is also a criminal offence for a disqualified person knowingly to seek appointment to any position covered by this ban including charity trusteeship of a children's charity. It is also an offence for someone knowingly to appoint a disqualified person to such a post.²⁶⁶

²⁶³ Section 72(6) of the *Charities Act 1993*.

²⁶⁴ Section 72(7) of the *Charities Act 1993*.

²⁶⁵ Available at www.companieshouse.gov.uk.

²⁶⁶ Charity Commission for England and Wales *Responsibilities of Charity*

1.278 A director subject to a disqualification order under the *Company Directors Disqualification Act 1986* is automatically disqualified from being a charity trustee.²⁶⁷

(b) *Scotland*

1.279 Section 8(1) of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* currently provides for the disqualification from being concerned with the management or control of a charity of a person who:

- has been convicted of an offence involving dishonesty;
- is an undischarged bankrupt;
- has been removed, under section 7, from being concerned with the management and control of any body; or
- is subject to a disqualification order under the *Company Directors Disqualification Act 1986*.

1.280 The *Charities and Trustee Investment (Scotland) Bill* proposes that the following categories of people be disqualified from being charity trustees:

- persons convicted of an offence involving dishonesty or an offence under the Act;
- undischarged bankrupts;
- persons subject to disqualification under the *Company Directors Disqualification Act 1986*;
- persons who have previously been removed as charity trustees.²⁶⁸

1.281 It will be an offence for a disqualified person to act as a charity trustee. Any acts done by a disqualified trustee will not be invalid by reason only of the disqualification.²⁶⁹

Trustees (Leaflet CC3 March 2002).

²⁶⁷ Section 72(1)(f) of the *Charities Act 1993*.

²⁶⁸ Section 68 of the *Charities and Trustee Investment (Scotland) Bill*.

²⁶⁹ Section 69 of the *Charities and Trustee Investment (Scotland) Bill*.

(c) *Canada*

1.282 The Ontario Law Reform Commission *Report on the Law of Charities* (1996) recommends that the following be disqualified from acting as trustees of charitable trusts:

- people who are bankrupt;
- persons declared by a court to be of unsound mind;²⁷⁰
- persons under the age of eighteen;
- persons convicted of an indictable offence or a summary conviction offence involving fraud or dishonesty.

(3) *Options for Reform*

1.283 The legislation in other jurisdictions only makes provision for disqualification in the context of charity trustees. The first question which needs to be addressed is whether there is a need for statutory disqualification provisions in relation to both general trusts and charitable trusts. The position of charitable trusts may be distinguished on the basis of their public nature and that they are holding funds in which the public has an interest. At the other end of the spectrum, in relation to trusts generally, it may be considered that a settlor should be free to appoint any person to act as trustee without any statutory interference. However as noted earlier, appointment of further trustees may take place at a time when the settlor has no further involvement in the trust. The overriding criterion is to achieve the protection of the trust property for the benefit of the beneficiaries. If a trustee (not just a trustee of a charitable organisation) has been removed from office for embezzlement of funds, for instance, is it not appropriate that the trust and any other trusts should be protected from appointing such a person?

1.284 However, the Commission is of the view that it would be impossible to police any disqualification of trustees in relation to general trusts and that recommendations in this regard can only apply to charitable trusts.

1.285 The Law Society recommended “that a person should be disqualified from acting as a charity trustee if that person:

²⁷⁰ Note the terminology used in this context is currently the subject matter of discussion and may no longer be considered appropriate.

- has been convicted at any time of an offence involving deception or dishonesty;
- is an undischarged bankrupt or has made a composition with creditors and has not been discharged;
- is of unsound mind;
- has at any time been removed by the Court from being a trustee because of misconduct;
- is disqualified from being a company director.²⁷¹

1.286 The issues raised above in relation to removal by the Registrar of Charities are also relevant in the context of disqualification. Should the Registrar of Charities have powers to disqualify a trustee subject to some form of appeal process against the decision? Again any such power should be accompanied by an appropriate appeals process. Disqualification could be for a specified period but the Registrar of Charities could have further powers to allow a trustee to act even though disqualified. For example, the Registrar of Charities might allow a trustee to act subject to certain conditions or limitations.

1.287 A further issue arises as to the need for the Registrar of Charities to maintain a list of charity trustees who have been disqualified or removed from office. In the absence of such a list it would be difficult for charities to ascertain whether or not potential trustees had been so removed. In Scotland, the Scottish Council of Voluntary Organisations, following consultations, considers that “asking trustees to ‘self-declare’ is not sufficient and that avoiding the establishment of such a list struck some people as a bureaucratic convenience rather than a principled or sensible approach”.²⁷² The Commission is of the view that a list should be maintained but that it should not be available for public inspection.²⁷³ Persons with a legitimate interest in obtaining such information should be able to

²⁷¹ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 228.

²⁷² *Report to the Scottish Executive from the Consultation Events on the Draft Charities and Investment (Scotland) Bill* - Scottish Council of Voluntary Organisations – July 2004 at 12.

²⁷³ This proposal may be dealt with more appropriately by way of Ministerial Regulations rather than inclusion in the primary legislation.

contact the Registrar of Charities to ascertain whether or not a potential trustee has been disqualified.

1.288 *The Commission recommends that the Registrar of Charities should have power, as part of its inquiry and investigative functions, to disqualify persons from acting as charity trustees and should maintain a list of persons so disqualified or removed. The Registrar of Charities should have further powers to impose sanctions on any person purporting to act while disqualified.*

1.289 *The power to disqualify a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee will also be disqualified if that person:*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002;*
- *has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts.*

1.290 *The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act*

subject to certain conditions or limitations or to act for a particular charity or class of charities.

I Suspension

(1) The Position in Ireland

1.291 There are no provisions in the *Trustee Act 1893*, the *Charities Acts 1961 and 1973* or the *Companies Acts 1963-2003* in relation to the suspension of trustees or directors.

(2) Other Jurisdictions

(a) England and Wales

1.292 Section 18(1)(i) of the *Charities Act 1993* provides that the Charity Commissioners for England and Wales may of their own motion suspend, for up to one year, a trustee, charity trustee, officer, agent or employee of the charity, pending consideration being given to removal. This power is available where the Commissioners have instituted an inquiry²⁷⁴ and are satisfied that there is or has been any misconduct or mismanagement in the administration of the charity.

(b) Scotland

1.293 Section 6 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1990* currently grants powers to the Lord Advocate to investigate charities and to suspend any person concerned with the management or control of the charity.

1.294 The *Charities and Trustee Investment (Scotland) Bill* grants power to the Office of the Scottish Regulator (OSCR) to suspend, for up to six months, any person concerned in the management or control of the charity following an inquiry into misconduct in the administration of the charity. The Bill grants power to the Court of Session, following an application by the OSCR, to suspend or remove any person concerned in the management or control of the charity.

(3) Options for Reform

1.295 The issues raised at paragraph 1.286 in relation to disqualification apply equally in relation to suspension. Suspension will only be appropriate in the context of an investigation or inquiry by the Registrar of Charities.

²⁷⁴ Section 8 of the *Charities Act 1993*.

1.296 The Law Society recommended that the Registrar of Charities be enabled to apply to the High Court to suspend any charity trustee, officer, agent, or employee of the charity from the exercise of the office or employment pending consideration being given to removal, subject to the initiation of a formal inquiry.²⁷⁵

1.297 The question arises as to whether the Registrar of Charities should have power to suspend charity trustees directly or whether an application to court should be required? In the case of trustees of pension schemes, the Pensions Board has to apply to the court to have a trustee suspended.²⁷⁶ If the Registrar of Charities is given extensive powers in relation to investigation of charities this could include the power to suspend along similar lines to the powers of the Charity Commissioners for England and Wales. In cases where the Registrar of Charities proposes to suspend a charity trustee, the legislation should provide for a suitable appeal process as discussed above.

1.298 *The Commission recommends that the Registrar of Charities should have power to suspend persons from acting as charity trustees, for a period not exceeding 6 months, following the institution of an investigation or inquiry. The Registrar of Charities should have further powers to impose sanctions on any person purporting to act while suspended.*

²⁷⁵ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002) at 230.

²⁷⁶ Section 27 of the *Pensions (Amendment) Act 1996*.

CHAPTER 2 REMUNERATION OF TRUSTEES

A Introduction

B The Position in Ireland

2.01 The office of trustee was historically carried out free of charge.¹ As a general principle, trustees are not entitled to remuneration for work carried out by them in their capacity as trustees.² Trustees are precluded from making any personal profit from the trust and must be careful to ensure that no conflict of interest arises between their own personal interests and those of the trust. They are entitled to be reimbursed for any expenses properly incurred in the performance of their duties,³ but they are only entitled to payment for work done if the trust instrument makes express provision for remuneration.

2.02 Where the trust instrument contains an express charging clause, the extent to which the trustee is permitted to charge is determined by the terms of the charging clause. Such clauses are strictly construed against the trustee.⁴ Unless the trust instrument provides otherwise, a charging clause, which allows a trustee who carries on a profession to charge for services, will only permit payment for services within the scope of the profession.⁵

¹ *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61 (CA); *Guinness plc v Saunders* [1990] 2 AC 663 (HL).

² *Re Ormsby* (1809) 1 Ba & B 189-90.

³ Section 24 of the *Trustee Act 1893* provides that a trustee "...may reimburse himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers".

⁴ *Re Gee* [1948] Ch 284 at 292 *per* Harman J.

⁵ In other words a trustee cannot charge for services which could have been undertaken by a lay trustee and which do not require professional expertise – *Re Chapple* (1884) 27 Ch D 584; *Clarkson v Robinson* (1900) 2 Ch 722.

2.03 In addition, as Delany⁶ points out, “...the court has an inherent jurisdiction to order that a trustee be remunerated for his services where no provision for payment has been made in the trust instrument or to allow a trustee to receive payment in excess of what was originally laid down or agreed.”⁷ The court also has the power to vary the remuneration provided for in the trust instrument. The basis of the jurisdiction is that the court has an inherent power to secure the good administration of trusts.⁸

2.04 A further exception to the general principle is where a trustee makes an arrangement for remuneration with all of the beneficiaries where they are all *sui juris* and absolutely entitled to the trust property.⁹ Such arrangements will be carefully scrutinised and are not to be encouraged.¹⁰

2.05 Where a solicitor/trustee acts for himself and his co-trustees in litigation relating to the trust and the costs do not exceed those which would have been incurred if he had acted for his co-trustees only, he is entitled to be paid those costs.¹¹

(a) *Charities*

2.06 The position of trustees of charitable trusts is the same as that of trustees of general trusts and, unless the trust instrument contains a charging clause, the trustees are not entitled to remuneration.

2.07 For the purposes of granting charitable tax exemption, the Revenue Commissioners expressly prohibit the remuneration of charity trustees by specifying that a clause be inserted into the charity’s governing instrument providing that:

“The income and property of the company/trust/body shall be applied solely towards the promotion of its main

⁶ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003).

⁷ *Ibid* at 417.

⁸ *Re Duke of Norfolk’s Settlement Trusts* [1982] Ch 61.

⁹ This is similar to the situation where there is no charging clause in a will – all of the beneficiaries can agree to the remuneration of the executors.

¹⁰ *Ayliffe v Murray* (1740) 2 Atk 58.

¹¹ This is known as the rule in *Cradock v Piper* (1850) 1 Mac & G 664.

object(s) as set forth in the memorandum of association / deed of trust/constitution/rules. No portion of the company/trust/body's income and property shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to members of the company/trust/body. No director/trustee/officer shall be appointed to any office of the company/trust/body paid by salary or fees, or receive any remuneration or other benefit in money or money's worth from the company/trust/body."¹²

2.08 Unlike the position in England, the Commissioners of Charitable Donations and Bequests have no power to authorise remuneration of trustees.

C The Position in England and Wales

(a) Position pre the Trustee Act 2000

2.09 As discussed above, the general rule is that "a trustee, executor, or administrator, shall have no allowance for his care and trouble".¹³ The exceptions to this general rule are:

- where the trust instrument expressly authorises remuneration;
- where remuneration is authorised by statute;¹⁴
- where remuneration is authorised by the court under its inherent jurisdiction;¹⁵
- where the beneficiaries are of full age and capacity, and between them are absolutely entitled to the trust property, and they agree to remunerate the trustees.

¹² *Applying for relief from tax on the income and property of Charities* (Leaflet CHY 1 May 2003).

¹³ *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, *per* Lord Talbot LC.

¹⁴ For example, under the *Public Trustee Act 1909*.

¹⁵ See for example, *Foster v Spencer* [1996] 2 All ER 672 where Baker J awarded remuneration to trustees for past but not future services and also allowed past expenses but no interest thereon.

2.10 The Law Reform Committee¹⁶ considered the issue of professional charging clauses in its Twenty-third Report, *The Powers and Duties of Trustees*.¹⁷ The Committee was opposed to the introduction of a general statutory charging clause as a default power for three reasons:

“settlers ought to be made aware that a professional trustee would be remunerated and of the terms of that remuneration, but an implied charging clause would not guarantee this;

a default power might be open to abuse; and

it would encroach too far upon the general principle that a trustee should not profit from the trust.”

2.11 In its Report which recommended the reforms embodied in the *Trustee Act 2000*, the English Law Commission rejected the Law Reform Committee’s approach and recommended the introduction of a statutory professional charging clause.¹⁸ In its Consultation Paper¹⁹ the Commission explained why it was desirable to have a statutory default charging clause:

“if a trust does not contain a charging clause, no professional trustee is likely to be willing to administer the trust;

even if a trustee is appointed who is not a professional, he or she may delegate much of the administration of the trust to and pay a professional agent, and this is so even if the work could be done by the trustee;

it is now common in express professional charging clauses to include provision that any charges shall be reasonable and shall not exceed the normal professional fees that would

¹⁶ In 1934 the Lord Chancellor set up the Law Revision Committee which became the Law Reform Committee in 1952. It is a part-time body of practitioners and academics whose task is to examine and report on any matters of civil law referred to it by the Lord Chancellor.

¹⁷ (Cmnd 8733 1982) at paragraphs 3.42-3.55.

¹⁸ Law Commission *Trustees’ Powers and Duties* (No 260 1999).

¹⁹ Law Commission *Trustees’ Powers and Duties* (No 146 1997).

be charged for that work by that person: there is therefore a yardstick by which professional charges can be measured.”

(b) *Trustee Act 2000*

2.12 Section 42 of the 1925 Act empowers the court when it appoints a corporation to act as trustee, to authorise the corporation to charge such remuneration as the court may think fit. This provision has effectively been superseded by Part V of the *Trustee Act 2000* in the case of a trust corporation or a professional trustee. The position of lay trustees remains unchanged and they have no right to charge for their services unless expressly provided for in the trust instrument.

2.13 Part V of the *Trustee Act 2000* fundamentally altered the principles regarding remuneration of trustees. Section 28 is relevant where there is a charging clause in the trust instrument and section 29 applies where the trust instrument makes no provision in relation to remuneration.

2.14 Section 28 of the 2000 Act provides that where there is an express clause permitting the trustee to be paid, and the trustee is a trust corporation or is acting in a professional capacity, the trustee is entitled to be paid even if the services are capable of being provided by a lay trustee. This section only applies to a trustee of a charitable trust who is not a trust corporation if he or she is not a sole trustee and to the extent that a majority of the other trustees have agreed that it should apply.

2.15 Trustees act in a professional capacity if they act in the course of a profession or business, which consists of, or includes, the provision of services in connection with the management or administration of trusts or in connection with a particular aspect of the administration of the trusts.²⁰ A person acts as a lay trustee if he or she is not a trust corporation and does not act in a professional capacity.²¹

2.16 The *Trustee Act 2000* has also modified the rule that a charging clause contained in a will takes effect as a legacy.²²

²⁰ Section 28(5) of the *Trustee Act 2000*.

²¹ Section 28(6) of the 2000 Act.

²² Section 28(4) provides that any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of- (a) section 15 of the *Wills Act 1837* (gifts to

2.17 Section 29(1) of the 2000 Act authorises a trustee who is a *trust corporation* to receive reasonable remuneration²³ out of the trust funds for any services which the trust corporation provides to or on behalf of the trust. Section 29(2) provides that a trustee who acts in a *professional capacity* other than a sole trustee is entitled to receive reasonable remuneration for services provided to the trust provided each other trustee has agreed in writing that the trustee may be so remunerated.

2.18 A trustee is not entitled to remuneration under section 29 if an express provision relating to remuneration is included in the trust instrument.

(c) *Charities*

2.19 As noted above, section 28 of the 2000 Act²⁴ only applies to a trustee of a charitable trust who is not a trust corporation if he or she is not a sole trustee and to the extent that a majority of the other trustees have agreed that it should apply.

2.20 With regard to the application of the statutory charging clause, the Law Commission considered the position of charity trustees and ultimately recommended that they should be excluded from the section 29 default provisions.²⁵ The new provision expressly excludes the trustees of a charitable trust,²⁶ but the Secretary of State

an attesting witness to be void), and (b) section 34(3) of the *Administration of Estates Act 1925* (order in which estate to be paid out).

²³ Section 29(3) – “Reasonable remuneration” means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee and for the purposes of subsection (1) includes, in relation to the provision of services by a trustee who is an authorised institution under the *Banking Act 1987* and provides the services in that capacity, the institution's reasonable charges for the provision of such services.

²⁴ Permitting payment to a professional trustee or trust corporation (even if the services could be provided by a lay trustee) where there is an express charging clause.

²⁵ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999).

²⁶ Sections 29(1)(b), and 29(2)(b) of the *Trustee Act 2000*.

may make regulations to provide for remuneration of charity trustees who are trust corporations or who act in a professional capacity.²⁷

2.21 In its report, the Law Commission indicated that there had been considerable support, on consultation, for the application of a statutory charging clause for charitable trustees for the following reasons:

“it is clearly in the best interests of charities that those who have the best qualifications and aptitude for trusteeship should be encouraged to act as charity trustees. Nowadays, such persons will commonly be financial services professionals who cannot be expected to work unpaid.

it may be to the economic advantage of a charity for certain specialised functions to be carried out by a trustee who has the necessary expertise (and to allow him or her to charge for so doing) if the alternative is to employ an agent to do so at a greater cost.

there is no justification for making a distinction between charities and other trusts in relation to the remuneration of professional trustees.”²⁸

2.22 However, strong reservations were also expressed to the effect that charities are a special case, and that no charity trustees should be able to charge for their services to the charity unless this is authorised by its constitution or by the Charity Commissioners. The following views were expressed:

“charities exist for the public benefit. Persons administering charities must act altruistically and not for their own benefit.

statutory default powers for trustees should encapsulate “best practice” in the drafting of trust instruments. Unlike non-charitable trusts, it is not standard practice for

²⁷ Section 30 of the *Trustee Act 2000*. The Bill as originally drafted would have allowed regulations to be made to remunerate lay as well as professional trustees. During its passage through Parliament concerns were expressed in this regard and the Bill was amended to restrict the Secretary of State’s power to the making of regulations for the remuneration of trustees who are a trust corporation or act in a professional capacity.

²⁸ Law Commission *Report on Trustees’ Powers and Duties* (No. 260 1999) at paragraph 7.21.

instruments establishing charities to include professional charging clauses. To do so is not accepted as best practice.

providing a universal power for professional trustees to charge for their services might be detrimental to public confidence in the charity sector by undermining its ethos of volunteer management.”²⁹

2.23 The Commission recognised that further consultation with the charity sector was required before the issue could be resolved one way or the other and therefore recommended that the Commission’s proposals for a statutory charging clause should not apply to charity trustees unless and until the Secretary of State so orders.³⁰ This is now provided for in section 30 of the 2000 Act.

2.24 Section 31 of the 2000 Act provides that a trustee (whether of a private or charitable trust) is entitled to be reimbursed from trust funds for expenses incurred by the trustee when acting on behalf of the trust.³¹

(d) *Charity Commissioners*

2.25 The Charity Commissioners make it clear that all trustees “must be alert to possible conflicts of interest, which they might have and to how they can minimise their effects”.³² The Commissioners do have power to authorise remuneration of charity trustees.³³ While their starting point is that the office of trustee carries no automatic right to remuneration, they will nevertheless authorise remuneration of charity trustees in those cases where it can be shown to be both necessary and reasonable in the interests of the charity. As Luxton comments “the Commissioners are now more expansive, and there is evidence of a slight softening of their approach”.³⁴ They will authorise remuneration of charity trustees where it can be shown to be “both necessary and reasonable in the interests of the charity.”

²⁹ Law Commission *Report on Trustees’ Powers and Duties* (No. 260 1999) at paragraph 7.22.

³⁰ *Ibid* at paragraph 7.23.

³¹ Replacing section 30(2) of the 1925 Act.

³² *Guide to Conflicts of Interest for Charity Trustees* – Version 03/04.

³³ See leaflet CC 11 – *Payment of Charity Trustees* (May 2004).

³⁴ Luxton *The Law of Charities* (1st ed Oxford University Press 2001).

(e) *Charities Bill*

2.26 The English *Charities Bill* provides a statutory power for charities to remunerate an individual trustee where that trustee, or a person connected with that trustee is also providing non-trustee services to the charity. It also provides safeguards to prevent misuse of the power. The statutory power does not apply to remuneration for services provided by a person acting in the capacity of trustee, or under a contract of employment. The provisions do not apply to any remuneration which a person is entitled to receive under a provision contained in the trust instrument.

D Other Jurisdictions

(1) *Northern Ireland*

2.27 Section 41 of 1958 Act gives the court power to authorise any person to charge such remuneration for services as the court may think fit. Part V of the *Trustee Act (Northern Ireland) 2001* makes provision for remuneration of trustees on the same lines as Part V of the English *Trustee Act 2000*.

(2) *Scotland*

2.28 In Scotland, in the absence of contrary provisions in the trust deed, a trustee must act gratuitously. The trust deed may however authorise a trustee to charge for services.

2.29 The Scottish Law Commission examined the question of trustees' remuneration in its discussion paper on *Breach of Trust*.³⁵ It set out the arguments in favour of a new statutory provision allowing trustees to charge for their services as agents on the grounds that:

“It would bring the law into line with current practice. Charging clauses are almost invariably added to professionally prepared trust deeds because of the perceived deficiencies of the existing common law.

A statutory charging clause would shorten trust deeds as it would meet the needs and expectations of the parties in the vast majority of cases.

³⁵ Discussion Paper 123 (September 2003).

A statutory charging clause would assist in those cases where there was no charging clause, either due to an oversight or because the trust had arisen by operation of law.”³⁶

2.30 The justifications for the existing common law prohibiting trustees from receiving remuneration for their services unless in pursuance of a charging clause or with the consent of the beneficiaries were listed as follows:

“Trustees may become more concerned with providing services and generating fees for themselves than giving unbiased consideration to the trust affairs. A trustee being a paid provider of services to the trust could lead to a conflict of interest in that the trustees are under a duty to supervise and monitor the actions of their paid agents.

Trustees could abuse their entitlement to remuneration and enrich themselves at the expense of the beneficiaries by creating remunerative work or charging excessive fees. As Lord Justice Clerk Hope said in *Fegan v Thomson*³⁷ “a man is not to be the judge of what is proper remuneration for himself”.

Trustees³⁸ should have to consider the issue of trustees’ remuneration. A statutory implied charging clause might lead to trustees being unaware that they were appointing trustees who could charge for their work since there would be nothing in the trust deed to bring the matter to their attention.”³⁹

2.31 The Scottish Commission did not favour an option where all trustees would be statutorily entitled to remuneration. It favoured a statutory provision authorising the trustees to appoint one or more of their number as their agents on a remunerated basis. The

³⁶ Scottish Law Commission *Discussion Paper on Breach of Trust* (No. 123 2003) at paragraph 4.24.

³⁷ (1855) 17 D 1146 at 1148.

³⁸ That is, settlors.

³⁹ Scottish Law Commission *Discussion Paper on Breach of Trust* (No. 123 2003) at paragraph 4.25.

Commission highlighted the need for the statutory provision to contain an express limitation to reasonable charges.

2.32 The Commission was not in favour of Scottish courts having to fix the remuneration of trustees and advised that the courts should confine themselves to determining disputes about a trustee's remuneration. The Commission did consider that the courts should have a role in varying the level of remuneration and therefore proposed that the courts should have the power, on application by any trustee or beneficiary, to increase or decrease the level of remuneration provided for trustees by the trust deed.

2.33 The *Charities and Trustee Investment (Scotland) Bill* makes provision for the remuneration of charity trustees who provide non-trustee services to or on behalf of the charity.⁴⁰

(3) Australia

2.34 In Australia, in addition to the Public Trustee, other trustees which are authorised trustee companies under relevant legislation are entitled to charge for their services. The legislation in some cases limits the fees that may be charged. Legislation in most jurisdictions specifically provides that the court may authorise any person to charge remuneration for services as the court thinks fit. Fees may also be paid by agreement of the beneficiaries if they are all *sui juris*.

(4) Canada

2.35 Canadian jurisdictions have taken a different approach towards trustee remuneration. In 1858, legislation was enacted in Ontario, authorising the courts to allow "fair and reasonable compensation to trustees for their care, pain and trouble and his time expended in and about the estate" and a similar authority has been conferred on the courts in the other provinces and territories. It is usual to allow compensation based on a percentage of capital and income but the compensation must be proportionate to the work done so that a large estate does not necessarily justify a large fee. However, if remuneration is fixed by the trust instrument, the courts have no power to award reasonable compensation.

2.36 The Saskatchewan Law Reform Commission having reviewed the provisions for remuneration found no evidence that the existing method was inadequate.⁴¹

⁴⁰ Sections 66 and 67.

2.37 Both the British Columbia Law Institute and the Ontario and Saskatchewan Law Reform Commissions recommended that, subject to certain conditions, trustees should be permitted to collect compensation before court approval has been obtained.

2.38 The Canadian provisions permit the court to fix remuneration if the trust instrument does not do so. The British Columbia Law Institute recommended that trustees who are professionally qualified should be allowed to charge their regular fees for professional services within the scope of their qualifications, provided that those services may reasonably be regarded as necessary for the fulfilment of the trust. They further recommended that the court should have discretion to override a provision in the trust instrument or will that does not provide fair and reasonable remuneration.⁴²

(5) New Zealand

2.39 In New Zealand a trustee is entitled to remuneration:

- if the relevant trust instrument so provides;
- with the leave of the High Court pursuant to its inherent jurisdiction or to section 72 of the *Trustee Act 1956*;
- pursuant to section 18 of the *Trustee Companies Act 1967* or section 100 of the *Public Trust Office Act 1957*.

2.40 In its discussion paper on the law of trusts,⁴³ the New Zealand Law Commission drew attention to the English *Trustee Act 2000* and particularly section 29 that makes it easier, in the absence of an appropriate charging provision, for a trustee to be remunerated for professional services without the need for a court order. On consultation, little enthusiasm was shown for the adoption of a similar provision in New Zealand and therefore no proposals were made in

⁴¹ Saskatchewan Law Reform Commission *Proposals for Reform of the Trustee Act* (2002).

⁴² British Columbia Law Institute *Report on Statutory Remuneration of Trustees and Trustees' Accounts* (2000).

⁴³ New Zealand Law Commission *Some Problems in the Law of Trusts* (PP48 2002) at paragraph 14.

that regard. The Commission noting that “[i]n practice there is almost always an adequate charging provision in the trust instrument”.⁴⁴

2.41 The Commission did however propose that the charging provisions in wills should no longer be treated as legacies.⁴⁵

(6) United States

2.42 In the United States, the normal presumption is that trustees of both charitable and private trusts are entitled to remuneration. Payments can be made provided they are reasonable. In relation to charities, there are complex legal rules to prevent trustees from benefiting from their trusteeship to the detriment of the charity. The report of the Joint Committee on the English *Charities Bill* highlights the fact that media attention in the United States has recently focused on excessive trustee payment by private foundations and other issues including conflicts of interest, fund-raising practices, charities being set up as tax shelters and charities serving as a conduit to finance terrorist activities. The Joint Committee cautions that “the US experience carries warnings about the risk of loss of public confidence in charities generally through excessive payments to trustees.”⁴⁶

E Options for Reform

(a) General Trusts

2.43 The principle behind the ban on payment of trustee fees is that trustees should not benefit from the trust and any conflict of interest and duty should be avoided.

2.44 As noted above, the Lord Chancellor’s Law Reform Committee had come down against introducing a statutory charging clause. One of the reasons was that it was unsuitable as a default provision. The view was that remuneration of a trustee was always a matter on which instructions should be taken. The Scottish Law Commission also highlighted this point. The Law Reform

⁴⁴ New Zealand Law Commission *Some Problems in the Law of Trusts* (PP48 2002) at paragraph 18.

⁴⁵ *Ibid* at paragraph 19, following the provisions of section 28(4) of the *Trustee Act 2000*.

⁴⁶ Report of the Joint Committee on the Draft Charities Bill (HL167-1 HC 660-1 30 September 2004).

Commission agrees with the view that settlors should be made aware specifically that a professional trustee is to be remunerated and that as a result the trust funds may be depleted.

2.45 The danger identified by the Law Reform Committee, that a default power might be open to abuse is also a real one. For example, a lay trustee may arrange to retire and appoint an acquaintance (who is a professional) to act in substitution even though the administration of the trust did not require a professional trustee.

2.46 The Law Reform Committee also noted that a default power would encroach too far upon the general principle that a trustee should not profit from the trust. This argument is more difficult to justify because as the Law Commission pointed out in their final report:

“The principal objection to the remuneration of trustees for their work is not that there is anything inherently wrong in rewarding them for their services, but that they should not derive any *secret* remuneration from their office or some benefit which is not authorised by law or expressly provided for.⁴⁷ In fact, it may be advantageous to the beneficiaries or the objects of the trust for there to be a power to remunerate professional trustees under properly controlled conditions, as this will make it easier to employ trustees who have the necessary skills for the complex task of modern trusteeship⁴⁸”⁴⁹.

2.47 The arguments in favour of a statutory charging clause⁵⁰ are not compelling. The English 2000 Act provides for remuneration of trust corporations and professional trustees only. Settlers are free to include in the governing instrument any powers deemed necessary for the trustees to administer the trust properly and this may include provision for the payment of trustees. In practice, if a professional trustee is appointed the trust instrument will invariably contain a professional charging clause. If a lay trustee is appointed, the trust

⁴⁷ See the comments of Lord Normand in *Dale v IRC* [1954] AC 11 at 27.

⁴⁸ See *Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

⁴⁹ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 73.

⁵⁰ See paragraphs 2.10 and 2.29 above.

instrument may, or may not, provide for remuneration. The appointment of a lay trustee indicates a preference on the part of the settlor that the trust should be administered by a lay as opposed to a professional trustee. When further appointments or replacements are made there is no reason to overrule the original wishes of the settlor by appointing professionals. The argument may be made that the trust property has grown or the trust has become too complex and difficult for a lay trustee to manage. The argument follows that a professional trustee should be appointed to assist or replace an existing trustee but will refuse to act in the absence of a remuneration clause. One option is for the lay trustee to delegate the administration of the trust to an agent. It may be argued that this may prove more costly than engaging a professional trustee but this argument is difficult to sustain given that most professionals charge by hourly rates and the charge should be more or less the same whether they are acting as trustee or agent. A trustee engaging professional advice should ensure that value for money is obtained.

2.48 *The Commission does not consider it appropriate to introduce a statutory default provision in relation to trustee remuneration, being of the view that, in most instances where appropriate and warranted, a charging provision is invariably included in the trust instrument.*

2.49 The Commission considered specific legislative provisions to allow the court to sanction payment to professional or corporate trustees along similar lines to the Canadian model. However, on balance the Commission is of the view that the court's inherent jurisdiction already covers this situation albeit that this jurisdiction is only exercised sparingly and in exceptional cases.

(b) Charities

2.50 With regard to charities, the arguments against having a statutory provision in relation to remuneration of trustees are even stronger. Charities must have an element of public benefit and giving charity trustees a right to charge for their services may undermine the whole voluntary ethos of charitable activities. It may also undermine public confidence in the charity sector by giving the impression that funds donated to a charity may be used for administrative rather than charitable purposes. As the English Charity Commissioners state "The concept of unpaid trusteeship has been one of the defining characteristics of the charitable sector, contributing greatly to public

confidence in charities.”⁵¹ The danger that any such statutory provision may be open to abuse is a real fear and has to be considered. In the case of charities there may be no identifiable beneficiaries to exercise control over the trustees. On a more practical level, in many cases charities may not be in a position financially to remunerate trustees.

2.51 In view of the prohibition by the Revenue Commissioners in respect of the remuneration of charity trustees in this jurisdiction as a pre-condition to granting charitable status, the numbers of professionals acting as trustees of charities in their professional capacity must be minimal. A distinction must be made between a professional acting as a trustee in that capacity and an individual, such as an accountant or lawyer, who is acting as trustee on a purely voluntary basis and just happens to be a professional. Over the years, charities have had the benefit of such persons agreeing to act as trustees and such altruism must continue to be encouraged. The question as to whether such persons are “acting in a professional capacity” becomes somewhat blurred and will in most instances depend on the facts of each particular case. The English *Trustee Act 2000* clarifies this by stating that acting in a “professional capacity” means acting “in the course of a profession or business which consists of or includes the provision of services in connection with the administration or management of trusts or in connection with a particular aspect of the administration or management of trusts.”

2.52 A further distinction must be drawn in relation to instances where lay trustees engage the services of professionals to assist in the administration of the trust.

2.53 The Joint Committee on the English *Charities Bill* received a number of submissions in relation to the remuneration of charity trustees in respect of their trusteeship. While some stressed the importance of the voluntary nature of trusteeship and considered honorary appointment to be essential for the maintenance of confidence in a charity, others reported increasing difficulty in getting people to act in a voluntary capacity and suggested that a charity should be able to pay a trustee for acting as such. The Committee, however, was not satisfied that recruitment problems had reached

⁵¹ CC 11 *Payment of Charity Trustees* (May 2004).

such a level that a wider power than that proposed in the Bill⁵² was necessary.

2.54 *The Commission does not consider it appropriate to introduce a statutory default provision in relation to remuneration of charity trustees, being of the view that the voluntary nature of charitable activities should be maintained to ensure public confidence in the administration of charities.*

2.55 The Law Society in its report recommended that the existing rules on payments and benefits to trustees (being the stipulations of the Revenue Commissioners) be incorporated in legislation, subject to discretion on the part of the Charities Office to authorise payments or benefits to members and directors or trustees in certain circumstances.⁵³

2.56 The Commission is of the view that the general principle outlined above is sufficient and that incorporation of the rules into legislation may prove inflexible and considers that it would be more appropriate for the Registrar of Charities to issue any further guidance required in relation to remuneration and benefits.⁵⁴

2.57 A further question which arises is the need, if any, for a statutory power allowing charities to remunerate an individual trustee where that trustee or a person connected with that trustee is providing services to the charity.

2.58 As noted above, the English *Charities Bill* provides a statutory power for charities to remunerate an individual trustee where that trustee, or a person connected with that trustee, is providing services to the charity. It also provides safeguards to prevent misuse of the power. The consultation process in advance of the Bill showed that many people were in favour of relaxing the rules which prevent a trustee receiving payment for providing the charity with a trade or professional service outside the person's duties as a trustee. The Consultation Paper "Private Action, Public Benefit: A

⁵² See paragraph 2.26 above.

⁵³ Law Society *Charity Law: The Case for Reform* (2002) at 214.

⁵⁴ This corresponds with the proposal in the Department's Consultation Paper *Establishing a Modern Statutory Framework for Charities* which recommends that the Registrar of Charities should issue Best Practice Guidelines.

Review of Charities and the Wider Not-For-Profit Sector”⁵⁵ made the following observations:

“Often a trustee can provide such a service on much more favourable terms than the charity could obtain elsewhere. For instance, a trustee who is a plumber might agree to replace the central heating at cost price; or a trustee who is a solicitor might agree to carry out some conveyancing for a nominal fee. We believe that a trustee should be allowed to be paid for a service if the trustee body, as a whole, reasonably believe it to be in the charity's interests that the service should be provided by that trustee. The trustee body would of course have to manage the inherent conflict of interest properly, and any transaction for value between a charity and one of its trustees should be conducted openly and reported as required.”⁵⁶

2.59 The *Charities and Trustee Investment (Scotland) Bill* also makes provision for the remuneration of charity trustees who provide services to or on behalf of the charity.⁵⁷

2.60 *The Commission is of the view that legislation allowing for remuneration of trustees for non-trustee services should be introduced. Any such provision should contain safeguards which would emphasise that it does not apply to remuneration for services provided by a person acting in the capacity of trustee.*

⁵⁵ Strategy Unit *Private Action: Public Benefit* (September 2002) available from <http://www.strategy.gov.uk/output/Page3714.asp>.

⁵⁶ *Ibid* at 70.

⁵⁷ Sections 66 and 67.

CHAPTER 3 DUTY OF CARE

A Introduction

3.01 It is well established that trustees may be found liable for breach of trust, which breach may arise where the trustees fail to perform the duties required of them by the trust instrument.¹ However, it may also be the case that liability will be imposed on such trustees for loss caused to the trust occasioned by a breach of duty in the exercise of the powers conferred on such trustees, whether such powers are derived from the trust instrument or by statute. Equity has long recognised the need to determine the liability of trustees in such matters against the criterion of a particular standard of care.² While other jurisdictions have chosen to place the standard and

¹ As Delany has noted, “[a] trustee will be found to be acting in breach of trust if he fails to perform the duties required of him or if he acts in an unauthorised manner”; Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 429. The issue of the liability of trustees for breach of trust is by no means a simple matter, and this statement is not intended to disregard the potential complexities which arise in this area. However, this particular issue falls outside the scope of the present examination, as it is intended to focus specifically on the issue of liability of trustees for breach of the duty of care in the exercise of trust powers, and the appropriate standard on which such liability should be assessed. For a detailed consideration of the liability of trustees for breach of trust simpliciter, see *inter alia* Delany *ibid* at 429-439; Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at paragraphs 10.21-10.30; McGhee (ed) *Snell’s Equity* (13th ed Sweet & Maxwell 2000) at 319-343; and Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 649-711.

² The original test of the “prudent man of business” was set out in *Speight v Gaunt* (1883) 9 App Cas 1, applied in *Re Weall* (1889) 42 Ch D 674. See also *Mendes v Guedella* (1862) 2 J & H 259, considered below at paragraphs 3.05-3.06. The same test is applied in the context of the power of investment: see for example the decision of Murphy J in *Stacey v Branch* [1995] 2 ILRM 136 (High Court), discussed at paragraph 4.33 below.

duty of care on a statutory footing, the *Trustee Act 1893* makes no reference to the concept.

3.02 With the transformation of some of the fundamental characteristics of the modern trust, it gradually became apparent that there was a need for greater supervision of the activities of trustees. Attention thus turned to the standard and duty of care, the circumstances in which it should apply, and whether the standard should be of uniform application or whether regard should be had to the possibility of imposing a higher standard on professional trustees. It is proposed in this section to consider the present situation on the standard and duty of care expected of trustees in this jurisdiction, before turning to the approach of other jurisdictions in tackling these difficult issues.

B The Position in Ireland

3.03 As noted above, the last legislative venture in this jurisdiction into the sphere of trust law was made with the enactment of the *Trustee Act 1893*. However, the provisions of the *Trustee Act 1893* made no reference to any duty of care to which trustees should be subject. Far from being a legislative omission, this can be explained by the very different climate in which trustees of the time were required to operate. As Ann Kenny³ has pointed out, present trust law is still to a large degree dictated by “rules derived from a social era when trustees were generously donating their time and skill to the administration of another’s property”.⁴ It was thus a matter for the courts to formulate the appropriate standard of the duty of care in varying circumstances, and also to set out the circumstances in which such a duty would apply.

3.04 An early formulation of trustees’ duty of care is to be found in *Speight v Gaunt*.⁵ Here, an action was taken against a trustee who

³ “Living Up to Expectations” (1996) 146 NLJ 348, where Kenny (Principal Lecturer in Law at the University of Northumbria) argues that the traditional rules of equity are unsuitable to modern professional trustees.

⁴ Thus, as Kekewich J commented at the close of the 19th century, “[t]rustees deserve and receive the utmost consideration at the hands of the Court. They gratuitously undertake duties for the benefit of others ...”: *Re Weall* (1889) 42 Ch D 674 at 677.

⁵ (1883) 22 Ch D 727.

had, with the consent of the beneficiary, employed a broker to invest trust funds in corporation stocks. When the broker was subsequently discovered to have embezzled trust funds, the beneficiary sought to have the trustee found liable to make good the loss caused to the trust. In refusing to impose such liability on the trustee, Bacon V-C enunciated the following statement of principle:

“A trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money. That is the rule which is properly to be applied to this and to such like cases.”⁶

3.05 The meaning of the requirement to exercise “prudence” in these circumstances was considered by Lord Cottenham LC in *Munch v Cockerell*,⁷ where he commented that in order to find a trustee liable for the misconduct of agents, the standard by which they were to be judged was not that the loss might have been prevented by extraordinary care and caution. Rather, Lord Cottenham LC stated that “the trustee is not held liable if, acting strictly within the line of his duty, he exercised reasonable care and diligence”.

3.06 These cases effectively set out the extent of the duty of care owed by trustees. As the Law Commission has noted, the law in this regard, insofar as it goes, is “largely clear and uncontroversial”.⁸ The Law Commission neatly summed up the state of the law in the light of these cases in the following manner:

“In essence, trustees were required to exercise reasonable prudence in choosing an agent and in negotiating the terms

⁶ *Speight v Gaunt* (1883) 22 Ch D 732. This test is seen as drawing on the language of an earlier case, *Mendes v Guedella* (1862) 2 J & H 159 at 177, where it was established that once trustees have exercised their powers of delegation, they are expected to exercise “that ordinary prudence which a man uses in his own affairs” in the supervision of such agents. See also to the same effect the decision of Murphy J in *Stacey v Branch* [1995] 2 ILRM 136 (High Court) discussing the duty concerning investment: see paragraph 4.33 below.

⁷ (1840) 5 My & Cr 178.

⁸ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 34.

on which that person was employed [as per *Re Weall and Speight v Gaunt*]. Once appointed, trustees were expected to exercise, in the supervision of their agents, 'that ordinary prudence which a man uses in his own affairs' [per *Mendes v Guedella*]"⁹.

3.07 Whilst the law in England is much changed since the promulgation of these principles, in the absence of legislative intervention and any further elucidation from the courts, it is submitted that the above summary by the Law Commission constitutes the present position of Irish law on the duty of care to be met by trustees. We now turn to consider the various changes effected to these principles under English law in the interim period.

C The Position in England

3.08 There have been numerous alterations effected to the law in England as regards to duty of care of trustees in the exercise of their functions. The issue arises most often in relation to trustees' exercise of their powers of delegation and powers of investment. The first legislative attempt to modify existing principles on the matter was made in four specific provisions of the *Trustee Act 1925*. It is proposed to examine each of these sections, and their particular aim and effect, in turn.

(1) Trustee Act 1925

3.09 There were four specific provisions in the *Trustee Act 1925* which were intended to affect the law on the duty of care owed by trustees, and the standard by which such duty would be measured. Section 23(1) of the *Trustee Act 1925* dealt with the duty of care required of trustees when delegating their "ministerial functions". It provided that trustees were not liable for loss resulting from the appointment of their agents, subject to the requirement that they acted "in good faith". This section has been described by the Law Commission as entailing a certain amount of ambiguity, as on one view, it may have actually lowered the standard of conduct expected of trustees exercising the power of delegation, by exempting trustees

⁹ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 34-35.

from liability for the defaults of any agents appointed under the power if that agent was “employed in good faith”.¹⁰

3.10 The confusion surrounding the precise scope and effect of the terms of the 1925 Act was further compounded when considered in conjunction with section 23(2), which governed the delegation of the performance of a trust of foreign property to an agent. Whilst the section provided that in such circumstances, trustees should not be responsible for any loss caused through the appointment of such agent simply by reason of their having made that appointment, it made no reference to the precise standard of care required in the selection or supervision of such agents.¹¹ Section 23(3) went on to give trustees a specific power to employ a solicitor or banker for certain purposes,¹² although it explicitly preserved the liability of such trustees if they allowed the trust assets to remain in the hands of such agents for longer than was necessary.¹³

3.11 The final provision of the 1925 Act dealing with the duty of care of trustees was section 30(1), which provided that a trustee would not be found liable for the losses occasioned by the defaults of agents “unless the same happens through his own wilful default”.¹⁴ The meaning of the phrase “wilful default” in this context was given extensive consideration in *Re Vickery*,¹⁵ where Maughan J held that

¹⁰ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at 65.

¹¹ *Ibid* at 67.

¹² Thus, the section provided that without prejudice to the general power of appointment of agents, trustees could appoint a solicitor to receive money or valuable consideration or property receivable by the trustee, by permitting the agent to produce a deed containing a receipt. A trustee could also appoint a banker or solicitor for the purpose of receiving money payable under a policy of insurance by producing the policy with a receipt signed by the trustee. For further detail, see McGhee *Snell's Equity* (Sweet & Maxwell 2000) at 302; a full statement of the provisions can be found in Hayton (ed) *Underhill and Hayton's Law of Trusts and Trustees* (Butterworths 1995) at 620-621.

¹³ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 35.

¹⁴ *Ibid* at 35-36. See also Hayton *op cit* at 623-625, also discussing the interpretation of this provision throughout the case law.

¹⁵ [1931] 1 Ch 572.

the phrase should be accorded its literal meaning of a conscious breach or reckless performance of a duty. The interpretation afforded to section 30(1) by Maugham J, and his *dictum* on the interrelationship between this subsection and sections 23(1) and 23(3) was the subject of much criticism.¹⁶ Such was the level of confusion caused by this judgment that the Law Commission identified no less than four distinct propositions which could be stated as representing the *ratio* of Maugham J's decision.¹⁷

3.12 The difficulties caused by the provisions of the *Trustee Act 1925* were not confined to such problematic interpretations. The various complaints levied against the terms of the *Trustee Act 1925* were summarised by the Law Commission,¹⁸ and included such persuasive arguments as the fact that on no reading could the four sections be “easily reconciled into a coherent code”. Thus, section 23(1) was criticised for its failure to clarify whether its terms applied to cases in which the trust instrument conferred wider powers of delegation on trustees than allowed for by the *Trustee Act 1925*, but the instrument remained silent as to the standard of care required in the execution of those wider powers.¹⁹ A similar complaint could be made in relation to section 23(2), in that it too failed to state explicitly the standard of care to be exercised by trustees in the supervision of agents appointed pursuant to the terms of the subsection.

3.13 The confusion arising in relation to section 23(3) stems from the judgment of Maugham J in *Re Vickery*.²⁰ Section 23(3) contained a significant proviso that a trustee would be held liable for breach if he or she allowed trust property to remain under the control of the agent longer than was reasonably necessary for the agent to transfer it to the trustee. According to Maugham J in *Re Vickery*,

¹⁶ See Oakley (ed) *Parker & Mellows on the Modern Law of Trusts* (7th ed Sweet & Maxwell 1998) at 513-515; Hayton (ed) *Underhill & Hayton's Law of Trusts and Trustees* (Butterworths 1995) at 623-624.

¹⁷ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 158-160.

¹⁸ Appendix C of the Law Commission Report, entitled “Summary of the Present Law” contained a succinct analysis of, *inter alia*, the difficulties caused by the various provisions of the 1925 Act considered here. See *ibid* at 157.

¹⁹ *Ibid.*

²⁰ [1931] 1 Ch 572.

section 23(1) of the 1925 Act was not subject to any such proviso; on this view, therefore, it was argued that because of the width of the power of delegation provided for in section 23(1), a prudent trustee would never exercise the power of delegation set out in section 23(3). Instead, they would rely on the interpretation afforded to section 23(1) by Maugham J, and consequently enjoy greater protection from liability.²¹

3.14 On this basis, it was therefore clear that the provisions of the *Trustee Act 1925* could not be regarded as operating satisfactorily so as to protect the interests of beneficiaries, whilst allowing trustees an acceptable margin within which to exercise their powers of delegation for the benefit of the trust. Thus, the Law Commission in its Consultation Paper concluded that “the existing statutory provisions ... are badly drafted, and the standard of conduct which they require of trustees when choosing and supervising their agents is widely regarded as insufficiently demanding”.²² The Law Commission was thus satisfied that the case for reform was “overwhelming”,²³ and at the conclusion of its consultation process, issued its *Report on Trustees' Powers and Duties*,²⁴ which led to the enactment of the *Trustee Act 2000*.

(2) *Trustee Act 2000*

3.15 Part I of the *Trustee Act 2000* now governs the duty of care required of trustees, specifying not only the standards of conduct expected of trustees, but also clarifying the precise exercises of trust powers to which it applies. Section 1 of the 2000 Act sets out the duty of care, whilst Schedule 1 goes on to outline the situations in which it will apply. It is informative to set out the terms of section 1 in full:

“Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular-

²¹ See further Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 149 1997) at 73-75, and Hanbury & Martin *op cit* at 577-582.

²² Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at 89.

²³ *Ibid.*

²⁴ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999).

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

3.16 It is quite clear from the terms of section 1 that the formulation of the duty of care is not intended to be of rigid application, irrespective of the particular circumstances of the trustee. Thus, the Law Commission's explanatory note on the section states that:

“[i]n determining the level of care and skill that it is reasonable in the circumstances to expect a trustee to exercise, regard must be had to all relevant factors including the nature, composition and purpose of the trust and the attributes of the trustee. Thus, in the circumstances contemplated in clause 1(1)(a) and (b), there may be an ‘uplift’ in the standard of care that would otherwise apply”.²⁵

3.17 Martin has also noted in the context of the new duty of care, that “what is reasonable will vary according to whether the trustee is a layman or a professional”.²⁶

3.18 Section 2 of the 2000 Act goes on to provide that the duty of care will apply in the instances specified in Schedule 1 of the Act. Whilst this Schedule is somewhat lengthy in terms, its scope can be gauged by reference to the sub-divisions contained within it. Thus, the duty of care established in section 1 of the 2000 Act applies to the following areas:

- exercise of powers in relation to investment;
- the acquisition of land,

²⁵ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 97. The issue of a flexible standard of proof, capable of allowing account to be taken of the particular skill and expertise of the individual trustees is considered further below at paragraphs 3.35-3.40.

²⁶ Hanbury & Martin *Modern Equity* (Sweet & Maxwell 2001) at 539-540.

- entering into arrangements with agents, nominees and custodians,
- compounding liabilities,
- when exercising the power to insure, and
- in relation to certain matters pertaining to reversionary interests, valuations and audits.

Schedule 1 also stipulates that the duty of care does not apply to powers conferred by a trust instrument if or in so far as it appears from the trust instrument that the duty is not meant to apply.

3.19 The *Trustee Act 2000* received Royal Assent in November 2000, and came into force on 1 February 2001. The Act seems to have been broadly welcomed, although as Harris has suggested, “[l]awyers have an endearing habit of noting new legislation and then continuing to practise as if it had not been enacted or was not yet in force.” Nevertheless, Harris concludes that

“Almost certainly this is a good Act, the effect of which will not make the headlines but will result in slightly better administration of trusts on a day-to-day basis”.²⁷

The absence of any major criticisms of the Act in almost four years of operation may be seen as further evidence of general approval of its provisions.

D The Position in Scotland

3.20 As the Scottish Law Commission noted in its recent discussion paper on *Breach of Trust*,²⁸ “there is no statutory regulation in Scotland of a trustee’s duty or standard of care”.²⁹ In the case of *Raes v Meek*,³⁰ Lord Herschell endorsed the application of an objective test, requiring of a trustee “the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs”. This objective standard was confirmed in the more

²⁷ Harris “The Trustee Act 2000: Plus ca change?” (2002) *New Law Journal* 945 at 950.

²⁸ (No 123 2003).

²⁹ *Ibid* at 13.

³⁰ (1889) 16 R (HL) 31 at 33.

recent decision of *Tibbert v McColl*.³¹ As in England, it has been held that the facts of each case must be judged objectively and not on the basis of hindsight;³² it has also been confirmed that trustees should take professional advice if that is what a reasonable, prudent person would do.³³

3.21 The Scottish Law Commission noted that there was some uncertainty as to whether Scottish law imposed a higher standard of care on professional trustees than the basic objective standard of the ordinary prudent person. In the absence of any Scottish case law on the point, some academic commentators took the view that the English case of *Re Waterman's Will Trusts* would likely be followed,³⁴ to the effect that professional trustees might be required to meet a higher standard of care, while others argued that there was no authority for the proposition that such a higher standard of care applied to professional trustees in Scotland.³⁵

3.22 The Scottish Law Commission was of the view that a higher standard of care should be required of professional trustees. It was accepted that such change would require legislative enactment, so the Law Commission also addressed the formulation of the basic standard of care to be imposed on non-professional trustees. Three formulations of the basic standard of care were considered,³⁶ namely:

- (a) Trustee to use the same care and diligence as an ordinary prudent person would use in relation to his or her own affairs;

³¹ 1994 SLT 1227.

³² *Gillespie & Sons v Gardner* 1909 SC 1053.

³³ *Wilson's Tr v Wilson's Creditors* (1863) 2 M 9; *Leith and East Coast Steam Shipping Co Ltd in Liquidation* (1909) 1 SLT 53.

³⁴ *Wilson & Duncan Trusts, Trustees and Executors* (2nd ed Green & Son 1995) at paragraph 28-17. The Scottish Law Commission noted that Professor Blackie agreed with this view "because the approach taken in England does not seem to depend on any feature of English trust law that is different from Scots trust law": Blackie "Trusts in the Law of Scotland" in Cantin-Cumyn (ed) *La Fiducie Face au Trust dans les Rapport des Affaires/ Trust v Fiducie in a Business Context* (Bruylant Brussels 2000) at 141. See Scottish Law Commission *Breach of Trust op cit* at paragraph 3.3.

³⁵ *Norrie & Scobbie Trusts* (Green & Co 1991) at 141.

³⁶ Scottish Law Commission *Breach of Trust op cit* at paragraph 3.6.

(b) The “pre-Trustee Act 2000 English common law” – trustee to use the same care and diligence as an ordinary prudent business person would use in the same circumstances;

(c) The “South African formula” – trustee to use the same care and diligence as an ordinary prudent person would use in managing the affairs of others.

3.23 The Scottish Law Commission preferred the South African formulation, on the basis that it “emphasise[d] the fact of trusteeship”, which acknowledges the responsibility inherent in assuming the position of a trustee, and reflecting the fact that “people are generally more careful and diligent in relation to the affairs of others than they are in relation to their own”.³⁷ It was also stated that the proposed new standard was workable, as “trustees and the courts could readily envisage what an ordinary prudent person managing another’s affairs would have done in the circumstances”.³⁸ While the Scottish Law Commission accepted that this proposal involved a standard slightly higher than the current position in Scotland, it was not felt that it would be too severe for ordinary lay trustees with no special skills.

3.24 In relation to the appropriate standard to impose on professional trustees, the Scottish Law Commission agreed with the approach taken in many other jurisdictions that more than the basic minimum standard should apply to professional trustees. After all, “solicitors, accountants and banks put themselves forward for trusteeship on the footing that they offer a superior standard of service to that of untrained amateurs”.³⁹ On this reasoning, it is not therefore unreasonable for the law to hold such professional trustees to a higher standard.

3.25 The Scottish Law Commission also addressed the question of how to distinguish between lay and professional trustees in this context. Reference was made to section 4(2) of the draft Ontario *Trustee Act* appended to the Ontario Law Reform Commission’s Report on the *Law of Trusts*, which provided:

³⁷ Scottish Law Commission *Breach of Trust op cit* at paragraph 3.6.

³⁸ *Ibid.*

³⁹ *Ibid* at paragraph 3.7.

“...trustees who in fact possess, or because of their profession, business or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, shall employ that particular level of knowledge or skill in the administration of the trust”.

3.26 The Scottish Law Commission rejected this formula on the basis that it could lead to an unjust result in certain circumstances, by failing to consider whether the trustee is acting in the course of his or her business.⁴⁰ The Scottish Law Commission also rejected the criterion of payment as determinative of whether a higher standard of care should be imposed; it was noted that “many lay trustees are left modest legacies or gifts as a token of appreciation for the services they will render as trustees”. Such gifts, in the view of the Scottish Law Commission, should not result in the recipient being subject to a higher standard of care, simply because the recipient happens to have extra skills and knowledge. Thus, it was concluded that the higher standard of care required of professional trustees should arise only where that trustee acts in the course of business, as provided for by section 1(1)(b) of the English *Trustee Act 2000*.

E Options for Reform

3.27 As mentioned above, the approach of the Law Commission of England and Wales in relation to the formulation of a new standard of care focused on the need for a standard which would respond to both the needs of beneficiaries to be protected from breaches of trust, as against the needs of trustees to be permitted a certain scope within which to exercise their powers for the good of the trust. With this aim in mind, the Law Commission embarked upon an extensive consultation process, with its Consultation Paper⁴¹ setting out in

⁴⁰ The Scottish Law Commission gives the example of a son who acts in an unpaid capacity as a trustee in his late father’s testamentary trust, who – it is argued – should not be held to a higher standard simply because he happens to be a solicitor or accountant; “he should not be expected to put his professional expertise at the disposal of the trust”: Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.9.

⁴¹ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No 146 1997).

admirably clear terms the various options for reform, whilst its Report⁴² set out the recommended avenue for progress and reasons for this choice.

3.28 It should be acknowledged at the outset of this discussion of the options for reform of the law in this jurisdiction that we draw on the work of the Law Commission from both the consultation paper and report, as its coverage of the various matters is so comprehensive that it would be inadvisable to attempt to restate or improve upon their analysis. However, whilst we acknowledge our reliance on much of the Law Commission's analysis, it must be remembered that the context of this examination of the case for reform in Ireland is somewhat different from that of the Law Commission's concerns. As noted above, the present law on trustees' duty of care in this jurisdiction remains that of the *Trustee Act 1893* and a limited amount of case law interpreting its provisions, which case law occasionally attempted to fill the gaps resulting from deficiencies in the drafting of the 1893 Act. The situation was quite different in England, given that much of the Law Commission's focus was concerned with the need to reform the problematic provisions of the *Trustee Act 1925*.

3.29 In other jurisdictions where reform of the duty and standard of care have been considered, examination of the issue has centred on a number of separate but inter-related questions, namely:

- (1) what should be the standard of the duty of care?
- (2) in what instances should this duty apply?
- (3) should the duty be of uniform application, or should it be more flexible to allow account to be taken of the situation of (unpaid) "lay trustees" as against (paid) professional trustees.

We will consider each question in turn.

(1) *What should be the standard of the duty of care?*

3.30 The Law Commission outlined five potential models for the duty of care, based on varying levels of flexibility and stringency. These models are outlined below.

⁴² Law Commission *Report on Trustees' Powers and Duties* (No 260 1999).

(a) *Good faith model*

3.31 This model would effectively retain the standard of care set out in section 23(1) of the *Trustee Act 1925*.⁴³ Thus, if trustees acted in good faith in the exercise of such powers as were specified as being subject to the duty of care, they would escape liability for any subsequent loss caused to the trust. However, as noted above, the terms of section 23(1) of the 1925 Act have been subject to serious criticism, although the Law Commission noted that some submissions had supported retention of this standard in relation to lay trustees without any professional expertise.⁴⁴ The Law Commission stated that although it sympathised with the view that more should be expected of professional trustees (especially those receiving remuneration for their services), it was ultimately satisfied that a uniform standard of “good faith” would not represent an adequate protection of beneficiaries’ interest. On this basis, the Law Commission provisionally rejected this model.

(b) *Vicarious liability*

3.32 Another possible model on which to base the duty of care is that of a strict liability approach; i.e. to hold trustees liable for any loss caused to the trust as a result of the exercise of a power subject to the duty of care, regardless of the level of care taken. As a general proposition, the Law Commission quickly rejected this possibility, on the basis that it would be “wholly unreasonable and would be likely to have adverse consequences”.⁴⁵ However, the Law Commission did invite submissions on the appropriateness or otherwise of imposing a standard of strict liability on trustees who delegate their discretions to one or more of their co-trustees, the rationale behind the higher standard in this case being the active discouragement of “passive delegation”.⁴⁶

⁴³ Section 23(1) and its interpretation by the English courts are considered above at paragraphs 3.09-3.14.

⁴⁴ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 149 1997) at 107.

⁴⁵ *Ibid.* it was also suggested that a strict liability model would operate to hinder the effective administration of a trust as trustees would inevitably be overcautious in almost every act for fear of attracting liability.

⁴⁶ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 149 1997) at 39-40, and at 107.

(c) *“Safe harbour” model*

3.33 The “safe harbour” approach would involve the stipulation of a series of criteria, or a “checklist”, with which trustees would have to comply in the exercise of those powers subject to the duty of care. Compliance with all such criteria would then indemnify a trustee against any finding of liability for loss caused to the trust. However, whilst the Law Commission acknowledged that such a model would enjoy the advantage of certainty for trustees regarding what is required of them, it was subject to the unavoidable difficulty that it would be virtually impossible to draft an exhaustive, comprehensive list in relation to the exercise of each trust power subject to the duty of care. For this reason, the “safe harbour” model was rejected outright.

(d) *Standard of the “reasonable, prudent person”*

3.34 The fourth option considered by the Law Commission was a restatement of the common law requirement that in the conduct of trust business, a trustee would be subject to the requirement to act as a “prudent and reasonable man”⁴⁷ would act in his own business affairs. The Law Commission noted that the effect of this option under English law would be a return to the position prior to the enactment of the *Trustee Act 1925*. It should be noted that in Ireland, to recommend this option would effectively constitute retaining the status quo. The Law Commission considered that there were a number of advantages to be gained from this model, including the inherent flexibility of this test, which would enable regard to be had to the particular qualifications or expertise of the trustee when examining the question of whether such trustee should be found liable for breach of duty.

(e) *Hybrid objective and subjective standard*

3.35 Despite the view that the “prudent man” test was probably sufficiently flexible to allow a distinction to be made between lay trustees and professional paid trustees, the Law Commission was of the view that the precise standards to which various types of trustees could be subject was “not, however, completely free from doubt”.⁴⁸ It thus considered the alternative approach of expressly distinguishing

⁴⁷ As per *Speight v Gaunt* (1993) 9 App Cas 1; for further discussion of the traditional common law standard see above at paragraph 3.03-3.07.

⁴⁸ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 149 1997) at 109.

between certain categories of trustees, and accordingly grading the standard to which each category should be held in accordance with their particular skills and expertise. Thus, it was suggested that this approach, effectively a “refinement of the prudent person test”, would be defined by regard to:

- (1) the characteristics of the particular trust;
- (2) the skills which the trustee actually has;
- (3) if he or she is a professional, the skills which the trustee ought to have.⁴⁹

3.36 The advantage of such a hybrid objective and subjective approach would be its greater flexibility, allowing the courts to distinguish between professional and non-professional trustees according to their particular skills and expertise. This standard, on one view, might thus be described as a sophisticated remodelling of the “prudent man” test at common law.

(2) *Distinguishing between professional and non-professional trustees*

3.37 As noted above, the standard expected of trustees in the exercise of certain trust powers was simply that of the ordinary and prudent man. However, the traditional test as formulated in such cases of *Speight v Gaunt*⁵⁰ made no reference to the uniformity of application of this test, or whether a higher standard should be expected of professional trustees in contrast with lay trustees, who may not possess equivalent levels of skill and expertise.

3.38 The issue was considered more recently by the English courts in the context of the exercise of powers of investment. Thus, whilst it had been suggested by Brightman J in *Bartlett v Barclays Bank*⁵¹ that a higher duty of care would be required of professional trustees. It has also been suggested that “the application of the standard of ‘an ordinary prudent man of business’ had more

⁴⁹ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 149 1997) at 109.

⁵⁰ (1883) 9 App Cas 1.

⁵¹ [1980] Ch 515. A similar suggestion was made by Harman J (*obiter*) in *Re Waterman's Will Trusts* [1952] 2 All ER 1054 at 1055.

disturbing consequences from the point of view of the beneficiary”⁵² in *Nestle v National Westminster Bank plc*.⁵³

3.39 It is submitted that there is legislative precedent in this jurisdiction for imposing a hybrid objective and subjective test in analogous circumstances, as provided for in sections 297 and 297A of the *Companies Act 1963* (as amended by section 138 of the *Companies Act 1990*). Sections 297 and 297A deal with the civil and criminal liability of company directors for fraudulent and reckless trading, and section 297A(2)(a) provides that the standard of such directors is to be adjudicated in accordance with whether:

“having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors or the company or any of them”.

3.40 Whilst the position of company directors is not directly analogous to that of trustees, it is submitted that this provision nevertheless demonstrates a willingness on the part of the Oireachtas to recognise varying degrees of skill and expertise when adjudicating on a person’s conduct in the context of imposing liability in relation to such conduct.

⁵² Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 399.

⁵³ [1993] 1 WLR 1260. The trustee bank, having failed to obtain legal advice on the scope of the powers of investment conferred by the trust instrument, assumed those powers were in fact narrower than they were. The plaintiff, who was the remainder beneficiary, contended that the trust fund, which was worth approximately £269,000 when she became absolutely entitled, would have been worth over £1million if the trustee bank had properly invested the trust funds. However, it was held that the trustee bank was not liable for breach of trust on the basis that the bank had acted conscientiously and fairly in its administration of the trust. Delany appears to suggest that the trustee bank should have exercised a higher duty of care, commenting that “the law in this area in England ... would seem to unduly favour the position of the trustee”; Delany *op cit* at 400.

F Provisional view of the Commission

3.41 The Law Commission's analysis of the various avenues for reform is persuasive, particularly as regards the defects inhering in options (a), (b) and (c). The Law Commission therefore concentrated on options (d) and (e), ultimately opting to recommend the enactment of a hybrid objective and subjective test for determining the liability of trustees for breaches of trust. Thus, the formulation which was ultimately enacted as section 1 of the *Trustee Act 2000* provides:

“Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular-

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

3.42 The Commission agrees with the analysis of the English Law Commission that the debate in relation to the duty of care centres on the choice of the “reasonable, prudent person” approach, based on the common law standard, or the “hybrid objective and subjective test”. Whilst it is acknowledged that ultimately, both tests would seek to achieve the same object, the Commission considers that for the avoidance of doubt, it would be preferable expressly to state the composite elements of the duty and standard of care to which trustees are subject.

3.43 *The Commission recommends the introduction of a statutory duty of care for trustees, to be founded on a hybrid objective and subjective standard. The Commission considers that section 1 of the English Trustee Act 2000 provides a useful model in this regard.*

3.44 Finally, it should be noted that in relation to the *Trustee Act 2000*, section 1(1) imposes the standard of care only insofar as the trust instrument does not exclude it. Concerns that it would be possible for trustees to push for a clause excluding section 1(1) led to the Lord Chancellor referring the issue of trustee exemption clauses to the Law Commission in England and Wales. The Law Commission recommended in its *Consultation Paper on Trustee Exemption*

*Clauses*⁵⁴ that a provision in a trust instrument limiting the duty of care, diligence and skill required from trustees acting for reward should be ineffective. The issue of trustee exemption clauses, and limiting provisions, will be fully addressed in Chapter 7.

G Charities

(1) *The Position in Ireland*

3.45 In Ireland, there are no provisions in the *Charities Acts 1961* and *1973* in relation to duty of care. As for general trustees, the standard and duty of care is governed by equitable principles and case law. The main distinction is that in the case of general trusts, it may be said that the duty of care is owed to the present and future beneficiaries of the trust, whereas in the case of charities the trustees' main duty is to ensure that the charitable purposes of the charity are fulfilled.

(2) *England and Wales*

3.46 As discussed above at paragraph 3.15, Part I of the *Trustee Act 2000* now governs the duty of care required of trustees and these provisions apply equally to charity trustees.⁵⁵ The statutory duty of care in the 2000 Act only applies in specified instances - see paragraph 3.18 above. In other instances, the duties and standard of care of trustees remain those laid down in equity. It is important to note that the duty of care not only applies to trustees in their exercise of a number of specified powers conferred on them by the *Trustee Act 2000*, but also in their exercise of the same type of power derived from a source other than that Act; for example, when they exercise any investment powers conferred on them by their governing document. However, the duty of care does not apply to powers conferred by a trust instrument if or in so far as it appears from the trust instrument that the duty is not meant to apply.

3.47 The *Charities Bill* (which inserts a new Part 8A of, and Schedule 5A to, the *Charities Act 1993*) also contains provisions

⁵⁴ (No 171 2002).

⁵⁵ It should be noted, however, that the *Trustee Act 2000* does not apply to the corporate property of charitable companies, but, where a company is acting as trustee of a charity, the Act applies to its actions as trustee.

specifying duties for the members and trustees of the proposed Charitable Incorporated Organisations (CIOs)⁵⁶ as follows:

“It is the duty of:

- (a) each member of a CIO and
- (b) each charity trustee of a CIO

to exercise his powers, and (in the case of a charity trustee) to perform his functions, in his capacity as such, in the way he decides, in good faith, would be most likely to further the purposes of the CIO.

Subject to any provision of a CIO’s constitution permitted by virtue of regulations made under subparagraph (2), each charity trustee of a CIO shall in the performance of his functions, in that capacity exercise such care and skill as is reasonable in the circumstances, having regard in particular:

- (a) to any special knowledge or experience that he has or holds himself out as having, and
- (b) if he acts as a charity trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

3.48 The Charity Commissioners also issue guidelines in relation to the duties of charity trustees.⁵⁷ For example, the Commissioners outline the following principles to guide charity trustees when administering their charity:

- The income and property of the charity must be applied for the purposes set out in the governing instrument and for no other purpose.
- The income of a charity must be applied for its purposes within a reasonable period of receipt, unless the trustees have an explicit power to accumulate it.

⁵⁶ This is a new legal structure designed specifically for charities.

⁵⁷ *Responsibilities of Charity Trustees* (CC3 March 2002).

- Trustees are required to act reasonably and prudently in all matters relating to the charity and need always to bear in mind that their prime concern is the interests of the charity.⁵⁸

3.49 The Commissioners have stated that if a trustee is a trust corporation or a professional person being remunerated for his skills, they would normally expect a higher duty of care.⁵⁹

(3) Scotland

3.50 In Scotland the *Charities and Trustee Investment (Scotland) Bill* sets out duties for charity trustees as follows:

“(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular:

(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and

(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.

(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4) Any breach of the duty under subsection (1) and (2) is to be treated as being misconduct in the administration of the charity.

(5) A breach of the duty under subsection (2) in relation to a charity’s duties under section 11 or 16, or under regulations under section 15, is an offence.

⁵⁸ *Responsibilities of Charity Trustees* (CC3 March 2002) at paragraphs 58-61.

⁵⁹ [1989] Ch Com Rep 25 (paragraph 90).

(6) A charity trustee guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

3.51 The Office of the Scottish Charities Regulator (OSCR) will be expected to investigate any charity where it suspects that a charity trustee is not complying with these duties. Breach of charity trustee’s duties will be an offence and may lead to action by OSCR.

(4) Options for Reform

3.52 The Law Society recommended that the role, responsibilities and duties of charity trustees should be the same, no matter what form of legal structure is chosen.⁶⁰ The Department’s consultation paper also contains a similar proposal.⁶¹ The Law Society also recommends that the duty of care should be a statutory duty.⁶²

3.53 The main problem with codification of roles, responsibilities and duties is the fact that currently charities operate under various different legal structures and each of these structures has a separate body of law governing its operation. The traditional legal structures used by charities are the charitable trust, the unincorporated association or the company – usually the company limited by guarantee. The difficulty with codification is how to cater for the charitable company and the inevitable interaction with company law. Difficulties relating to the interaction of charity, trust and company law have also been encountered in other jurisdictions.⁶³

3.54 One of the issues raised in the debate is the legal uncertainty as to exactly how the fiduciary duties imposed on directors by

⁶⁰ *Charity Law: The Case for Reform* (2002) at 230.

⁶¹ *Establishing a Modern Statutory Framework for Charities* (December 2003).

⁶² *Op cit* at 238.

⁶³ In England, the *Trustee Act 2000* does not apply to charitable companies – the Law Commission having come to the conclusion that “it had become apparent in finalising the recommendations that there would be considerable technical difficulties in doing so... [c]haritable corporations are not necessarily subject to all the rules applicable to trustees, and it is by no means clear that it would be appropriate for some of the proposed provisions (such as those relating to powers of delegation) to be applied to them.”

company law overlap with the duties imposed by charity law on trustees and, where there is a conflict, which prevails. The general scheme of the new *Companies Bill* now contains a statutory statement of directors' fiduciary duties.⁶⁴ The provision relates to directors of private companies limited by shares but it is envisaged that the same provisions will also apply to directors of designated activity companies (DACs) or companies limited by guarantee and will also therefore apply to directors of charitable companies if the DAC structure is used.

3.55 Because of the difficulties outlined above, the Commission is of the view that, given the various existing legal structures, it is not possible to achieve absolute codification of the roles, responsibilities and duties of charity trustees. The difficulties highlighted identify the possible need for a new optional corporate structure for charities⁶⁵ and this topic may form the basis for further review by the Commission.⁶⁶

3.56 *The Commission is of the view that charity legislation should provide for a general statutory duty of care rather than set out specific statutory duties. It considers that further specific requirements for charity trustees should be dealt with by way of guidelines issued by the Registrar of Charities.*

3.57 The first step is to find a common term to describe persons involved in controlling and managing the administration of a charity. The term used to describe those involved in the management of trusts varies depending on the legal structure. As a precursor to specifying a statutory duty of care, it is desirable that a common term be used to describe the persons having the general control and management of the administration of a charity.

⁶⁴ Following a recommendation contained in the Company Law Review Group's *First Report* (31 December 2001) at 239-241.

⁶⁵ Similar to the English and Scottish proposals in relation to charitable incorporated organisations (CIOs) which have now been given life in the *Charities Bill* and the *Charities and Trustee Investment (Scotland) Bill* respectively.

⁶⁶ The Commission's Second Programme 2000-2007 has identified the law of trusts including the law of charities for examination.

3.58 In both England and Wales,⁶⁷ and Northern Ireland⁶⁸ “charity trustees” are defined as “the persons having the general control and management of a charity”.

3.59 The *Charities and Trustee Investment (Scotland) Bill* defines charity trustees as:

“in relation to a charity which is a body corporate (other than a SCIO), its directors or where the charity is managed by its member, its members or where a committee or group manage the charity, the members of that group or committee;

in relation to a charity which is a body of trustees, its trustees;

in relation to a charity which is an unincorporated association, each of the persons in accordance with whose directions or instructions the managers of the charity’s affairs (whether or not the same persons) are accustomed to act;

in relation to a SCIO, the persons defined in section 50(2)(b).”⁶⁹

3.60 The use of the term “charity trustees” seems an apposite description and appropriate for Ireland given the fact that this term is already in use in other jurisdictions in a similar context. The language conveys an understanding that the trustees of charitable trusts, the directors of companies and the officers of unincorporated associations all have special fiduciary responsibilities to use the assets of the company or the trust or the association for charitable purposes. The use of the term “trustee” conveys the quality of duty that the governing body has. It points specifically to the underlying trust relationship that the legal structure embodies.

3.61 *The Commission recommends that the term “charity trustees” be defined as “the persons having the general control and management of a charity”.*

⁶⁷ Section 97(1) of the *Charities Act 1993*.

⁶⁸ Section 35 of the *Charities Act (NI) 1964*.

⁶⁹ Section 103.

3.62 The next question to be addressed is the standard of care required. This issue cannot be considered in isolation from the nature of charities and the individuals who agree to assist in their administration. The first point to remember is that trustees of a charity which wishes to avail of charitable tax exemptions are prohibited from receiving remuneration.⁷⁰ This means that any individual who becomes involved as trustee of a charity does so on a voluntary and unpaid basis, giving freely of their time for the benefit of others. Many professionals, for example accountants or lawyers or other professional people, agree to act as trustees but importantly in this context, are not doing so in the course of their profession or business.

3.63 In setting a duty of care for charity trustees, therefore, one must carry out a careful balancing act to ensure that the standard is not set so high as to discourage individuals from becoming involved in voluntary activities, yet at the same time ensuring that public confidence in the charity sector is maintained by ensuring that funds donated to a charity are properly applied for the purposes of the charity.

3.64 It is for these reasons that the Commission considers that a different statutory duty of care should be prescribed for charity trustees than for trustees of general trusts.⁷¹ The overriding principle is that the charity trustee should act in good faith and in the interests of the charity.

3.65 *The Commission recommends the following duty of care for charity trustees:*

A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular:

- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and*
- (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.*

⁷⁰ See full discussion on remuneration at Chapter 2.

⁷¹ Bearing in mind that ordinary trustees can, and in many instances do, charge for their services.

3.66 *The Commission recommends that the duty of care should apply to all charity trustees, including the trustees of charitable trusts, trustees and committee members of unincorporated associations, the directors of charitable companies and the governors of bodies incorporated by charter, but would welcome submissions in this regard.*

CHAPTER 4 POWERS OF INVESTMENT

A Introduction

4.01 The investment of trust monies raises two main issues: first, the nature of the powers conferred on trustees for the purpose of making such investments, and secondly, the duties to which trustees are subject in the exercise of such powers. The basic principle has been explained as follows:

“[t]rustees are under a duty to invest the trust property with a view to ensuring a steady income for the beneficiaries currently entitled to an interest while at the same time preserving the value of the capital for the benefit of those who may subsequently become entitled to an interest in the property”.¹

4.02 A number of important principles should be noted at the outset of this consideration of powers of investment. Unless governed by express clauses in the trust instrument, the scope of trustees’ powers of investment is limited to “authorised securities”.² However, the act of compliance with the investment of trust funds in such authorised securities alone is not sufficient; trustees must also “observe certain standards in carrying out [their] duties in this regard”.³

¹ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 395. However, it should be noted that in *X v A* [2000] 1 All ER 490, Arden J accepted that there was no obligation on a trustee to consult the beneficiaries as regards investments of trust funds, although she referred to the hope expressed by Wilberforce J in *Re Pauling’s Settlement (No 2)* [1963] Ch 576 that the trustees would have regard to any suggestions made by the beneficiaries in relation to the exercise of the power of investment, and would not disregard any reasonable comments offered in this regard.

² A full consideration of authorised investments is contained in paragraphs 4.06-4.08.

³ Delany *op cit* at 397.

As O'Connor MR noted in *Re O'Connor*:

“however unlimited the power of investment may be, the trustee remains subject to the jurisdiction of the court. The trustee has no power to act dishonestly, negligently or in breach of trust to invest on insufficient security”.⁴

4.03 Thus, trustees may not always rely simply on the fact that an investment was authorised by the trust instrument or statute in order to escape liability. If it can be shown that the trustees failed to observe a reasonable exercise of care in their exercise of the power of investment, liability may be imposed upon such trustees for any resulting loss caused to the trust. In this consideration of the power to invest, the focus will lie on two discrete issues: the question of whether an investment is authorised, and the issue of the standard of care to be exercised in the exercise of this power.

B Scope of the Power of Investment

(1) The Position in Ireland

4.04 In determining the scope of the power of investment in respect of a particular trust, the first source of any such powers is the specific terms of the trust instrument. The trust instrument generally includes an investment clause setting out the trustees' powers of investment. Where the powers of investment are specifically delineated by an investment clause in the trust instrument, the trustees are obliged to comply with such terms as are stipulated.⁵ In such circumstances, any investment in securities not authorised by the investment clause will constitute a breach of trust.⁶ It has been suggested that there was historically a marked tendency of the courts to construe express investment clauses on a narrow basis, which tendency has been attributed to an initial mistrust by the courts in

⁴ [1913] 1 IR 69, at 75-76.

⁵ Many trust precedents contain investment clauses which confer upon trustees the power to invest as if they were absolute beneficial owners. This is also the standard adopted by the *Trustee Act 2000* in England, and is discussed further at paragraph 4.23-4.32.

⁶ See *Rochford v Seaton* [1896] 1 IR 18; *Re Webber's Settlement Trusts* [1922] 1 IR 49.

relation to investments in ordinary shares.⁷ In *Re Braithwaite*⁸ the court limited the effect of an investment clause conferring upon the trustees “power to invest in such securities as they might think fit” simply to permitting the trustees to choose amongst the securities authorised by the express clause. However, this would no longer appear to be the case, with the decision in *Re Harari’s Settlement Trusts*⁹ demonstrating the new attitude of the courts to such matters. Thus, Jenkins J held that the trustees had the power to invest in any investments which they honestly thought were desirable for the trust. In so holding, Jenkins J described the older authorities such as *Re Braithwaite* as being somewhat unsatisfactory, and held that there was “no justification for implying any restriction”.¹⁰

4.05 In relation to the converse situation, it has been held that in certain circumstances the courts may make an order permitting the trustees to countermand an express direction in an investment clause, but only where there is a conflict between the instructions and the settlor’s implied intentions. Authority for this proposition comes from the decision of Johnson J in *Re Lynch’s Trusts*,¹¹ where it was held that the court had jurisdiction to disregard directions as to the lodgement of the legacies on deposit receipt, and instead directed them to be invested in suitable trustee securities. This departure from the express instructions of the testator was justified on the basis of the “predominating object” of the testator, as expressed in his will, was ensuring proper provision be made for the support, maintenance and welfare of his family. Johnson J held that the direction in the will directing that the amounts should remain on deposit receipt were subsidiary to the overall intention of the testator, and should therefore be disregarded.

4.06 Where the trust instrument contains no such express clause in relation to investment, or the terms of such clause are not drafted appropriately widely, the scope of trustees’ powers of investments are set out in Part I of the *Trustee Act 1893* as amended by the *Trustee (Authorised Investments) Act 1958*. Section 3 of the 1893 Act

⁷ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 535.

⁸ (1882) 21 Ch D 121.

⁹ [1949] 1 All ER 430.

¹⁰ *Ibid* at 434.

¹¹ [1931] 1 IR 517.

provides that the statutory power of investment is to be exercised in accordance with the discretion enjoyed by trustees. Section 1 of the 1958 Act (as amended) sets out the various classes of authorised investment under the legislation, whilst section 2 of the 1958 Act provides for the variation of the list of authorised investments by the Minister for Finance. Delany has noted that:

“Until recently, the ambit of investments authorised by statute remained limited and was generally confined to investments such as Irish and British government securities, real securities, stock in semi-state bodies, debentures or debenture stock, in publicly quoted industrial and commercial companies registered in Ireland which met certain requirements, and in deposit accounts in specified financial institutions”.¹²

4.07 However, in accordance with the terms of section 2, the scope of the investments authorised by statute have been extended a number of times, with SI No 28 of 1998 varying the list of investments set out in section 1 of the *Trustee (Authorised Investments) Act 1958*. The First Schedule of SI No 28 of 1998 substitutes a revised list of authorised investments for section 1 of the 1958 Act, extending the scope of trustees’ statutory power of investment to include units or shares in certain unit trust or collective agreement schemes, specified annuity and life assurance contracts and the equity of companies listed on the Irish Stock Exchange and other recognised exchanges which meet certain financial requirements.¹³

4.08 Further changes have been effected by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002*,¹⁴ the main effect of which was to remove the restriction on the proportion of trust funds which may be invested in a single collective investment scheme or insurance contract and to replace this with a requirement to have regard to certain considerations such as concentration of investment risk. Article 3 of the Order also provided that:

“in making an investment of trust funds a trustee shall take due account of

¹² Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 396.

¹³ See SI No 327 of 1990, SI No 75 of 1992 and SI No 28 of 1998.

¹⁴ SI No 595 of 2002.

- (a) the nature of the liabilities of the Trust,
- (b) an appropriate diversification of investments, including appropriate diversification of credit and counterparty risks, and
- (c) an appropriate liquidity of investments.”

Trustees are also required by the Order to review the investment of trust funds at intervals of not more than six months. The Order came into operation on 2 January 2003.

4.09 The power to invest in “real securities” includes investment in mortgages of land, although it does not extend to the purchase of land.¹⁵ It was also established in *Johnston v Lloyd*¹⁶ that the power to invest does not authorise trustees to lend trust funds on the security of a judgment mortgage. However, section 8 of the *Trustee Act 1893* provides some comfort for trustees who lend funds on the security of any property, by providing that:

“A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.”

¹⁵ *Robinson v Robinson* (1877) IR 10 Eq 189. Trustees’ power of sale and purchase of land will be considered in Chapter 5.

¹⁶ (1844) 7 Ir Eq R 252. See also *Smithwick v Smithwick* (1861) 12 Ir Ch R 181 where Smith MR suggested that trustees lending on a second mortgage should exercise “greater caution than if there was no prior encumbrance” (at 196).

4.10 The Commission is of the view that the current situation in relation to authorised investments has many advantages, particularly in relation to default trusts¹⁷ as these may be administered by persons with little or no expertise in the administration of trusts or investment of trust monies. The list of authorised investments may therefore provide invaluable guidance to such trustees in the exercise of the power of investment. The current situation in Ireland does not extend so far as the recent legislative changes effected in England by the *Trustee Act 2000*, which will be considered below.

(2) The Position in England

(a) Introduction

4.11 As in Ireland, the primary source of a trustee's powers of investment in England derives from the trust instrument. Unlike Ireland, however, there has been a more concerted attempt to ensure that legislation provides that trustees' default powers of investment are adequate to allow trustees to operate in the best interests of the trust in the rapidly changing modern investments arena. Although various ancillary matters were contained in the *Trustee Act 1925*, the true beginning of the modern legislative attempt to provide trustees with adequate default powers of investment begins with the *Trustee Investments Act 1961*.

(b) Trustee Investments Act 1961

4.12 Before the enactment of the 1961 Act, trustees without a wide express power of investment were limited to the narrow categories of investment set out in the *Trustee Act 1925*. The purpose of the *Trustee Investments Act 1961* was described by the Law Commission of England and Wales as designed to "allow trustees to invest in assets with a greater potential for return, in particular shares, without taking an undue risk with trust capital."¹⁸ Liberalisation of

¹⁷ For example, trusts arising on an intestacy and which involve minors whose interests require protection. Other examples of automatically resulting trusts include circumstances where there has been a failure to exhaust the beneficial interest, where surplus funds remain on the dissolution of an unincorporated association, and a "*Quistclose* trust": for a discussion of resulting trusts, see Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 131-146.

¹⁸ Law Commission *Report on Trustees' Powers and Duties* (No. 260 1999) at paragraph 2.5.

trustees' default powers of investment was deemed necessary as trusts which were restricted to investment in such "safe" options as fixed-interest government securities suffered serious losses in real terms because of the effects of inflation.

4.13 The *Trustee Investments Act 1961* divided investments which trustees could make into two groups:

- (i) "narrower-range investments"¹⁹ which were mainly fixed-interest securities, including those issued or guaranteed by the UK and other EU governments; and
- (ii) "wider-range investments"²⁰ (which consisted mainly of shares (subject to a number of restrictions), building society shares, and authorised unit trusts).

4.14 The central feature of the *Trustee Investments Act 1961* was that if trustees wished to invest in wider-range investments, they must first divide the trust into two parts.²¹ Initially, these parts had to be of equal value, so that at least 50% of the trust fund had to be invested in narrow-range investments. In response to complaints in relation to the working of this scheme, the set ratio of wider-range to narrower-range investments was extended to 75:25 by the Treasury in 1996.²²

4.15 The *Trustee Investments Act 1961* did not set out the standard of care expected of trustees in making investments, which remained subject to the rules laid down at common law. However, section 6(1) required that in exercising any power of investment, a trustee must have regard to the need for diversification of investments so far as appropriate to the circumstances of the trust, and to the suitability to the trust of the proposed investment. Section 6(2) also required trustees to obtain and consider proper advice about whether an investment was satisfactory, having regard to the factors set out in section 6(1).

4.16 The requirement to take advice under the *Trustee Investments Act 1961* applied before a trustee made any wide-range

¹⁹ Schedule 1 Parts I and II.

²⁰ Schedule 1 Part III.

²¹ Section 2(1) of the 1961 Act.

²² Trustee Investments (Division of Trust Fund) Order (SI 1996 No 845) exercising the power conferred by section 13 of the 1961 Act.

and most narrower-range investments, or made such an investment using a special power. A limited number of narrower-range investments could be made without taking advice. The statutory requirement to take advice only applied where the trustees are making an investment using the powers given by the 1961 Act. It does not apply where trustees are exercising an express power given to them by the trust instrument. Because such trustees must act with reasonable prudence in exercising their powers of investment, in practice they would commonly seek legal advice. Where advice was required pursuant to the 1961 Act, it must be made or confirmed in writing and be given by a person whom the trustees reasonably believed to be qualified by ability in, and practical experience of, financial matters.

4.17 The operation of the 1961 Act was widely criticised, although the Law Commission described the principles upon which it was based as “eminently sensible”,²³ acknowledging that the Act gave trustees wider default powers of investment than they had previously enjoyed, (including power to invest in more speculative investments, such as equities) whilst at the same time seeking to ensure that trustees did not take undue risks with trust capital. The main complaints were described by Martin as follows:

“First, the Act had not kept pace with the developments in the world of investments and thus did not permit trustees to utilise many advantageous investments. Secondly, its machinery was cumbersome as a result of the requirement of division of the fund before any investment in equities could be made”.²⁴

The Law Commission agreed that the requirement to divide the trust into two parts was both “crude and administratively burdensome”,²⁵ whilst it accepted that the definition of wider-range investments was in fact quite restrictive.

4.18 In formulating proposals for reform, the Law Commission stated that it was necessary to achieve a balance between two factors, namely:

²³ Law Commission *Trustees’ Powers and Duties* (No 260 1999) at paragraph 2.16.

²⁴ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 537.

²⁵ *Op cit* at paragraph 2.17.

- (i) the desirability of conferring the widest possible investment powers, so that trustees may invest trust assets in whatever manner is appropriate for the trust; and
- (ii) the need to ensure that trustees act prudently in safeguarding the capital of the trust.²⁶

The Law Commission recommended the introduction of primary legislation to reform the law governing the investment powers of trustees and that, in so far as practicable to do so, the *Trustee Investments Act 1961* should be repealed.

(c) *Law Commission Report on Trustees' Powers and Duties*²⁷

4.19 The Law Commission agreed that in exercising the new statutory power of investment, trustees would have the same power to make an investment as they would have if they were absolute owners of the trust assets.²⁸ In so recommending, the Commission referred to legislative precedent for such an approach, and also noted that this recommendation would have the result of ensuring that the default investment powers of all trustees would be broadly the same.²⁹

4.20 One further issue raised by this proposal related to the ability of trustees to acquire and to hold property jointly or in common with other persons. The Law Commission noted that in England and Wales, trustees did not have the power to do this because of the duty imposed upon trustees to take reasonable steps to secure and retain control of the trust property. This matter was considered in

²⁶ Law Commission *Report on Trustees' Powers and Duties* (No. 260 1999) at paragraph 2.19.

²⁷ (No. 260 1999).

²⁸ *Ibid* at paragraph 2.24, approving this proposal which originated from a Treasury consultation document on reform of the 1961 Act. The Law Commission also noted that in England a legislative precedent already exists for a trustee investment power of this kind: section 34(1) of the *Pensions Act 1995* makes special provision for the investment powers of the trustees of occupational pension schemes, providing that the trustees of a trust scheme shall have, subject to any restrictions imposed by the scheme, "the same power to make an investment of any kind as if they were absolutely entitled to the assets of the scheme."

²⁹ Allowing the trustees to invest trust funds as if they were themselves the absolute owners of those funds was also said to accord with the formula for conferring express investment powers which is frequently used in modern English trust deeds: see Law Commission *Trustees' Powers and Duties* (No 260 1999) at paragraph 2.26.

the *Consultation Paper on Trustees' Powers and Duties*,³⁰ and the Law Commission provisionally recommended that the rule should be abrogated. The proposal was broadly welcomed during the consultation period, and the draft Bill encapsulating the Commission's proposals on the power of investment was stated to be in sufficiently wide terms to allow trustees to acquire and hold property for the trust jointly or in common with other persons.³¹

4.21 The Law Commission acknowledged that, although for the purposes of the new statutory power of investment, trustees would be entitled to act as if they were the absolute owners, "it is important not to lose sight of the fact that trustees are *not* the absolute owners of the assets under their control".³² Thus, it was recognised that a number of safeguards were required in order to ensure that beneficiaries are sufficiently protected against the danger of the trust funds being lost or diminished by unwise investments and speculations.

4.22 The Law Commission was careful to point out that its proposals for wider powers of investment did not affect the general duties which the law imposed on trustees to act in the best interests of the trust, and to avoid any conflict between their duties as trustees and their personal interests. However, the Commission considered that the legislation conferring the wider default powers of investment as recommended should also set out specific duties which would apply to trustees in the performance of their investment function. The Law Commission considered that two such duties should be of general application – a duty to have regard to the need for diversification and suitability of investments; and a duty to obtain and consider proper advice where appropriate. The *Trustee Investments Act 1961* provided a statutory precedent for both of these safeguards.

(d) *Trustee Act 2000*

4.23 The *Trustee Act 2000* came into force on 1 February 2001. Part II of the Act gives effect to the wide-ranging reforms to trustees' general power of investment as recommended by the Law Commission. Martin succinctly encapsulates the fundamental principles underlying this Act, stating that:

³⁰ (No 146 1997).

³¹ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at paragraph 2.28.

³² *Ibid* at paragraph 2.30.

“the new legislation substantially widens investment powers so that trust income may be maximised without eroding the capital. The beneficiaries remain protected by the requirement of professional advice, the financial services legislation and the general law on investment duties”.³³

4.24 Section 3 of the 2000 Act sets out the scope of the “general power of investment”, with subsection (1) providing that subject to the other provisions of Part II of the Act, “a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust”. The general power of investment conferred by Part II of the Act is stated to be in addition to any express powers granted to the trustees, and section 6 also recognises that the general statutory power may be restricted or excluded by the trust instrument or by any other legislation.

4.25 Section 4 of the *Trustee Act 2000* provides that “in exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.” The standard investment criteria are defined as:

“(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.”³⁴

These criteria effectively carry forward analogous provisions from the 1961 Act and represent the safeguards recommended by the Law Commission to accompany the new general power of investment. A further safeguard contained in section 4(2) is the requirement for trustees to review the investments of the trust “from time to time” and consider whether, having regard to the standard investment criteria, these investments should be varied.

4.26 Section 4 of the *Trustee Act 2000* is consistent with the modern “portfolio theory” which has been approved by both the

³³ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 537.

³⁴ Section 4(3) of the *Trustee Act 2000*.

English courts³⁵ and other commentators.³⁶ The essence of the modern portfolio theory is explained by Whitehouse & Hassall as the making of investment decisions based on a balance between the two extremes of risk and return. Thus, the:

“balance between risk and return has to be taken into account in the overall management of a portfolio and because diversification is fundamental to managing risk it is a basic consideration in all prudent investment management”.³⁷

4.27 Thus, as Hoffmann J stated in *Nestle v National Westminster Bank*:³⁸

“[m]odern trustees acting within their investment powers are 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”.³⁹

Martin notes that whilst the portfolio theory is not explicitly mentioned in the provisions of the *Trustee Act 2000*, she suggests that “it may now be regarded as part of the general law”.⁴⁰

4.28 Section 5 of the 2000 Act, again following similar provisions from the 1961 Act, requires trustees to obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised. A similar duty applies to trustees when considering whether the investments should

³⁵ See, for example, the judgment of Hoffmann J in *Nestle v National Westminster Bank* (1996) 10 TLI 112 at 115.

³⁶ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) and the Treasury in a consultation paper on *Investment Powers of Trustees* (May 1996) at paragraphs 35(ii) and 40(iii).

³⁷ Whitehouse & Hassall *Trusts of Land, Trustee Delegation and the Trustee Act 2000* (2nd ed Butterworths 2001) at 213.

³⁸ Decided in 1988 but not reported until (1996) 10 TLI 112.

³⁹ *Ibid* at 115. However, Whitehouse & Hassall note that on appeal ([1993] 1 WLR 1260, discussed at paragraph 4.37 below), while Dillon LJ accepted that trustees were entitled to be judged according to modern economic and financial conditions, the Court of Appeal did not specifically refer to Lord Hoffmann's *dicta*: Whitehouse & Hassall *op cit* at 214.

⁴⁰ Hanbury & Martin *op cit* at 537.

be varied. Proper advice is defined as “the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment”.⁴¹ However, section 5(3) recognises an exception to the general rule, so that trustees are not under an obligation to seek such advice if they reasonably conclude that, in all the circumstances, it is unnecessary or inappropriate to do so.

4.29 The duty to have regard to the standard investment criteria and the duty to obtain and consider proper advice apply irrespective of whether the trustees are exercising an express power of investment or the default statutory power, and furthermore, these provisions may not be restricted or excluded by any provision in the trust instrument.

4.30 In terms of the scope of application of this legislation, section 7 of the *Trustee Act 2000* provides that the provisions in respect of the general power of investment “appl[y] in relation to trusts whether created before or after its commencement”. Thus, “as a general rule the statutory power of investment applies to trusts irrespective of when they were created but subject to restrictions or exclusions in the trust instrument”.⁴²

4.31 Although the provisions of Part II of the *Trustee Act 2000* were broadly welcomed at the time of their introduction, some notes of caution have also been sounded. Although it is accepted that the purpose of Part II of the Act was to widen significantly the scope of the general power of investment enjoyed by trustees, some commentators have suggested that the 2000 Act “remains ambivalent as regards much of the portfolio theory”.⁴³ This complaint centres on the interpretation to be given to the word “suitable” in sections 3 and 4 of the Act, and specifically whether it “displace[s] the long-established principle that the paramount objective of trustee investment is to preserve the capital”.⁴⁴

⁴¹ Section 5(4) of the *Trustee Act 2000*.

⁴² Whitehouse & Hassall *Trusts of Land, Trustee Delegation and the Trustee Act 2000* (2nd ed Sweet & Maxwell 2001) at 231.

⁴³ Schindler “Trustee Act 2000: A Practical Guide on some Key Features” (2001) *Elder Law & Finance*.

⁴⁴ *Ibid.*

4.32 Whitehouse & Hassall have also commented that the provisions of the Act are likely to pose “few problems for professionally run trusts where investment powers are delegated to brokers or trustees ... and by and large the fund is invested in equities”.⁴⁵ However, they note that the application of sections 4 and 5 may be more problematic in other cases, giving the example of a fund made up solely of private company shares or chattels. In terms of a trust set up purely to hold shares in a family trading company, it is unlikely that the trustees will wish, or indeed be in a position, to diversify. In such cases, Whitehouse & Hassall recommend that when establishing such trusts, a recital should be included indicating that the purpose of the trust is to hold such shares and should state in the operative part of the deed that the trustees have power to retain the shares and shall not be liable for the consequences of so doing. Thus, whilst section 4 cannot be excluded, Whitehouse & Hassall suggest that “a statement that trustees shall not be obliged to diversify will be relevant in determining whether diversification is appropriate for the circumstances of the trust”.⁴⁶ However, the failure of the legislation explicitly to clarify the position of trustees in such situations would seem regrettable.

C Duty of Care in Exercising the Power of Investment

4.33 As noted above, trustees may not rely on the fact that an investment was authorised by the trust instrument or statute in order to absolve them of all liability for any loss caused to the trust. In exercising the power of investment, whether that power derives from the express terms of the trust instrument or from statute, trustees are required to observe certain standards. As O’Connor MR noted in *Re O’Connor*,⁴⁷ “[t]he trustee has no power to act dishonestly, negligently or in breach of trust to invest on insufficient security”. The basic principle was enunciated by Murphy J in *Stacey v Branch*,⁴⁸ as follows:

⁴⁵ Whitehouse & Hassall *Trusts of Land, Trustee Delegation and the Trustee Act 2000* (2nd ed Butterworths 2001) at 228.

⁴⁶ *Ibid.*

⁴⁷ [1913] 1 IR 69 at 76.

⁴⁸ [1995] 2 ILRM 136 (High Court).

“What is the nature of [this] duty imposed upon a trustee? A trustee must, of course, invest trust funds in the securities authorised by the settlement or by statute. To invest in any other securities would be of itself a breach of trust; but, even with regard to those securities which are permissible, the trustee must take such care as a reasonably cautious man would take having regard not only to the interest of those who are entitled to the income but to the interest of those who will take in the future. In exercising his discretion a trustee must act honestly and must use as much diligence as a prudent man of business would exercise in dealing with his own private affairs; in selecting an investment he must take as much care as a prudent man would take in making an investment for the benefit of persons for whom he felt morally bound to provide”.

4.34 The precise nature of the standard of care expected of trustees when exercising the power of investment has not always been consistently delineated. Thus, in *Learoyd v Whiteley*,⁴⁹ Lindley LJ stated that the standard expected was not simply that of a prudent man if he had only himself to consider, but rather the care that an ordinary prudent man would take if he were making investments for the benefit of those for whom he felt morally obliged to provide. This approach was confirmed on appeal by the House of Lords, where Lord Watson suggested that trustees should avoid speculative classes of investment, but rather should confine themselves to those investments permitted by the trust which are “not attended with hazard”.⁵⁰

4.35 It has been suggested that although these statements appear to require a trustee to observe a greater standard of care in the exercise of a power of investment than the care he might take when investing personal funds, a more flexible approach can also be seen in more recent case law. Thus, in *Bartlett v Barclays Bank Trust Co Ltd*,⁵¹ Brightman J appeared to endorse a more flexible approach in

⁴⁹ (1886) 33 Ch D 347.

⁵⁰ (1897) 12 App Cas 727 at 733.

⁵¹ [1980] Ch 515. The defendant bank was trustee of a trust, the only assets of which were 99.8% of the shares in a family property company. In response to the need to raise funds to pay taxes on the death of life tenants, it was proposed that the company should go public and that such public issue would be more successful if the company was involved in property development. In furtherance of this proposal, two speculative purchases

respect of the standard of care expected of non-professional trustees, when he stated as follows:

“The cases establish that it is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs ... That does not mean that the trustee is bound to avoid all risk and in effect act as an insurer of the trust fund ... The distinction is between a prudent degree of risk on the one hand, and hazard on the other. Nor must the court be astute to fix liability upon a trustee who has committed no more than an error of judgement, from which no businessman, however prudent can expect to be immune”.⁵²

4.36 Brightman J held that a professional corporate trustee, such as the defendant bank, owed a higher duty of care and was liable for loss caused to a trust by neglecting to exercise the special care and skill which it professed to have.⁵³

4.37 It has been suggested that the standard of the “ordinary prudent man of business” can operate with “disturbing consequences”⁵⁴ in respect of a situation where an attempt is made to impose liability on trustees not for loss caused to the trust by the exercise of the power to invest, but rather by the *failure* to exercise

were made, one of which ultimately returned a profit for the trust by “sheer luck”, whilst the other resulted in a substantial loss to the trust fund.

⁵² [1980] Ch 515, at 531. In so holding, Brightman J had regard to the decision in *Re Godfrey* (1883) 23 Ch D 483, where Bacon VC held (at 493):

“no doubt it is the duty of a trustee, in administering the trusts of a will, to deal with property entrusted into his care exactly as any prudent man would deal with his own property. But the words in which the rule is expressed must not be strained beyond their meaning. Prudent businessmen in their dealings incur risk. That may and must happen in almost all human affairs”.

⁵³ In so holding, Brightman J noted that a similar comment had been made, albeit *obiter*, by Harman J in *Re Waterman's Will Trusts* [1952] 2 All ER 1054. However, Brightman J also noted that counsel for the bank had not disputed the proposition that the bank as a professional paid trustee was subject to a higher standard of care than the ordinary prudent man of business.

⁵⁴ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 399.

such power. The case of *Nestle v National Westminster Bank plc*⁵⁵ illustrates the potential difficulties that can arise in this regard. Under the terms of a settlement made in 1922, the defendant bank was given wide powers to invest in equities. However, the bank failed to seek legal advice in relation to the scope of its powers, and operated on the erroneous assumption that the express power of investment was narrower than in fact was provided. The plaintiff claimed that had the bank properly invested the fund, its worth by the time she became absolutely entitled should have been in excess of £1million, instead of the £269,000 she received. Hoffmann J rejected the plaintiff's claim, and concluded that the bank had acted conscientiously, carefully and fairly throughout the course of its trusteeship. The Court of Appeal rejected the plaintiff's appeal, with Legatt LJ stating that it had not been established that a prudent trustee, knowing the true scope of the power of investment and having conducted regular reviews (which the bank had not done), would have invested the fund in such a manner that it would have been worth more than it was when the plaintiff became absolutely entitled. Delany has noted that the Court of Appeal applied the "traditional test";⁵⁶ thus, as Legatt LJ stated, "the essence of the bank's duty was to take such steps as a prudent businessman would have taken to maintain and increase the value of the trust fund. Unless it failed to do so, it was not in breach of trust".⁵⁷

4.38 This case was the subject of criticism, with Watt and Stauch commenting that the reasoning of the Court of Appeal showed an "erroneous conflation of the quite distinct processes of determining breach of trust and determining the loss caused by that breach".⁵⁸ Ann Kenny⁵⁹ has also commented of the decision in *Nestle*, that it was a sad reflection on the state of trust law that a bank which "no testator ... would choose ... for the effective management of his

⁵⁵ [1993] 1 WLR 1260. See also paragraph 4.27 above.

⁵⁶ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 400.

⁵⁷ [1993] 1 WLR 1260 at 1293.

⁵⁸ [1998] Conv 352 at 361.

⁵⁹ Kenny "Living Up to Expectations" (1996) 146 NLJ 348.

investment”⁶⁰ would be found to be not liable for mismanagement of the trust.

4.39 It would seem that the provisions of Part II of the *Trustee Act 2000* do much to address these complaints, particularly sections 3 and 4 which apply to any exercise of an investment power by trustees, whether expressly granted by the trust instrument or pursuant to statute. Delany has suggested that legislation similar to the *Trustee Act 2000* might provide “welcome clarification”⁶¹ to the law in this jurisdiction, particularly in light of the growing unease about the message which decisions such as *Nestle v National Westminster Bank plc* may be sending to trustees.

D Extension of Investment Powers by the Court

4.40 Under English law, trustees may apply to court under section 57 of the *Trustee Act 1925* or under the *Variation of Trusts Act 1958* to widen investment powers.

4.41 The Commission in its *Report on the Variation of Trusts*,⁶² recommended the introduction of legislation broadly similar to the provisions of the English 1958 Act. The Commission proposed a provision which would allow the court, if it thinks fit, *inter alia* to approve an arrangement enlarging, adding to or restricting the powers of trustees to manage or administer any trust property, provided the arrangement would be for the benefit of those on whose behalf approval is sought.

4.42 *The Commission restates its recommendation that legislation conferring greater powers on the courts in relation to the variation of trusts should be enacted, in accordance with the draft legislation appended to the Commission’s Report on the Variation of Trusts.*

⁶⁰ Quoting Legatt LJ in *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260.

⁶¹ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 403.

⁶² (LRC 63-2000).

E Recommendations

4.43 *The Commission considers that the introduction of a statutory power to allow trustees to invest trust property as if they were absolute beneficial owners of that property would be, on balance, inappropriate and inadvisable. The Commission has reached this conclusion bearing in mind the particular needs of default trusts, and trustees of such trusts, and also having regard to the relatively broad powers of investment conferred by the statutory scheme of “authorised investments” which currently operates in this jurisdiction. The Commission recommends that the default powers of trustees in Ireland as to investment should continue to be governed by the statutory scheme of authorised investments, as contained in section 1 of the Trustee (Authorised Investments) Act 1958 as amended.*

4.44 *The Commission recommends that the statutory duty of care should apply to trustees’ exercise of the power of investment, subject to a contrary intention in the trust instrument.*

4.45 *The Commission is of the view that such matters as the need for trustees to obtain legal advice when exercising the power of investment, adherence to the modern portfolio theory and standard investment criteria properly fall to be considered in the context of trustees’ compliance with the duty of care. The Commission accordingly considers that these matters do not require separate consideration.*

F Ethical Investments

4.46 A question arising with greater frequency in the context of modern trusts is the extent to which trustees may allow non-financial considerations to inform their investment decisions. Specifically, this can arise in relation to whether the trustees’ powers of investment allow them to make “socially responsible” or “ethical” investments. The Charity Commission for England and Wales has defined ethical investment as:

“a wide phrase which is used to cover many different approaches to investment strategy. An ethical investment policy may involve looking for companies which demonstrate best practice in areas like environmental protection, employment and human rights, or for companies

whose businesses contribute directly to a cleaner environment or healthier society. Or it may involve negative screening, to avoid investments in a particular business or sector”.⁶³

4.47 The potential difficulty which can arise in respect of ethical investments is where the operation of an ethical investment policy may potentially have negative financial repercussions for the trust fund. As Petitt notes, “[t]he duty of trustees to exercise their powers in the best interests of the present and future beneficiaries, known in the US as ‘the duty of undivided loyalty to the beneficiaries’ is paramount”.⁶⁴ Thus, it may be said that where the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their financial interests.⁶⁵

4.48 A number of decisions of the English and Scottish courts have clarified the extent to which trustees may allow non-financial considerations to inform their investment decisions. In *Cowan v Scargill*⁶⁶ a mineworker’s pension fund was managed by ten trustees, five of whom were members of the National Union of Mineworkers. These five trustees refused to agree to a revised investment plan unless it was amended so as to prevent any increase in overseas investment, so as to provide for the withdrawal of existing overseas investments at an appropriate time, and so as to prohibit investment in energies such as oil and gas which were in competition with coal. It was held by Megarry VC that the trustees were in breach of duty in refusing to concur in the adoption of the investment plan. Megarry VC stated:

⁶³ *CC14 – Investment of Charitable Funds* (February 2003) at paragraph 80, available at <http://www.charity-commission.gov.uk/publications/cc14.asp>. The Charity Commission of England and Wales regarded the phrases “ethical investment” and “socially responsible investment” as broadly synonymous, although it was at pains to distinguish the concept of “social investment” which is effectively a method of carrying out the objects of a charity, even though the way in which this is done may resemble investment by the charity. (See further paragraph 13, *ibid*).

⁶⁴ Petitt *Equity and the Law of Trusts* (9th ed Butterworths 2001) at 406, referring to the decision of *Blankenship v Boyle* 329 F Supp 1089 at 1095 (1971).

⁶⁵ *Ibid*.

⁶⁶ [1985] Ch 270.

“in considering what investments to make, trustees must put to one side their own personal interests and views. Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may be opposed to any form of investment in companies concerned with alcohol, tobacco and armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investment. Yet under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the views that they hold.”⁶⁷

4.49 Delany⁶⁸ notes that Megarry VC seemed to accept that trustees might pursue an ethical investment policy, provided that the financial implications of doing so were equally advantageous from the point of view of the beneficiaries. Lord Nicholls, writing extra-judicially, has also accepted this point in the following terms:

“the range of sound investments available to trustees is so extensive that very frequently there is scope for trustees to give effect to moral considerations, either by positively preferring certain investments or negatively avoiding others, without thereby prejudicing beneficiaries’ financial interests”.⁶⁹

4.50 Martin characterises the distinction between a “socially sensitive policy”, which is acceptable, and a “socially dictated” policy, which is not.⁷⁰ Thus, it may be presumed that “there would be no breach if trustees were to pursue an ethical investment policy only

⁶⁷ [1985] Ch 270, at 287-288.

⁶⁸ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 403. Megarry VC also pointed out that he was not suggesting that the benefit of the beneficiaries solely meant their financial benefit; he accepted that if beneficiaries held strong views on certain moral and ethical issues, it might not be for their benefit to know that they were obtaining financial returns from sources which they would not consider to be morally acceptable. However, Megarry VC stressed that in his view cases in which such circumstances might arise would be “very rare”.

⁶⁹ (1995) 9 Trust Law Int 71, 75.

⁷⁰ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 544.

after satisfying themselves that their selected investments were at least as financially sound as those rejected on ethical grounds: a “socially sensitive” policy.”⁷¹ It is when the trustees fetter their discretion by adopting a policy which excludes any consideration of the financial merits of a particular class of investments – a “socially dictated” policy, that they are deemed to act beyond their powers.⁷²

4.51 The distinction between socially sensitive investment policies and socially dictated policies is well illustrated in the case of *Martin v City of Edinburgh District Council*.⁷³ The Scottish court granted a declaration that a policy to oppose apartheid by disinvesting in companies which had South African interests was a breach of duty, even though no loss was incurred. The trustees (the local authority) had failed to consider whether their policy was in the best financial interests of the beneficiaries. These principles should be adhered to whether the trustees have a negative investment policy (that is, a policy of not investing in a specific class of investment) or, less commonly, a positive investment policy (that is, a policy of actually investing in a specific class of investment).

4.52 The issue of socially responsible investments is of particular importance for charities; as Martin notes, “an additional factor is that the trust is pursuing an aim, so that the question arises whether the trustees can invest in undertakings which are incompatible with their objective”.⁷⁴ This issue was considered in the English case of *Harries v Church Commissioners*.⁷⁵ The plaintiffs sought declarations that the commissioners were obliged to have regard to the object of promoting the Christian faith and not to act in a manner which would be incompatible with that object when managing the assets of which they were trustees. The plaintiffs contended that the commissioners in making investment decisions attached overriding importance to financial considerations, and that they were only prepared to take non-financial considerations into account to the extent that they did

⁷¹ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 544.

⁷² See Dockring & Pittaway (1990) *Trust Law & Practice* 25; Ellison (1991) 5 *Trust Law Int* 157; Irish & Kent (1994) *Trust Law Int* 10.

⁷³ [1988] SLT 329.

⁷⁴ Hanbury & Martin *Modern Equity* (16th ed Butterworths 2001) at 545.

⁷⁵ [1992] 1 WLR 1241.

not significantly jeopardise or interfere with accepted investment principles.

4.53 It was held by Nicholls VC in refusing the declarations sought that it was axiomatic that charity trustees were concerned to further the purpose of the trust of which they had accepted the office of trustee. When property was held by trustees for the purpose of generating money, *prima facie*, the purposes of the trust were best served by the trustees seeking to obtain the best return which was consistent with commercial prudence and in most cases, the best interests of the charity required that the trustees' choice of investments be made solely on the basis of well-established investment criteria. The circumstances in which charity trustees were bound or entitled to make financially disadvantageous investment decisions for ethical considerations were extremely limited and there was no evidence that such circumstances existed in the case before the court. Nicholls VC stated as follows:

“the law is not so cynical as to require trustees to behave in a fashion which would bring them or their charity into disrepute ... on the other hand, trustees must act prudently. They must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees.”⁷⁶

4.54 The terms of the *Trustee Act 2000* do not specifically resolve the question of the extent to which it is permissible for trustees to adopt an ethical investment policy. As Martin notes,⁷⁷ there is nothing to prevent a settlor providing in the terms of the trust instrument that trustees must or must not make certain kinds of investment. Where the trustees have delegated their investment powers, the policy statement which must be prepared pursuant to section 15(2) of the 2000 Act will reflect any such direction by the settlor. Where the trust instrument is silent on the matter, trustees may include ethical considerations in the policy statement, subject to their general duties as discussed in the cases of *Cowan v Scargill*, *Martin v City of Edinburgh District Council* and *Harries v Church Commissioners*. Martin notes that “the guidance in the policy must

⁷⁶ *Harries v Church Commissioners* [1992] 1 WLR 1241, at 1247.

⁷⁷ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 545-546.

be formulated ‘with a view to ensuring that the functions will be exercised in the best interests of the trust’ and the statutory duty of care applies to its preparation”.⁷⁸ *Tudor on Charities*⁷⁹ agrees with this assessment of the impact of recent legislative changes in England, noting in relation to charity trustees that:

“the changes introduced by the *Trustee Act 2000* do not affect the duty of charity trustees in formulating their investment policy to consider only the purposes of the trusts and not to do anything which conflicts with those purposes”.

4.55 The Charity Commission for England and Wales has issued guidance to charity trustees on the circumstances where they may legitimately pursue an ethical investment policy, as follows:⁸⁰

(a) First, cases where investment in a particular type of business would conflict with the aims of the charity. For example, a charity with objects for the protection of the environment and wildlife may decide not to invest in businesses which pollute what the charity is trying to protect. The Charity Commission emphasises that point here is a **practical** conflict with the charity’s aims and activities; not just **moral** disapproval; “where the judgment is a moral one, the trustees’ room for manoeuvre is more limited”;

(b) Secondly, a charity can avoid investments which might hamper its work, either by making potential beneficiaries unwilling to be helped because of the source of the charity’s money, or by alienating supporters. As noted by the Charity Commission, this requires a balancing exercise – between the difficulties which the charity would encounter, or the likely cost of lost support if it were to hold the investments,

⁷⁸ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 545-546, quoting section 15(3) of the *Trustee Act 2000*. Martin also notes that the investment policy of pension trustees must now be explicit as to the extent, if any, of ethical considerations: *Pensions Act 1995*, section 35; Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc) Amendment Regulations 1999 (SI 1999 No. 1849).

⁷⁹ Warburton (ed) *Tudor on Charities* (9th ed Thomson Sweet & Maxwell 2003) at paragraph 6-026.

⁸⁰ *CC14 – Investment of Charitable Funds* (February 2003) at paragraphs 86-90.

as against the risk of financial underperformance if those investments are excluded from its portfolio. Thus, “the greater the risk of underperformance, the more certain the trustees need to be of the countervailing disadvantages to the charity before they incur that risk”.

(c) Thirdly, even if an investment does not come into either of the previous two categories, trustees can accommodate the views of those who consider it to be inappropriate on moral grounds, provided that they are satisfied that this would not involve “a risk of significant financial detriment”. In many cases, trustees may be able to conclude, after taking advice where appropriate, that a particular ethical policy is likely to perform as well as an unrestricted policy. But, as was made clear in *Cowan v Scargill*, trustees are not free to use their investment powers to make moral statements at the expense of their charity.

The Charity Commission concludes that the key is for charities to make a judgment in the light of their own circumstances, rather than “trying to conform to a supposedly homogeneous ‘public opinion’”.⁸¹

4.56 There is a clear divergence of opinion amongst commentators on this particular issue. The Law Society of Ireland called for the position on ethical investment to be clarified by a statutory (or ministerial or Charities Office) confirmation that it is in order for charity trustees to consider the objects or mission of the charity involved as a relevant and overriding factor in making any investment decisions.⁸² Indeed, the Charity Commission for England and Wales notes the view that an ethical investment policy may be entirely consistent with this principle of seeking the best returns. The Charity Commission cites the “... increasingly held view that companies which act in a socially responsible way are more likely to flourish and to deliver the best long term balance between risk and return.”⁸³

4.57 On the other hand, concerns have been voiced by the British Colombia Law Institute on the growing trend of legislative

⁸¹ *CC14 – Investment of Charitable Funds* (February 2003) at paragraph 91.

⁸² *Charity Law: The Case for Reform* (July 2002) at 248-249.

⁸³ *Op cit* at paragraph 84.

intervention to allow trustees to pursue an ethical investment policy. The objection is stated as follows:

“as the achievement of any indirect aims through a trust depends largely on that trust being able to serve its immediate financial purposes, legislation putting non-financial criteria for investment on the same level as financial ones would not be likely to send the correct message to those administering trusts.”⁸⁴

The BCLI view, therefore, was that the *Trustee Act* should not authorize trustees to give weight to non-financial criteria for investment, with any such power instead coming from the trust instrument, if at all. Further concerns have been raised from a practical perspective, namely that “the lack of widely accepted and appropriate benchmarks for SRI [socially responsible investment] funds remains the biggest stumbling block when attempting to analyse the performance of these funds. This can make the task of whether or not a manager has the potential to add or detract value problematic”.⁸⁵

(I) Conclusions

4.58 *The Commission is of the view that legislative intervention to allow trustees to follow an ethical investment policy is inappropriate and that such powers, if any, should be dictated only by the terms of the trust instrument.*

G Charities

4.59 The existing provisions regarding the investment powers of charity trustees are broadly similar to those outlined above for general trustees. The charity trustees’ powers of investment derive from the specific terms of the trust instrument or if the trust instrument contains no such terms, the scope of the powers of the charity trustees will be governed by Part 1 of the *Trustee Act 1893* as amended by the *Trustee (Authorised Investment) Act 1958*. The duty of charity trustees to manage and invest trust assets properly is governed by equitable principles and case law. In *Harries v Church*

⁸⁴ *Report on Trustee Investment Powers* (No 6 1999) at Part IV(f).

⁸⁵ Submission from Mercer Human Resource Consulting at 7.

Commissioners for England,⁸⁶ Nicholls VC summed up the basic duty of charity trustees relating to investment by stating that:

“[c]harity trustees should endeavour to secure the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence....having regard to the need to diversify, the need to balance income against capital growth, and the need to balance risk against return.”⁸⁷

4.60 The *Charities Acts 1961 and 1973* make provision whereby the trustees of a charitable trust can seek advice from the Commissioners of Charitable Donations and Bequests in relation to the investment of charity funds.⁸⁸ Section 32(3) of the 1961 Act provides that the Commissioners may confer on the trustees the power to invest any fund held on charitable trust in such manner, on such terms and subject to such conditions, as the Commissioners may think proper, whether or not such investment is authorised by the trust instrument, if any, or by law.

4.61 Charity trustees may also invest in the instruments approved by the Commissioners – and for this purpose the Commissioners have developed a list of approved investments.⁸⁹ However, as the Law Society points out in its report,⁹⁰ “the Commissioners’ List” does not coincide with the list authorised by the Minister for Finance and this may give rise to confusion in practice. The Commissioners are aware of this situation and have sought and received expert financial advice as to the steps to be taken to resolve this perceived problem appropriately.

⁸⁶ [1992] 1 WLR 1241.

⁸⁷ *Ibid* at 1246.

⁸⁸ Sections 32 and 33 of the *Charities Act 1961* as substituted by section 9 and 10 of the *Charities Act 1973*. Section 32 authorises the court or the Board of the Commissioners of Charitable Donations and Bequests to invest funds held upon any charitable trust or such funds held by the Board upon any charitable trust in such manner, on such terms and conditions as the Board may think proper, whether or not such investment is authorised by the trust instrument, if any, or by law. Section 33 contains comparable provisions in relation to funds held subject to a prior limited interest.

⁸⁹ This is known as “the Commissioners’ List”.

⁹⁰ *Charity Law: The Case for Reform* (2002) at 243.

4.62 The Law Society's main recommendation with regard to investment issues is that, in line with the recent changes in England and Wales, the restrictive approach to investments should be relaxed in favour of an approach based on underlying principles of risk, suitability, diversity and appropriateness.⁹¹

4.63 *In line with the recommendations in relation to general trusts, the Commission recommends that the authorised list of investments should continue to regulate the investment of charity funds. The Commission recommends that it should be clarified that the list compiled by the Commissioners of Charitable Donations and Bequests would be reviewed periodically by reference to the list compiled by the Minister for Finance.*

4.64 *The Commission recommends that the proposed statutory duty of care should apply to trustees' exercise of the power of investment, subject to a contrary intention in the trust instrument.*

4.65 By way of clarification, if a charity realises an investment, subject to any contrary intention expressed in the trust instrument, the proceeds may be applied for its charitable purposes rather than re-invested. In other words, just because the original donation was in a particular form, for example, government stock, the income from which was being used to fund the charity's purposes and if the trust instrument permits realisation of the investment, the proceeds can, subject to the provisions of the trust instrument, be used to fund the charity's purposes rather than being re-invested.

4.66 A further point to note in relation to investments by charity trustees is the existence of the Commissioners' Common Investment Fund.⁹² The Commissioners set up this fund so that a number of charities can pool their funds so as to make one substantial fund for investment thereby benefiting from a higher rate of return and a reduction in administrative costs.

4.67 *The Common Investment Fund is particularly useful for charities with limited funds and the Commission recommends that the scheme be retained.*

⁹¹ *Charity Law: The Case for Reform* (2002) at 239.

⁹² This fund was established in 1985 under a scheme pursuant to section 46 of the *Charities Act 1961*.

4.68 In England, the Charity Commissioners have issued detailed guidance on the investment of charitable funds.⁹³ The guidance distinguishes between investment on the one hand, and other forms of income generation, such as trading on the other. It gives examples of investment assets such as company shares, land which is let to produce rental income, tradeable debt such as government stock, non-tradeable debt such as bank deposits and units in collective investment schemes. It also gives examples of items which are not regarded as investment assets, for example commodities such as gold or wine acquired with a view to re-sale, works of art, premium bonds and land purchased with a view to sale.⁹⁴ The guidance sets out the duties of charity trustees in relation to investments and these are as outlined in the *Trustee Act 2000* and discussed at paragraph 4.25 above.

4.69 *The Commission considers that it would be helpful if guidelines on the investment of charitable funds could be issued in this jurisdiction in relation to charity investments.*

⁹³ See CC 14 *Investment of Charitable Funds* (February 2003).

⁹⁴ The reasons for the distinction are that the tax treatment of trading profits is different than the tax treatment of investment returns. The ability of charities to trade is also restricted.

CHAPTER 5 POWER OF SALE, PURCHASE AND TO ISSUE RECEIPTS

A Introduction

5.01 The ability of trustees to deal with trust property by way of purchase or sale may, in many instances, be essential to the sound administration of the trust. While many trust instruments contain such powers, this is not always the case, and the lack of statutory powers governing acquisitions and sales may cause difficulties in respect of general trusts in practice.¹

5.02 Any consideration of trustees' power of sale must address the problematic issues of trusts for sale and settlements of land. The Commission is of the view that the issue of powers of sale, particularly in respect of the sale of land, is an issue in need of further consideration and, in due course, reform. However, the myriad issues of not only trust law, but also of land law, which arise in this context mean that this is a topic ultimately beyond the scope of the present paper. For that reason, the Commission proposes to reserve the issue of powers of sale, including trusts for sale and settlements of land, to a further paper to be issued in the future.

B Acquisition of Property

(1) *The Position in Ireland*

(a) *General Trusts*

5.03 As noted above in Chapter 4, under present Irish law trustees are only permitted to invest in authorised securities. The extent of trustees' power of investment is governed in the first instance by the terms of the trust instrument. As noted by Delany, "where a clause in the trust instrument expressly delimits the ambit of a trustee's power of investment, its provisions must be adhered to and

¹ The situation in respect of charitable trusts is quite different, and is considered below at paragraphs 5.04-5.06.

investment in unauthorised securities will amount to a breach of trust”.² Another source of trustees’ power of investment derives from statute; where the trust instrument contains no investment clause, or in addition to the terms of such investment clause, trustees may invest trust property in accordance with the statutory scheme of authorised investments, governed by Part I of the *Trustee Act 1893*, as amended by the *Trustee (Authorised Investments) Act 1958*. The statutory scheme of authorised investments allows trustees to invest in “real securities”; however, whilst it has been held that “real securities” include mortgages of land, it does not extend to the purchase of land.³ Thus, in the absence of an express power in the trust instrument to purchase land, trustees do not currently enjoy any statutory power to purchase land under current Irish law.

(b) *Charitable Trusts*

5.04 In relation to charities, the general trust principles on the acquisition of land apply; thus, trustees of a charitable trust may only acquire land if the trust instrument so provides. The power in the trust instrument may specify that land can only be acquired for a particular purpose, for example, for the fulfilment of the charity’s purpose or for investment. If the trust instrument does not confer such a power it may be possible to imply the existence of a power, for example, if the charity’s purposes cannot be fulfilled without the acquisition of land.

5.05 Land acquired under an express power by trustees of a personalty settlement, or by trustees of land held upon trust for sale, is held upon trust for sale, unless the settlement otherwise provides. Trustees are under a duty to sell land purchased in breach of trust,⁴ unless all the beneficiaries are *sui juris* and direct the trustee to retain the land.

5.06 Under section 32 of the *Charities Act 1961*⁵ the Commissioners of Charitable Donations and Bequests may, if they think fit, on the application of the trustees of any fund held upon any

² Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 396.

³ *Robinson v Robinson* (1877) IR 10 Eq 189.

⁴ *Re Patten and Edmonton Union* (1883) 5 L J Ch 787.

⁵ As substituted by section 9 of the *Charities Act 1973*.

charitable trust, by order confer upon the trustees the power to invest the fund in such manner, on such terms and subject to such conditions, as the Commissioners may think proper, whether or not such investment is authorised by the trust instrument, if any, or by law. This allows the Commissioners to authorise the acquisition of land by the trustees where the trust instrument contains no such power.

(2) The Position in England

(a) Legislative Provisions

5.07 The *Trustee Investments Act 1961* did not contain any statutory power to allow trustees to purchase land. The *Trusts of Land and Appointment of Trustees Act 1996* gave trustees of land “the power to purchase a legal estate in any land in England and Wales”.⁶ This provision was amended in 2000 to read the “trustees of land have power to acquire land under the power conferred by section 8 of the *Trustee Act 2000*”.

5.08 Section 8 of the 2000 Act provides that “[a] trustee may acquire freehold or leasehold land in the United Kingdom:

“as an investment;
for occupation by a beneficiary, or
for any other reason.”⁷

5.09 Section 8 is broader in scope than the original provision in the 1996 Act as the latter only applied to trustees who already held land on trust or held the proceeds of sale of land on trust. The Law Commission in its *Report on Trustees’ Powers and Duties*⁸ highlighted the anomaly that trustees of a settlement under the *Settled Land Act 1925* or a settlement where either land or the proceeds of the sale of land consisted of the trust assets had a default power to acquire

⁶ Section 6(3) of the *Trusts of Land and Appointment of Trustees Act 1996*. This provision also applies to charitable trusts and in the case of charitable trusts, the power cannot be restricted or excluded by the provisions of the trust instrument – section 8(3).

⁷ During the passage of the Bill it was confirmed that paragraph (c) was wide enough to include the purchase of functional land – ie land required for a specific purpose – by charitable trusts – Committee Trustee Bill HL (7 June 2000) Col CWH3.

⁸ (No 260 1999) at 27.

land whereas other trustees did not. This meant that, for example, the trustees of personal property had no power to acquire land unless the trust instrument so authorised. The new provision extends the power to all trustees and also allows for the purchase of freehold or leasehold land in the United Kingdom as opposed to just England and Wales. A trustee who acquires land under this section has all the powers of an absolute owner in relation to the land.⁹

5.10 The powers are in addition to any powers conferred on the trustees in the trust instrument but may be restricted or excluded by the trust instrument.¹⁰ It is important to note that trustees of a charity who are already trustees of land may still use the powers under the 1996 Act to acquire land and that power cannot be restricted by the trust instrument.¹¹ The power may not be exercised in contravention of any order of the court or the Charity Commissioners or any rule or law of equity.¹²

(b) Role of the Charity Commissioners

5.11 An order of the Charity Commissioners will not normally be required before acquiring land unless the charity is proposing to:

“use money which represents permanent endowment¹³ to acquire land other than freehold land.

buy land from one of its trustees (or from other people or bodies closely connected with a trustee).

buy land when it has no power to do so.”¹⁴

(3) Scotland

5.12 The *Charities and Trustee Investment (Scotland) Bill* amends section 4 of the *Trusts (Scotland) Act 1921* (general powers of trustees) to allow trustees:

⁹ Section 8(3) of the *Trustee Act 2000*.

¹⁰ Sections 9(a) and (b) of the *Trustee Act 2000*.

¹¹ Section 8(3) of the *Trusts of Land and Appointment of Trustees Act 1996*.

¹² Section 6(6) and (7) of the *Trusts of Land and Appointment of Trustees Act 1996*.

¹³ Funds which may not lawfully be spent as if they were income.

¹⁴ Leaflet CC33 *Acquiring Land* (April 2001).

“to make any kind of investment of the trust estate (including an investment in heritable property);
to acquire heritable property for any other reason.”¹⁵

5.13 Before exercising the power of investment, the trustees must have regard to the suitability of the proposed investment and the need for diversification of investments. The trustees must also obtain and consider proper advice if necessary or appropriate.

(4) Options for Reform

5.14 *The Commission does not recommend granting charities a general default power to acquire land.*

C Disposal of Property

(1) The Position in Ireland

(a) General Trusts

5.15 A trustee may be authorised to sell trust property by virtue of an express power contained in a trust instrument, or alternatively such a power may be implied, for example in circumstances where the rule in *Howe v Earl of Dartmouth* applies.¹⁶ The only other circumstance in which a trustee may sell trust property is if a power of sale is conferred by statute.¹⁷

5.16 In relation to the sale of trust land, currently trustees in Ireland only have power to sell land if the trust instrument specifically

¹⁵ Section 93 of the *Charities and Trustee Investment (Scotland) Bill*.

¹⁶ The rule in *Howe v Earl of Dartmouth* effectively provides that “where residuary personalty is settled by will in favour of persons who are to enjoy it in succession, subject to a contrary intention in the will, all assets of a wasting, future or reversionary nature or which consist of unauthorised securities should be converted into property of a permanent or income bearing nature”: see Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 406.

¹⁷ For example, a statutory power of sale in respect of charitable trusts is contained in section 34 of the *Charities Act 1961*, which enables the Commissioners for Charitable Donations and Bequests, if they think fit, to inquire into the circumstances, and if, after inquiry, they are satisfied that the proposed disposition, mortgage or charge would be advantageous to the charity, they may authorise the disposition, mortgage or charge and give such directions for securing the due investment or application of the money arising therefrom for the benefit of the charity as they think fit.

provides such a power. The authority to sell may be in the form of a trust for sale or a power of sale.¹⁸ If the trust instrument does contain such a power,¹⁹ the conduct of any sale will be governed by sections 13-15 of the *Trustee Act 1893* which apply equally to charitable and general trusts.

5.17 Where trustees hold property on trust for sale or with a power of sale, statutory powers are conferred on them in relation to the sale by section 13 of the *Trustee Act 1893*. The section provides that subject to a contrary intention being expressed in the trust instrument, trustees are empowered to sell the trust property in whole or in part and either by public auction or by private contract subject to such conditions as they think fit.

5.18 In terms of the conduct of such sale, it was established in *Buttle v Saunders*²⁰ that the overriding duty of a trustee selling trust property is to obtain the best possible price. Reference must be made in this context to section 14 of the *Trustee Act 1893*, which provides that a sale may not be impeached by a beneficiary on the grounds that any of the conditions of sale were unduly depreciatory unless it appears that the consideration for the sale was thereby rendered inadequate. In such cases, the position of the purchaser is also protected, unless it appears that the purchaser was acting in collusion with the trustee at the time the contract for sale was concluded.²¹ A further relevant power is contained in section 15 of the 1893 Act which provides that a trustee who is either a vendor or purchaser may sell or buy trust property without excluding the application of section 2 of the *Vendor & Purchaser Act 1874*.²²

¹⁸ It is important to note that trustees cannot give themselves a power of sale. For example, if a charitable trust transfers its charity land to a holding company whose memorandum contains a power of sale this cannot be relied upon to effect a sale where the original deed of conveyance or grant did not include a power of sale.

¹⁹ The power may be either express or implied.

²⁰ [1950] 2 All ER 193.

²¹ Section 14(2) of the 1893 Act.

²² Section 2 of the 1874 Act provides rules for regulating the obligations and rights of vendor and purchaser, relating to the deduction and investigation of title; see Wylie *Conveyancing Law* (Butterworths 1999) at 137.

5.19 A statutory power is conferred on trustees by section 20 of the *Trustee Act 1893* to give receipts, subsection (1) of which provides that:

“the receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof”.

5.20 In addition to the provisions of the *Trustee Act 1893* governing general trusts, it is necessary also to refer to the position of settled land and trusts for sale under Irish law. Section 2(1) of the *Settled Land Act 1882* provides as follows:

“any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates... a settlement ...”²³

5.21 Section 63 of the *Settled Land Act 1882* extended this provision to cover trusts for sale. Coughlan describes the effect of section 63 as follows:

“where land is subject to a trust or direction for sale, and the proceeds of that sale or the income produced by such proceeds are for the benefit of any person for his life or for any other limited period, or for two or more persons concurrently for any limited period, that land is deemed to be settled land”.²⁴

²³ The powers of sale of the tenant for life are set out in section 3 of the *Settled Land Act 1882*, which provides: “A tenant for life (i) May sell the settled land or any part thereof...”.

²⁴ Coughlan *Property Law* (2nd ed Gill & Macmillan 1998) at 190.

Coughlan also notes that not all trusts for the sale of land fall within the *Settled Land Acts*. The reference in section 63 of the *Settled Land Act 1882* to the beneficial interest means that there must be beneficiaries entitled in succession; thus, a trust for sale which is for the absolute benefit of a specified individual or individuals concurrently does not fall within the terms of the *Settled Land Acts*.

5.22 Reference should also be made in this context to the *Settled Land Act 1884*, which was enacted in part to address some of the anomalies which arose from the provisions of the *Settled Land Act 1882*.²⁵ Section 6(1) of the *Settled Land Act 1884* provides that in the case of a settlement within the meaning of section 63, if the settlement itself does not require the giving of consent in order for the trustees of the settlement or any other person to execute the trusts or powers of the settlement, nothing in the *Settled Land Act 1882* should be taken as imposing a requirement of consent. Effectively, this meant that trustees under trusts for sale could carry out their duties without having to obtain the consent of the tenant for life. However, the *Settled Land Act 1884* did not entirely strip the tenant for life of all rights; instead, section 7 provides that the statutory powers of sale enjoyed by a tenant for life cannot be exercised without an order of the court giving leave to do so. Thus, “as long as such an order is in force, neither the trustees of the settlement nor any other person who does not have the leave of the court can execute any trust or power created by the settlement.”²⁶

5.23 Professor Wylie summarises the current position as follows:

“in the case of a trust for sale of land, the trustees may exercise their trusts to the full, including the sale of the land, without the consent of the tenant for life or any other beneficiaries, provided the tenant for life has not obtained

²⁵ Coughlan provides an example of such an anomaly as follows; while under a trust for sale the responsibility for selling the property is given to trustees, the *Settled Land Acts* conferred a power of sale on the tenant for life. Section 56(2) of the 1882 Act provides that the consent of the tenant for life is required before any power created by a settlement which is inconsistent with a statutory power of the tenant for life, can be exercised. This meant that under the *Settled Land Act 1882*, trustees were obliged to obtain the consent of the beneficiary before they could perform their duty to sell the land; see Coughlan *op cit* at 190.

²⁶ Coughlan *Property Law* (2nd ed Gill & Macmillan 1998) at 191.

any order of the court under section 7, which has been duly registered against the trustees. Once such an order has been obtained and registered, however, the tenant for life only may sell and exercise the other persons conferred upon him by the Settled Land Acts 1882-1890. The trustees for sale then have only the powers conferred upon the trustees of the settlement by the 1882-1890 Acts.”²⁷

5.24 Finally, it should be noted that in its *Report on the Variation of Trusts*,²⁸ the Commission described one of the “typical deficiencies” in the powers of the court in this regard as being in relation to “powers, omitted from the trust instrument, which transpire to be necessary *after* the trust has come into operation. These include the power to sell land or other assets...”²⁹

(b) *Charities*

5.25 If the trustees of any charity comprising land wish to dispose of land and the trust instrument does not constitute a trust for sale, or contain a power of sale, the trustees may apply to the Commissioners of Charitable Donations and Bequests for authorisation. Under section 34 of the *Charities Act 1961*³⁰ the Commissioners can authorise the trustees to sell, exchange, mortgage, surrender a lease or accept a surrender of a lease of any charity land. Under section 37 of the Act of 1961³¹ the Commissioners can authorise the lease of any charity land or the repair, improvement or alteration of charity land. Sections 35 and 36 grant powers to the Commissioners to authorise the sale or purchase of any periodical payments in relation to charity land. All sales, leases, exchanges and other transactions authorised by the Commissioners have the like effect and validity as if they had been authorised by the express terms of the trust affecting the charity.³²

5.26 The overriding factor in granting consent is whether the Commissioners are satisfied that the application made by the trustees

²⁷ Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 483.

²⁸ (LRC 63-2000).

²⁹ *Ibid* at 7.

³⁰ As substituted by section 11 of the *Charities Act 1973*.

³¹ As substituted by section 13 of the *Charities Act 1973*.

³² Section 40 of the *Charities Act 1961*.

would be advantageous to the charity. For example, the Commissioners will not normally sanction a sale at an undervalue unless they are satisfied that the proposed disposition would both be for the benefit of a specified charitable purpose other than a purpose of the charity of which the applicants are trustees and the disposition would operate for the benefit of the public. When authorising a sale, the Commissioners may give directions for securing the due investment or application of the money arising therefrom, for the benefit of the charity, as they think fit.³³

5.27 The Commissioners may frame a *cy-près* scheme to deal with charity property.³⁴ In the case of charities established or regulated by a statute or by a charter, section 4 of the *Charities Act 1973* allows the Commissioners to frame a scheme to enable the trustees, with the approval of the Commissioners, to sell, lease, exchange, mortgage or charge any land or any other property of the charity. In fact, the applicant would usually submit a scheme to the Commissioners for approval and thus a scheme would come to be considered and to be framed.

5.28 Section 41 of the *Charities Act 1961* authorises the Commissioners of Charitable Donations and Bequests to give effectual receipts for payments for charitable purposes where there is no person available or competent so to do. The section provides that where:

(a) a person is liable to make any payment to or for any charitable purposes, and

(b) difficulty arises in making the payment by reason of the death, absence, incapacity or non-existence of a person competent to give an effectual discharge,

the Board, may, if they think fit, accept the payment (to be applied by them according to the trusts affecting it) and the receipt of the Board shall be an effectual discharge to the person making the payment.

³³ Section 34(2) of the *Charities Act 1961*.

³⁴ Section 29 of the *Charities Act 1961* as amended by section 8 of the *Charities Act 1973*.

(2) *The Position in England*

(a) *Legislative Provisions – General Trusts*

5.29 The general power of sale enjoyed by trustees under English law is contained in section 12 of the *Trustee Act 1925*,³⁵ which provides that trustees may sell all or any part of the property, by public auction or private contract, subject to any such conditions respecting title or other matter as the trustees think fit. Section 13(1) of the 1925 Act provides that if the sale has taken place, it may not be impeached by a beneficiary on the ground that any of the conditions of the sale were unduly depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.³⁶ Section 13(2) provides that a purchaser will not be affected unless he was acting in collusion with the trustees.

5.30 Under section 57 of the *Trustee Act 1925*, the court has power, in the absence of any power vested in the trustees by the trust instrument, to confer on the trustees the power to deal with trust property by way of sale, lease, mortgage, surrender and release.

5.31 In terms of the power of sale in respect of land, Lloyd et al note, “historically, trusts of land fell into one of two types – strict settlements and land held on trust for sale.”³⁷ There has been much legislative intervention in this area of English law, with the provisions of the *Settled Land Act 1925*, the *Law of Property Act 1925* and more recently the *Trusts of Land and Appointment of Trustees Act 1996* effecting major changes in the law governing this sphere.

5.32 The present position under English law is that “land is held either by an owner absolutely entitled or under a trust of land or, in the case of a settlement created before the commencement of the *Trusts of Land and Appointment of Trustees Act 1996*, under a strict settlement”.³⁸ In the case of a strict settlement, section 38(1) of the *Settled Land Act 1925* provides that the tenant for life has the legal

³⁵ As amended by Schedule 3 of the *Trusts of Land and Appointment of Trustees Act 1996*.

³⁶ Although the trustee may, of course, be liable; see Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 573.

³⁷ Lloyd Gibson Finely & Wells *A Practitioner’s Guide to Powers and Duties of Trustees* (Tolley LexisNexis 2002) at 103.

³⁸ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 572.

estate and a power of sale. In the case of a trust of land, the legal estate is vested in the trustees, who enjoy a power of sale pursuant to section 6(1) of the *Trusts of Land and Appointment of Trustees Act 1996*. Section 6(1) provides “[f]or the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.” Furthermore, as Martin notes, “where an express trust for sale is created, the trustees have power to postpone the sale indefinitely in the exercise of their discretion, despite any provision to the contrary in the trust instrument.”³⁹

(b) *Legislative Provisions – Charitable Trusts*

5.33 Under section 29 of the *Settled Land Act 1925*, land vested in trustees for charitable purposes was deemed to be settled land and the trustees had all the powers conferred on a tenant for life and on the trustees of a settlement subject to the obtaining of such consent or order, for instance, the Charity Commissioners consent, as would have been required in any event. The trustees, therefore, effectively had a power of sale.

5.34 The *Trusts of Land and Appointment of Trustees Act 1996* provided that, with effect from 1 January 1997, land held on charitable trusts is not settled land and land previously held subject to charitable trusts ceased to be settled land from that date.⁴⁰ Instead such land is now held on a trust of land.⁴¹ As noted above, for the purposes of exercising their functions as trustees, the trustees of land have in relation to the land and subject to the trust all the powers of an absolute owner.⁴² The power of an absolute owner obviously includes the power of sale. The statutory duty of care under section 1 of the *Trustee Act 2000* applies to a trustee when exercising any power in relation to land.

³⁹ Pursuant to section 4 of the *Trusts of Land and Appointment of Trustees Act 1996*; see Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 572.

⁴⁰ Section 2(5) of the *Trusts of Land and Appointment of Trustees Act 1996*.

⁴¹ *Ibid* at section 1(1).

⁴² *Ibid* at section 6(1).

5.35 In the case of charitable trusts, the powers conferred by section 6 of the 1996 Act cannot be restricted by the trust instrument.⁴³ However, as Luxton points out:

“[i]t cannot, however, have been intended that the 1996 Act should enable trustees of land held on charitable trusts to dispose of land the identity of which is essential to the charity’s purposes...[i]f the continued holding of a particular piece of land is essential to the charity’s purposes, its disposal will be permissible only if there is a *cy-près* circumstance”.⁴⁴

5.36 Examples of cases where the qualities of the property which is the subject matter of the gift are themselves the factors which make the purpose of the gift charitable were set out by Dillon LJ in *Oldham Borough Council v Attorney General*⁴⁵ as:

“[w]here there is a trust to retain for the public benefit a particular house once owned by a particular historical figure, or a particular building for its architectural merit or a particular area of land of outstanding natural beauty. In such cases, sale of the house, building or land would necessitate an alteration of the original charitable purposes and, therefore, a *cy prè*s scheme because after a sale the proceeds or any property acquired with the proceeds could not possibly be applied for the original charitable purpose.”⁴⁶

5.37 The *Trustee Act 2000*⁴⁷ confers powers on the trustees of a charitable trust to delegate, *inter alia*, any investment powers including the management or disposition of land held as an investment. They may delegate all decisions concerning land held as an investment but not a decision whether to dispose of land held for functional purposes.

⁴³ Section 8(3) of the *Trusts of Land and Appointment of Trustees Act 1996*.

⁴⁴ Luxton *The Law of Charities* (Oxford University Press 2001) at 650.

⁴⁵ [1993] Ch 210.

⁴⁶ *Ibid* at 222.

⁴⁷ Section 11(3).

5.38 The interaction of the new statutory provisions and existing common law powers has been the subject of some discussion. As Picarda points out:

“A doubt has been raised as to whether the statutory provisions relating to the disposal of charity land supplanted the common law powers. The basis for this doubt is not sufficiently indicated; but, having regard to the fact that such a doubt has been adumbrated in a treatise of authority, [Halsbury’s Laws (4th ed) Reissue 222, para 336] it is obviously unsafe for trustees to rely on the general powers implied by law.”⁴⁸

(c) *Role of the Charity Commissioners*

5.39 Prior to 1993, the consent of the court or the Charity Commissioners was required in relation to any sale, lease, mortgage, charge or other disposal of land which formed part of a charity’s permanent endowment,⁴⁹ or which was functional property⁵⁰ of the charity. Consent was not required in relation to land held as an investment.

5.40 The disposition of all charity land (including land held as an investment) is now governed by Part V of the *Charities Act 1993*. It is important to note that these provisions apply notwithstanding anything to the contrary in the trust instrument. It should also be noted that these provisions do not give trustees a power of sale, rather they provide a framework within which trustees must use the powers which they have. While at first glance it appears that the Charity Commissioners consent is required in all cases,⁵¹ the new regime enables the consent of the court or the Commissioners to be dispensed with in the majority of cases so long as a specified procedure⁵² is

⁴⁸ Picarda *The Law and Practice Relating to Charities* (3rd ed Butterworths 1999) at 500.

⁴⁹ Property of the charity which the trustees may not spend as if it were income. It must be held permanently.

⁵⁰ Property which had at any time been occupied for the purposes of the charity.

⁵¹ Section 36(1) of the *Charities Act 1993*.

⁵² This procedure requires the charity trustees to (i) obtain a report on the proposed disposition from a qualified surveyor, (ii) advertise the property

followed. Consent is, in practice, confined to disposals at an undervalue or in favour of a “connected person”.⁵³ Special provisions also apply to the disposal of land held on trust for a charity which stipulate that it is to be used for the purposes, or any particular purposes, of the charity.⁵⁴ In such cases the trustees are required to give public notice of their intention to dispose of the land and consider any representations made to them. This requirement may be dispensed with if:

- the trustees intend to acquire replacement land to be used for the same purposes;
- the disposition is a lease for two years or less;
- the Charity Commissioners have given a direction that the rules do not apply to the particular disposition or to a class of disposition.

5.41 A conveyance of charity land must contain certain specified statements.⁵⁵ The purpose of these statements is to put any person dealing with the charity on notice that special charity rules apply.⁵⁶

5.42 The Charity Commissioners also have a general power under section 26 of the 1993 Act to sanction any transaction entered into by the trustees in connection with the administration of the charity. The Commissioners sometimes sanction dispositions of land held on trust for functional use under this section where the trust instrument does not contain a power of sale.

(3) Other Jurisdictions

5.43 In Queensland, Western Australia and New Zealand the trustee legislation confers upon all trustees the power to sell trust

as advised by the surveyor and (iii) decide whether the proposed terms are the best available in the interests of the charity.

⁵³ Include, *inter alia*, a charity trustee, an officer, agent, or employee of the charity, certain of their relatives and institutions and companies controlled by them or in which they have a substantial interest.

⁵⁴ Sections 36(6) – (8) of the *Charities Act 1993*.

⁵⁵ *Ibid* at section 37(1).

⁵⁶ See *Bayoumi v Women's Total Abstinence Educational Union Ltd and Another* [2003] EWCA Civ 1548; [2004] 3 All ER 110 for a discussion on the consequences of failure to comply with the specified procedures.

property, and to mortgage trust property where the trustee is authorised by the trust instrument to pay or apply capital money.

5.44 In the United States, section 816 of the Uniform Trust Code authorises a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust.⁵⁷ In arranging a sale, a trustee must comply with the duty to act prudently.

D Options for Reform

(1) General Trusts

5.45 The issue of trustees' powers of sale under Irish law is currently unsatisfactory. In the absence of an express power of sale in the trust instrument, there is currently no statutory provision conferring such power. Trusts for sale and settled land were considered briefly above; as noted, there are numerous difficulties which arise in relation to the *Settled Land Acts 1882-1890*. As Wylie notes, "in view of the general policy of the Settled Land Acts of making land more marketable, it is difficult to think of provisions more likely to cause complications for a prospective purchaser of land and his solicitor".⁵⁸

5.46 The Commission also notes that any reform in respect of the power of sale of trust assets may raise concern as to the identity of the beneficial owner of those assets. Such concerns have prompted legislative measures aimed at preventing money laundering in this jurisdiction, such as section 31 of the *Criminal Justice Act 1994*, as amended by section 21 of the *Criminal Justice (Theft and Fraud) Act 2001*, and the *Disclosure of Certain Information for Taxation and Other Purposes Act 1996*. The Commission notes that issues such as disclosure of beneficial ownership, and the ability to trace such ownership, must be considered in the context of any reform of the power of sale of trust assets. The Commission would welcome submissions on this point.

5.47 *The Commission proposes to give full consideration to the power of sale, not only in relation to the aspects of trust law involved, but also those of land law. It is intended that this paper shall be*

⁵⁷ *Restatement (Third) of Trusts: Prudent Investor Rule*, section 190 (1992).

⁵⁸ Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 483.

made available at the earliest possible date. In the light of this future publication, the Commission considers it appropriate at this stage to reserve its views on the matter, although submissions from any interested parties on this area would be particularly welcomed.

(2) Charities

5.48 If a charity's governing instrument constitutes a trust for sale or contains a power of sale, the question of consent from the Commissioners does not arise and is primarily a matter for the solicitors for the purchaser to be satisfied that the sale is valid and is not liable to challenge.

5.49 *If the governing instrument does not contain a power of sale or if the terms of the power of sale are unclear, the Commission recommends that the charity trustees should obtain appropriate consent, which at present is by way of application to the Commissioners of Charitable Donations and Bequests.*

5.50 Difficulties may arise, for example, where the land represents permanent endowment of the charity or if the governing instrument stipulates that the land is to be used for the purposes, or any particular purposes, of the charity.

5.51 It is also important for charity trustees to note that they cannot give themselves a power of sale, for example, by transferring the charity land to a holding company whose memorandum contains a power of sale. This device cannot be relied upon to effect a valid sale where the original conveyance or grant did not include a power of sale.

5.52 The general principles outlined above may also be applied to any leases, mortgages or exchange of charity land.

CHAPTER 6 POWER TO DELEGATE

A Introduction

6.01 The power of trustees to delegate may also be framed in the negative form of a “duty not to delegate”,¹ though it is questionable whether much turns on the distinction. The equitable maxim governing delegation of trust powers is *delegatus non potest delegare*.² This is the position in the absence of an explicit power to delegate; a settlor is free to provide trustees with an express power of delegation in the trust instrument. It is only in the absence of such express authority in the trust instrument that the power of trustees to delegate, and the circumstances in which such delegation may be permitted, become an issue. The rationale underpinning the prohibition on delegation has been described as resulting from the fact that “the office is viewed as one where confidence is placed in the abilities of the particular individual and it is therefore expected that he should personally look after the interests of the beneficiaries.”³ Thus, if a trustee delegates without authority, that trustee will be held liable for any loss incurred by the trust as a result of the actions of the person to whom he has delegated his powers.⁴

¹ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 421; Underhill & Hayton *Law of Trusts and Trustees* (Butterworths 1999) at 618.

² The essence of this principle is explained in *Osborn’s Concise Law Dictionary* as follows: “A person to whom powers have been delegated cannot delegate them to another”. Bone (ed) *Osborn’s Concise Law Dictionary* (9th ed Sweet & Maxwell 2001).

³ Delany *ibid* at 421.

⁴ *Turner v Corney* (1841) 5 Beav 515.

B The Position in Ireland

6.02 Despite the general rule against delegation in the absence of express authority in the trust instrument, there has long been judicial (and, more recently, statutory) recognition of the need for trustees to be permitted to delegate some of their functions in certain circumstances.⁵ This necessity has generally been effected by distinguishing between what are described as “administrative” or ministerial functions, which may be delegated, and functions which involve the exercise of personal discretion by the trustees, which are regarded as non-delegable. It has become particularly clear in the era of the modern trust, which by virtue of its complexity must be regarded as far removed from its original antecedents, that delegation to professional agents with the requisite levels of expertise in their chosen fields can be vital to the effective administration of a trust. Thus, as Keane notes:

“if the trustee is in a position where the proper exercise of his office demands the obtaining of expert advice, be it from a solicitor, stockbroker, valuer or anyone else, he is not merely entitled to take such advice but also to act on it and this will not constitute delegation by him of the trust office”.⁶

6.03 Indeed, Wylie has gone so far as to suggest that there may be certain limited occasions when a trustee could be found to be in breach of trust by reason of a failure to delegate.⁷

6.04 As a general proposition, it can be stated that trustees will be permitted to delegate administrative or ministerial functions where “a prudent man of business would do [so] on his own behalf”,⁸ and in such instances, the trustee will not be held liable for any acts of default on the part of the agent. Thus, in *Speight v Gaunt*⁹ it was held

⁵ An early example of such recognition is to be found in the 18th century case of *Ex parte Belchier* (1754) Amb 218, where it was held that trustees may delegate in situations of “legal necessity” or “moral necessity”.

⁶ Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at 123.

⁷ Wylie *Irish Land Law* (3rd ed 1997) at 610.

⁸ *Fry v Tapson* (1884) 28 Ch D 268 at 270, *per* Kay J.

⁹ (1883) 22 Ch D 727.

that the defendant trustee was not liable for loss caused by the embezzlement of trust moneys by a stockbroker he had appointed, on the basis that the trustee had acted prudently in the ordinary course of business. It was also established that where trustees delegate without authority, they will be held vicariously liable for any loss occasioned as a result.¹⁰

6.05 A further gloss on the power to delegate in these circumstances was established in *Re Weall*,¹¹ where Kekewich J held that the trustee alone must be responsible for the appointment of an agent; the choice of such agent is not a function which may be delegated.¹² There are also a number of decisions which confirm that an agent so appointed must be employed within his particular field,¹³ while it has also been established that the trustees must exercise reasonable prudence in supervising the activities of their agent.¹⁴ The judicial standard for determining the adequacy of supervision exercised by trustees was expounded by Page Wood VC in *Mendes v Guedella*,¹⁵ where he stated that trustees are required to exercise “the ordinary prudence which a man uses in his own affairs”.

6.06 It is appropriate at this juncture to consider the statutory intervention in the context of delegation of powers by trustees. The judicial controls to which trustees are subject in this area were somewhat augmented by the provisions of the *Trustee Act 1893*. Section 17 of the 1893 Act deals with the power of trustees to

¹⁰ For a more recent confirmation of this principle, see *Target Holdings v Redfern* [1995] 3 WLR 352.

¹¹ (1889) 42 Ch D 674.

¹² See also *Fry v Tapson* (1884) 28 Ch D 268, where the trustees relied on the recommendation of their solicitor in deciding on the appointment of a valuer; the trustees were subsequently found liable as they had not exercised their own discretion in the choice of the agent.

¹³ *Fry v Tapson* (1884) 28 Ch D 268. Thus, as Keane notes, “it would not be within the usual scope of a solicitor’s or accountant’s professional activity to invest money on behalf of a client”, and any purported delegation by a trustee in such circumstances would result in the trustee being liable for any loss caused to the trust by the agent. See Keane *op cit* at 123, citing *Royland v Witherdan* (1851) 3 Mac & G 568 as authority for this proposition.

¹⁴ *Speight v Gaunt* (1883) 22 Ch D 727.

¹⁵ (1862) 2 J & H 259 at 277.

authorise receipt of moneys by a banker or solicitor. Section 17(1) provides that a trustee may appoint a solicitor to receive purchase money derived from the sale of trust property by permitting the solicitor to have custody of, and to produce, a deed containing a receipt for the money. Section 17(2) provides that a trustee may appoint a banker or solicitor to receive and give a discharge for any money payable by virtue of an insurance policy, with the validity of the delegation in this case being dependent on the banker or solicitor being in possession of, and authorised to produce, the insurance policy with a receipt signed by the trustee. Furthermore, reference must be made to section 16 of the *Powers of Attorney Act 1996*, which provides that the general power of attorney under the Act “does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life within the meaning of the Settled Land Act, 1882, or as a trustee or other person exercising the powers of a tenant for life under section 60 of that Act”.

6.07 In relation to the obligation to exercise reasonable prudence in supervising an agent’s conduct as established in such decisions in *Speight v Gaunt*, section 24 of the 1893 Act provides an implied indemnity that a trustee:

“shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, not for any banker, broker or other person with whom any trust moneys, or securities may be deposited ... nor for any other loss, unless the same happens through his own wilful default.”

6.08 The meaning of the phrase “wilful default” in this context was considered by Lindley LJ in *Re Chapman*,¹⁶ which he regarded as meaning that trustees would not be fixed with liability provided that they had acted honestly and prudently in the belief that they had taken the best course of action for all parties interested in the trust estate. Thus, he commented that “trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment”.¹⁷ This interpretation was also adopted by

¹⁶ [1896] 2 Ch 763.

¹⁷ *Ibid* at 776.

Maugham J in *Re Vickery*,¹⁸ in the context of the English provisions of the *Trustee Act 1925*.

C The Position in England

6.09 From the brief analysis of the terms of the *Trustee Act 1893* above, it is clear that the current statutory provisions governing the power of trustees to delegate are far from comprehensive, and the fact that Irish legislation has failed to keep abreast of modern developments in the world of trusts has led to calls for reform. This was not the case in England, where the first legislative intervention in relation to trustees' powers of delegation in the 20th century was the enactment of the *Trustee Act 1925*. Sections 23 and 30 of the 1925 Act have been described as having "widened considerably the power to delegate in England".¹⁹ As Martin has commented,

"[u]nder the Trustee Act 1925 trustees were no longer required to show a need to delegate. Delegation as such was accepted as a normal method of performing the duties incidental to trusteeship; but the overall duties of trusteeship remained of course in the trustees."²⁰

6.10 Thus, sections 23(1) and (2) of the 1925 Act allowed trustees and personal representatives to "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, or the administration of the testator's or intestate's estate", and goes on to provide that they "shall not be responsible for the default of any such agent if employed in good faith". Section 30(1) provided that a trustee was responsible for his own acts and defaults, but not for those of any co-trustee or agent, nor for any other loss unless occasioned by "his own wilful default".

6.11 As noted above, the changes effected by these provisions of the 1925 Act was considered by Maugham J in *Re Vickery*.²¹ Here, a

¹⁸ [1931] 1 Ch 572, although this judgment has been criticised on a number of grounds; see Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 577-578. This decision will be considered in greater detail in the context of the *Trustee Act 1925*, below.

¹⁹ Delany *op cit* at 424.

²⁰ Hanbury & Martin *op cit* at 577.

²¹ [1931] 1 Ch 572.

trustee had employed a solicitor to wind up the testatrix's estate, unaware that the solicitor had twice been suspended from practice. Although the trustee subsequently learned of this suspension, he did not act to remove the solicitor, who later absconded with trust moneys. The plaintiff beneficiaries brought an action seeking a declaration that the trustee had been in breach of trust; the trustee relied on the provisions in section 23 of the Trustee Act 1925 in his defence. Maugham J refused to find the trustee liable for the loss to the trust by reason of his finding that the loss had not been occasioned by the "wilful default" of the trustee; in so holding, Maugham J commented

"Where an executor employs a solicitor or other agent to receive money belonging to the estate in reliance upon section 23(1), he will not be liable for a loss occasioned by the misconduct of the agent unless the loss happened through the "wilful default" of the executor, using those words as implying ... either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty."

6.12 The judgment of Maugham J has been the subject of much criticism,²² with Martin suggesting that the conclusion reached was inconsistent with the settled construction of the expression in trustee exemption clauses, where it had been held to include "imprudence".²³ Despite such criticisms, Millett LJ in *Armitage v Nurse*²⁴ upheld Maugham J's interpretation of section 23 of the 1925 Act, although it was confirmed in *Re Lucking's Will Trusts*²⁵ that the 1925 Act had not removed the duty to exercise the appropriate level of supervision over an agent.

6.13 The area of trustees' powers of delegation has been the subject of a number of consultation papers and reports by the Law Commission in England, resulting in the enactment of a number of statutes in recent years. In order fully to understand the aim and effect of these provisions, it is necessary to draw a distinction

²² See Underhill & Hayton *op cit* at 623-624.

²³ See further Hanbury & Martin *op cit* at 577-578. See also Jones (1959) 22 MLR 381, and Stannard [1979] Conv 345.

²⁴ [1998] Ch 241 at 252.

²⁵ [1968] 1 WLR 866.

between individual delegation, being the delegation by one trustee to an agent often by power of attorney, and collective delegation, whereby the trustees as a body delegate their powers, often in the context of investment of trust funds.

(1) Individual delegation

6.14 The original statutory provision governing the power of individual trustees to delegate their powers to an agent by way of a power of attorney, was section 25 of the *Trustee Act 1925*, subsection (1) of which provided:

“[n]otwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.”

6.15 Although section 23 of the 1925 Act permits trustees to delegate only administrative acts, it would seem that section 25 allows the delegation of trustees’ discretionary functions.²⁶

6.16 The provisions of section 25 had long been subject to criticism, and the first legislative augmentation to section 25 was made by the *Powers of Attorney Act 1971*, which removed the original restriction on the power *viz.* the fact that the power had previously applied only to trustees intending to remain outside the United Kingdom for over a month. Further changes were made by the *Enduring Powers of Attorney Act 1985*. However, dissatisfaction with various aspects of the legislation remained, and resulted in the Law Commission examining the issue in its report on *Delegation by Individual Trustees*.²⁷ This report resulted in the enactment of the *Trustee Delegation Act 1999*, section 1 of which allows a power of attorney under the 1925 Act to become an enduring power of attorney, designed to survive the incapacity of the trustee.²⁸ It should be noted that section 25(7) of the *Trustee Act 1925* remains in force, providing that the donor of the power of attorney remains liable,

²⁶ See Hanbury & Martin *op cit* at 582-586.

²⁷ (No 220 1994).

²⁸ Note that section 1 of the *Trustee Delegation Act 1999* repealed section 2(8) of the *Enduring Powers of Attorney Act 1985*.

regardless of fault, for the acts and defaults of the attorney. Thus, as Martin notes, “[t]hese provisions should only be used when such delegation is essential”.²⁹

(2) Collective delegation

6.17 Whilst the various legislative enactments outlined above addressed the difficulties arising in the context of individual powers of delegation by trustees, there remained much dissatisfaction with the continuing difficulties in respect of trustees’ collective powers of delegation. This was confirmed by the Law Commission in its report, *Trustees’ Powers and Duties*, which stated that:

“[f]ar from promoting the more conscientious discharge of the obligations of trusteeship, the prohibition on the delegation of fiduciary discretions may force trustees to commit breaches of trust in order to achieve the most effective administration of the trust.”³⁰

6.18 The Law Commission report concluded with a draft bill designed to modernise the law relating to collective delegation of trustees’ powers, which was enacted as the *Trustee Act 2000*. Part IV of the 2000 Act deals with powers of delegation, and the provisions are based on the principle that trustees may delegate any or all of their “delegable functions”.³¹ Rather than setting out an exhaustive list of those functions which should be regarded as “delegable”, section 11(2) of the 2000 Act provides that trustees may not delegate:

- (a) any function relating to whether or in what way any assets of the trust should be distributed,
- (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,
- (c) any power to appoint a person to be a trustee of the trust, or
- (d) any power conferred by any other enactment of the trust instrument which permits the trustees to delegate any

²⁹ Hanbury & Martin *op cit* at 583.

³⁰ (No 260 1999) at paragraph 4.6.

³¹ Section 11(1) of the 2000 Act. See Hanbury & Martin *op cit* at 579.

of their functions or to appoint a person to act as a nominee or custodian.

6.19 Section 12 sets out the classes of persons who may act as agents, which includes one or more of the other trustees, although it prohibits trustees from authorising a beneficiary to exercise any function as their agent; trustees are also prevented from authorising two or more persons from exercising the same function unless they are to exercise such function jointly. Section 14(1) sets out the terms of agency, and allows the trustees to appoint an agent on such terms as to remuneration and other matters as they may determine, while subsection (2) imposes some restrictions on the terms of such agency. Thus, it provides that “the trustees may not authorise a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary to do so”; those terms are-

- (a) a term permitting the agent to appoint a substitute;
- (b) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary;
- (c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

6.20 Whilst the trustees are given a considerable discretion as regards such matters as the remuneration of agents, sections 14 and 32 of the 2000 Act place some limits on this discretion by providing that the amount paid must not exceed what is reasonable for the services in question. Finally, it should be noted that the obligation on trustees to supervise the conduct of their appointees has survived this most recent enactment; sections 21 and 22 of the 2000 Act provide that where the trustees have appointed an agent,

- (a) they are required to keep under review the arrangements under which the agent acts, and how those arrangements are being performed;
- (b) if circumstances make it appropriate to do so, they must consider whether there is a need to exercise any power of intervention that they have, and
- (c) if they consider that there is a need to exercise such power, they must do so.

(3) Other statutory powers of delegation in England

6.21 Finally, it should be noted that there are a number of miscellaneous statutory provisions allowing for delegation in certain circumstances. Section 9 of the *Trusts of Land and Appointment of Trustees Act 1996* allows trustees to delegate any of their functions as trustees relating to the land, to any beneficiary or beneficiaries, who are of full age and together wholly entitled to an interest in possession. Section 9(5) provides that the delegation may be for any period or may be indefinite, while subsections (3) and (6) operate to the effect that any such delegation must be made by power of attorney which must be given by all trustees jointly. However, where the trustees have exercised this power of delegation in respect of one or more beneficiaries, the latter are subject to some limitation on their powers; section 9(7) prohibits beneficiaries from sub-delegating their powers, nor can they give a valid receipt for capital monies. It should be noted that the statutory duty of care introduced by section 1 of the *Trustee Act 2000* applies to trustees when exercising the powers conferred by section 9 of the 1996 Act.³²

(4) Duty of Care

6.22 As noted above, the original standard expected of trustees in exercising their powers of delegation was the standard of a “prudent man of business”. The provisions of sections 23 and 30 of the *Trustee Act 1925*, namely the requirement of “good faith”, and their subsequent interpretation by Maugham J in *Re Vickery*³³ were subjects of considerable uncertainty and dissatisfaction. These difficulties were dealt with in section 1 of the *Trustee Act 2000*, which provides that where the duty of care in section 1 applies:

“a trustee must exercise such care and skill as is reasonable in the circumstances, having regard in particular-

- (a) to any special knowledge or experience that he has or holds himself out as having, and
- (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is

³² See section 9A of the *Trusts of Land and Appointment of Trustees Act 1996* as inserted by Schedule 2 of the *Trustee Act 2000*.

³³ [1931] 1 Ch 572.

reasonable to expect of a person acting in the course of that kind of business or profession.”

6.23 Schedule 1 of the 2000 Act provides when the duty of care applies to a trustee, and includes the exercise by trustees of their powers of delegation.

D Conclusion

6.24 The comment by the Law Commission that “trusteeship is an increasingly specialised task that often requires professional skills that ... trustees may not have”³⁴ can hardly be denied. The work of the Law Commission in England in drafting a new legislative scheme capable of operating satisfactorily in the context of modern trust law has been widely welcomed, and there might well be merit in the introduction of similar provisions in Ireland, drawing on the successes of recent legislative enactments in other jurisdictions.

6.25 *The Commission considers that trustees’ powers of delegation are in need of reform. The Commission recommends the introduction of legislation in terms similar to the provisions of section 11 of the Trustee Act 2000, which provides:*

“(1) Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees’ delegable functions consist of any function other than-

(a) any function relating to whether or in what way any assets of the trust should be distributed,

(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,

(c) any power to appoint a person to be a trustee of the trust, or

(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of

³⁴ Law Commission Consultation Paper on Trustees’ Powers and Duties (No 146 1997) paragraph 1.1.

their functions or to appoint a person to act as a nominee or custodian.”

6.26 *The Commission recommends that the proposed statutory duty of care shall apply to trustees’ power of delegation.*

6.27 *Provision should also be made in relation to the terms of appointment and remuneration of custodians and nominees.*

E Charities

(1) The Position in Ireland

6.28 Besides the statutory provisions discussed at paragraphs 6.06 and 6.07 above, there are no statutory provisions in the *Charities Acts 1961* and *1973* governing delegation. The Commissioners of Charitable Donations and Bequests have powers to frame schemes for the application *cy-près* of the property comprised in the charitable gift.³⁵ The Commissioners also have authority to confer power on the trustees to invest the charity fund, in such manner, on such terms and subject to such conditions as the Commissioners may think proper.³⁶ These powers are considered sufficiently broad as to allow the Commissioners to confer on the trustees the power to delegate as part of the scheme or in relation to the investment of the charity fund.

(2) England and Wales

6.29 Powers of delegation in the case of charitable trusts fall under the terms of the 2000 Act. However, section 26 of the English *Charities Act 1993* also provides that the Charity Commissioners have a statutory power to authorise dealings with charity property which would not otherwise be within the powers of the trustees. The Law Commission in its report on *Trustees’ Powers and Duties*³⁷ noted that the powers of the Charity Commissioners include a power to extend trustees’ powers of delegation. In recommending that charitable trusts be subject to the proposed reforms, the Law Commission acknowledged that there would have to be some modification of these proposals as they would impact on charitable

³⁵ Section 29 of the *Charities Act 1961* as amended. See further on *cy-près* schemes paragraph 10 of the Introduction.

³⁶ Section 32 of the *Charities Act 1961* as substituted by section 9 of the *Charities Act 1973*. See further paragraph 4.60.

³⁷ (No 260 1999) at paragraphs 4.37-4.47.

trusts. This was achieved by drawing a distinction between those aspects of charitable trusts that relate to the generation of income to finance the trust's charitable purposes, and the execution of those purposes. It was considered necessary to list in statute the specific functions which charity trustees should be allowed to delegate, applying mainly to "investment, fund raising, and ministerial acts concerned with the administration of the charity".³⁸ The Law Commission also noted that if it was necessary, in future, to extend this list of functions, any such revision could be done by statutory instrument.

6.30 The Law Commission's recommendations in relation to charitable trusts are embodied in section 11(3) of the *Trustee Act 2000*, which sets out the four classes of functions which trustees of charitable trusts will be permitted to delegate; these are:

- (a) any function consisting of carrying out a decision that the trustees have taken;
- (b) any function relating to the investment of assets subject to the trust (including, in the case of land acquired as an investment, managing the land and creating or disposing of an interest in the land);
- (c) any function relating to the raising of funds for the trust otherwise than by means of profits or a trade which is an integral part of carrying out the trust's charitable purpose;
- (d) any other function prescribed by order made by the Secretary of State.

6.31 The Secretary of State has power to prescribe further functions by order.³⁹ The trustees of a charitable trust must act in accordance with any guidance given by the Charity Commissioners when selecting a person for appointment as a nominee or custodian.⁴⁰ In this regard, the Commissioners' guidance covers issues such as:

³⁸ Law Commission Report on *Trustees' Powers and Duties* (No 260 1999) at paragraph 4.40.

³⁹ Section 11(3)(d) of the *Trustee Act 2000*.

⁴⁰ *Ibid* at section 19(4).

“the relationship between the nominee to be selected and the charity;

the qualification and location of the nominee/custodian to be selected;

the independence of the nominee and custodian to be selected, from each other and from any person to whom the charity trustees have delegated the function of managing the charity’s investments; and

reporting by the nominee/custodian to be selected.”⁴¹

6.32 Section 82 of the *Charities Act 1993* enables charity trustees to delegate to any two or more of their number the power to execute assurances, or other deeds or instruments, in the names and on behalf of the trustees, for giving effect to transactions to which the trustees are a party. Any deed or instrument executed in pursuance of an authority so given is deemed to be of the same effect as if executed by the whole body.

F Options for Reform

6.33 The Law Society in its report recommended that a statutory power to delegate day to day investment decisions (as opposed to strategic, long-term, investment decisions) be created subject to certain protections such as the professional qualifications of the agent and the need to provide a statement of investment principles.⁴² The Commission considers that this approach would best serve the public interest.

6.34 *The Commission recommends the introduction of default statutory powers of delegation similar to those in the English Trustee Act 2000. The classes of functions which trustees of charitable trusts should be permitted to delegate are as follows:*

(a) any function consisting of carrying out a decision that the trustees have taken;

(b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an

⁴¹ *Appointing Nominees and Custodians: Guidance under section 19(4) of the Trustee Act 2000* (CC24 February 2001).

⁴² *Charity Law: The Case for Reform* (2002) at 247.

investment, administrative powers or procedures relating to the management of the land or the creation or disposition of an interest in the land);

(c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;

(d) any other function prescribed by Ministerial Regulations.

6.35 *The Commission recommends that the statutory duty of care shall apply to trustees' power of delegation.*

6.36 *Charitable trustees should be required to act in accordance with any guidance given by the Registrar of Charities concerning the selection of a person for appointment as a nominee or custodian. This is without prejudice to the powers currently exercised by the Commissioners of Charitable Donations and Bequests in respect of investment and delegation under sections 32 and 33 of the Charities Act 1961, as amended by sections 9 and 10 of the Charities Act 1973. Arrangements for timely liaison in respect of these matters would need to be carefully considered.*

6.37 *Provision should also be made in relation to the terms of appointment and remuneration of custodians and nominees.*

CHAPTER 7 LIABILITY OF TRUSTEES

7.01 As noted by Delany, “a trustee will be found to be acting in breach of trust if he fails to perform the duties required of him or if he acts in an unauthorised manner”.¹ A breach of trust may occur in a variety of circumstances, such as investment of trust monies in unauthorised investments, or failure to exercise the appropriate degree of supervision over the management of the trust by co-trustees. An issue which has attracted “considerable judicial and academic attention”² in many common law jurisdictions in recent times has been the extent to which a trustee may be protected from liability by the inclusion of an exemption clause in the trust instrument.

A Definition of Trustee Exemption Clause

7.02 A trustee exemption clause may be defined as “a provision contained in a trust document that purports to excuse the trustee from liability for conduct that may constitute a breach of trust”.³ The origins of the trustee exemption clause may be linked to the relatively unrestricted nature of trustees’ liability for breach of trust;⁴ initially

¹ *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 429.

² Delany *ibid* at 436-437. See eg in England the Trust Law Committee *Consultation Paper on Trustee Exemption Clauses* (1999); Law Commission of England and Wales *Consultation Paper on Trustee Exemption Clauses* (No 171 2003), and such judicial decisions as *Armitage v Nurse* [1997] 2 All ER 705 and *Walker v Stones* [2000] 4 All ER 412. The British Columbia Law Institute also considered the issue in its *Report on Exculpation Clauses in Trust Instruments* (No 17 2002), while the New Zealand Law Commission addressed it as part of its Report on *Some Problems in the Law of Trusts* (No 79 2002).

³ British Columbia Law Institute *Report on Exculpation Clauses in Trust Instruments* (No 17 2002) at Foreword.

⁴ See Law Commission of England and Wales *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at vi.

such clauses were relatively narrow, and were strictly construed against trustees. However, the transformation of trusts in modern times – including the changed nature of trust assets and the use of the trust for purposes never before envisaged, and the extended powers given to trustees – has led to the inclusion of ever wider trustee exemption clauses in trust instruments.

(1) Exclusion of Trustees' Liability for Breach of Trust

7.03 It is now standard practice to insert trustee exemption clauses into trust instruments relieving trustees from liability resulting from an act or omission that would otherwise be regarded as a breach of trust. An example of a standard trustee exemption clause is as follows:

“no trustee shall be liable for any loss or damage which may happen to [the Trust Fund] or any part thereof or the income thereof at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud...”⁵

7.04 In addition to this standard form of exemption clause, there are other ways in which a trust instrument may seek to exclude the liability of trustees.⁶ For example, a “duty exclusion clause” limits the duties to which a trustee is subject, and thus limits the ability of the beneficiary to demonstrate that the trustee was in breach of trust. Another method of excluding trustees’ liability is by virtue of “extended powers clauses” or “authorisation clauses” – such clauses operate by conferring upon the trustees wider powers than is normal, or expressly to allow them to do acts which would generally be proscribed. The final method by which trustees may be shielded from liability is by virtue of an “indemnity clause”, which arises where a provision in the trust instrument entitles the trustee to an indemnity out of the trust fund which covers not only costs and expenses incurred in the ordinary administration of the trust but also includes any liability for breach of trust (with the possible exception of

⁵ These are the terms of the trustee exemption clause which was at issue in the leading English case of *Armitage v Nurse* [1997] 2 All ER 705, which was taken from *Hallett's Conveyancing Precedents* (1965).

⁶ This material is based on the analysis contained in the Law Commission of England and Wales *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at 6-7.

liability arising from a trustee's individual fraud). The Law Commission noted that such indemnity clauses are not as effective as a standard exemption clause, because the efficacy of an indemnity clause "is dependant on the continuing solvency of the trust".⁷

(2) Categories of Trustees' Conduct

7.05 As recognised by the British Columbia Law Institute,⁸ there are varying degrees of trustee dereliction and the difficulty lies in determining whether a trustee exemption clause applies to *any* such conduct or whether there are limits on the validity of the trustee exemption clause.

7.06 The Trust Law Committee in England identified six possible degrees of trustee dereliction, namely:

- (a) Fraud;
- (b) Wilful conduct;
- (c) Recklessness;
- (d) Gross negligence;
- (e) "ordinary" negligence;
- (f) innocent breach of trust (strict liability).⁹

The debate as to the validity of trustee exemption clauses tends to focus on the dividing line between fraud and gross negligence, although the categories of wilful conduct and recklessness are also the subject of some debate.

7.07 Essentially, the difficulties in respect of trustee exemption clauses lie in the conflict between settlor autonomy and the entitlement of trustees to be protected from liability on the one hand, with the entitlement of beneficiaries for redress, the "irreducible core of trustee obligations"¹⁰ and public policy on the other. These

⁷ Law Commission of England and Wales *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at 7.

⁸ British Columbia Law Institute *Report on Exculpation Clauses in Trust Instruments* (No 17 2002).

⁹ Trust Law Committee *Consultation Paper on Trustee Exemption Clauses* (1999) at paragraph 2.4 – available from www.kcl.ac.uk/depsta/law/tlc/

¹⁰ See generally Hayton "The Irreducible Core Content of Trusteeship" in Oakley (ed) *Trends in Contemporary Trust Law* (OUP 1996) at 47 *et seq.*

tensions have been fully explored by case law and comment in various jurisdictions, and it is proposed to set out the full scope of the issues by reference to comparative developments.

B England and Wales

(1) *Armitage v Nurse*

7.08 The decision in the English case of *Armitage v Nurse*¹¹ remains the leading authority in that jurisdiction on the scope of trustee exemption clauses. As noted above, the terms of the exemption clause in issue was to excuse trustees for liability for “any loss or damage ... from any cause whatsoever” with the single exception of a trustee’s own “actual fraud”.

7.09 The sole beneficiary brought an action for breach of trust, alleging in her statement of claim that the trustees had acted contrary to the express provisions of the trust in using the capital to benefit her mother, had failed properly to supervise the management of trust property or to make proper inquiry into the reasons for its dramatic devaluation prior to its sale, had failed to obtain proper payment of interest in respect of a loan made to her mother, and had failed to give paramount consideration to her best interests but had subordinated them to the interests of her mother.

7.10 The crucial question which then arose was whether the terms of the exemption clause excluded liability for all of the matters contained in the statement of claim. The trial judge held that the exemption clause absolved the trustees from liability for all of the breaches alleged, and the beneficiary then appealed this finding to the Court of Appeal.

7.11 Millett LJ in the Court of Appeal held that the phrase “actual fraud” did not extend to constructive fraud or equitable fraud; having reviewed the authorities he was satisfied that “nothing short of fraudulent intention in the strict sense will suffice for a case of deceit or fraud properly so called ... it requires proof of dishonesty”.¹² Thus, Millett LJ stated that:

¹¹ [1997] 2 All ER 705.

¹² In so holding Millett LJ made the point that breaches of trust are of many different kinds; he gave as an example a situation where trustees consciously act beyond their powers by making an investment which they

“...[the exemption clause] exempts the trustees from liability for loss or damage to the trust property no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly”.¹³

7.12 However, in so holding, Millett LJ did consider the question of the permitted scope of trustee exemption clauses, noting the argument 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. Although counsel for the beneficiary had cited a number of English¹⁴ and Scottish¹⁵ decisions as authority for the proposition that it was contrary to public policy to allow a trustee exemption clause to exclude liability for gross negligence, Millett LJ rejected this interpretation of the case law, stating:

“I agree with the conclusion ... that all these cases are concerned with the true construction of the particular clauses under consideration or of similar clauses in standard form in the 19th century. None of them deals with the much wider form of clause which has become common in the

know to be unauthorised, which constitutes a deliberate 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”: [1997] 2 All ER 705, 710.

¹³ *Ibid* at 711.

¹⁴ *Wilkins v Hogg* (1861) 31 LJ Ch 41 and *Pass v Dundas* (1880) 43 LT 665. Millett LJ suggested that Lord Westbury LC in *Wilkins v Hogg* “was clearly of opinion that a settlor could, by appropriate words, limit the scope of the trustee’s liability in any way he chose”, whilst he regarded comments of Bacon VC in *Pass v Dundas*, suggesting that an exemption clause protected the trustee from liability unless gross negligence was established, as “plainly *obiter*”: *ibid* at 714.

¹⁵ *Seton v Dawson* (1841) 4 D 310, *Knox v Mackinnon* (1888) 13 App Cas 753, *Rae v Meek* (1889) 14 App Cas 558, *Carruthers v Carruthers* [1896] AC 659, *Wyman v Paterson* [1900] AC 271, *Clarke v Clarke’s Trustees* [1925] SC 693. The Scottish cases, containing *dicta* which had previously been taken to indicate that no trustee exemption clause in a Scottish settlement could exonerate a trustee from his own “*culpa lata*” (gross negligence), were distinguished by Millett LJ as “merely decisions on the true construction of the particular clauses under consideration...”: *ibid* at 714.

present century, and none of them is authority for the proposition that it is contrary to public policy to exclude liability for gross negligence by an appropriate clause clearly worded to that effect”.¹⁶

7.13 Despite this conclusion, Millett LJ acknowledged that the view was widely held that trustee exemption clauses have “gone too far”, and that trustees who charge for their services and who, in the ordinary course of their business, would not conceive of excluding liability for ordinary professional negligence, should not be allowed to rely on trustee exemption clauses which allow them to exclude even *gross* negligence. Millett LJ emphasised that in finding that there was no public policy argument for denying the effectiveness of trustee exemption clauses in respect of gross negligence, this was not to say that there could be no change in the law, only that such change as might occur should be done by parliament, having consulted all relevant bodies.

(2) *Trust Law Committee Consultation Paper on Trustee Exemption Clauses*

7.14 As noted above,¹⁷ the Trust Law Committee in its *Consultation Paper on Trustee Exemption Clauses*¹⁸ suggested that there were six categories of trustee dereliction. The most controversial issue arising in this context is whether gross negligence can be considered to be a part of fraud in the context of trustee exemption clauses. The Trust Law Committee (“TLC”) noted that in *Armitage v Nurse*, Millett LJ considered that, whilst in civilian systems like Scotland gross negligence could properly be regarded as equivalent to fraud, English law had regarded “the difference between negligence and gross negligence as merely one of degree. English lawyers have always had a healthy disrespect for [this] distinction.”¹⁹

7.15 The TLC suggested that the force of the decision of Millett LJ could be diminished as “apparently influenced by the assumption that the court had to choose either to outlaw or to accept all clauses exempting trustees from liability for negligence because serious

¹⁶ *Armitage v Nurse* [1997] 2 All ER 705 at 715.

¹⁷ Paragraph 7.06.

¹⁸ (1999). Available from <http://www.kcl.ac.uk/depsta/law/tlc/consult.html> .

¹⁹ [1997] 2 All ER 710, 713.

consideration should not be given to outlawing exemption from liability for strict liability”.²⁰ As the TLC noted, there is a long and respectable line of authority which was not cited to the court, dealing with the concept of gross negligence in the common law and distinguishing it from ordinary negligence.²¹

7.16 The TLC also noted that there are a number of areas of English law where statutory provisions operate to affect the validity of exemption clauses. An example is section 192 of the *Companies Act 1985*, which deals with provisions in debenture trust deeds which purport to exempt or indemnify a trustee from or against liability for breach of trust; subsection (1) provides:

“Subject to this section, any provision contained –

- (a) in a trust deed for securing an issue of debentures or
- (b) in any contract with the holders of debentures secured by a trust deed

is void insofar as it would have the effect of exempting a trustee of the deed from, or indemnifying him against, liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretion”.

As the TLC notes, “this provision invalidates a clause exempting from mere negligence, let alone anything more serious.”²²

²⁰ Trust Law Committee *Consultation Paper on Trustee Exemption Clauses* (1999) at paragraph 2.8.

²¹ The TLC pointed to such decisions as *Giblin v McMullen* (1868) LR 2 PC 317 (distinguishing ordinary negligence from gross negligence in the context of bailments) and *The Hellespont Arden* [1997] 2 Lloyd’s Rep 547 (considering the effect of certain indemnity and exemption clauses in commercial contracts, where Mance J accepted that “ ‘gross negligence’ is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence”).

²² *Op cit* at paragraph 3.3. Legislative provisions with similar effect include section 33 of the *Pensions Act 1995* (liability for failure to take care or to exercise skill in the performance of investment functions exercisable by the trustees or the fund manager cannot be excluded or restricted by an instrument or agreement), section 253 of the *Financial Services and Markets Act 2000* (exemption for negligence not permitted for manager or trustee of unit trust), and section 310 of the *Companies Act 1985* (renders

7.17 In addition to its consideration of the decision in *Armitage v Nurse*, the TLC also referred to the decision of the Court of Appeal in *Bogg v Raper*.²³ In this case, it was held that an executor or trustee who drafts the trust of a testator or settlor may subsequently be allowed to invoke the protection of a very broad exemption clause, once the existence and effect of the clause was brought to the settlor's attention at the time of the drafting of the settlement. The Court of Appeal held that such clauses may be valid notwithstanding the fact that the trustee (who was a solicitor) may not have advised the settlor or testator to take separate and independent legal advice. The TLC noted that despite this decision, some solicitors remain "uneasy" and take steps not only to draw a settlor's attention to the existence of exemption clauses in a trust instrument, but also advising such settlors to take independent legal advice.²⁴

7.18 The TLC also expressed concern at what it described as "the tendency to treat trusts as though they were contracts" in modern trust law. Thus, for example, Millett LJ in *Armitage v Nurse* stated:

"It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. *What is true of a contract must be equally true of a settlement*".²⁵ [Emphasis added]

As noted by the TLC, the comparison of trusts to contracts can be misleading for two main reasons: the first is that a trust is a property relationship and not a contractual one, and the second that a trust is a fiduciary arrangement rather than a commercial one.

7.19 The TLC also noted the relevance in this context of the power of the court to relieve a trustee for any breach of trust, as provided by section 61 of the *Trustee Act 1925*. Section 61 states:

"If it appears to the court that a trustee ... is or may be personally liable for any breach of trust ... but has acted

void any provision exempting or indemnifying any officer of the company against any liability which might attach to him in respect of any "negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company").

²³ (1998/1999) 1 ITLER 267.

²⁴ *Op cit* paragraph 3.17.

²⁵ [1997] 2 All ER 705, 713.

honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same”.

The TLC noted the argument by some commentators that such provision, “bar a little fine tuning”, is all that is needed.²⁶ On the other hand, it was noted that the English courts had “expressed themselves as unlikely to apply that provision in favour of a professional, paid trustee”.²⁷ Furthermore, some commentators regard the reliance on a discretionary power of the court to relieve as being inherently uncertain, and would prefer a fixed standard as a means of ensuring certainty in such matters.

7.20 The TLC stated its preference for a relatively rigid rule to govern the area of trustee exemption clauses in the event of any reforms, on the basis that such an approach would be less costly and present fewer difficulties in practice. It was recommended that the rule concerning liability for dishonest breach of trust,²⁸ should be retained. The TLC also recommended a statutory provision, to the effect that trustees in receipt of remuneration for their services should not be permitted to rely on an exemption clause excluding liability for breach of trust arising from negligence. On the crucial question of whether the appropriate level was that of negligence or *gross* negligence, the TLC accepted that there was:

“much to be said for trust corporations and professional individuals paid for their services as trustees ... to accept the price of liability for negligence in acting as a paid trustee and to insure against such risk, with the premiums being reflected in the fees for the services provided”.²⁹

²⁶ The TLC pointed to comments made by Kessler (1998) 6 PTPR 137, 141-142.

²⁷ *Op cit* paragraph 6.3, referring to such cases as *National Trustee Co of Australasia v General Finance Co Ltd* [1905] AC 373 and *Re Pauling's Settlement* [1964] Ch 303.

²⁸ It was held in *Armitage v Nurse* that such liability could not be excluded; the TLC suggested that it seemed unnecessary to place such a rule on a statutory footing, unless it was decided to develop a codified provision.

²⁹ Trust Law Committee *Consultation Paper on Trustee Exemption Clauses* (1999).

7.21 The Committee’s provisional view was to outlaw the exclusion of liability for negligence, whether ordinary or gross. This provision would apply only to remunerated trustees; “unremunerated trustees would be free to rely on exemption clauses to exclude liability up to, but not including, dishonest breach of trust”.³⁰ As the TLC pointed out, if trustees do not receive any payment for the services they provide, it would not seem reasonable to expect them to have to pay for insurance cover. In order to counter any complaints that such proposal would constitute an unwarranted interference with settlor autonomy, it was also recommended that such prohibition would not apply to any trust “where it is proved that before the creation of the trust the settlor was given advice in writing, by a person reasonably competent in drafting trust documentation, and independent of the proposed trustee of the trust, drawing the settlor’s attention to the scope and effect of the provision concerned”.³¹

7.22 The TLC also considered the difficulties posed by attempting to prohibit or restrict clauses which exclude duties (thus ousting liability for breach of duty). Despite the various possibilities outlined as a means of dealing with this issue,³² the TLC ultimately decided that there would be little utility in such complex prohibitions. This was particularly so in light of the fact that “the circumstances of

³⁰ Trust Law Committee *Consultation Paper on Trustee Exemption Clauses* (1999) at paragraph 7.10.

³¹ *Ibid* at paragraph 7.18. Although it was accepted that such provision would make the creation of a trust more expensive, it was also pointed out that it would allow a “strong-minded settlor” to achieve his or her desired result whilst also offering protection to a settlor who may not fully understand the consequences of such provisions without the benefit of proper advice.

³² Amongst the proposals considered was a formula based on the prohibition on clauses exempting liability for breach of duty such as:

“a provision in a trust purporting, whether wholly or partly, to negative a positive duty that in the absence of such provision would otherwise lie on the trustee is void to the extent that such trustee could not rely on an exemption clause purporting to relieve from liability for such breach of duty”.

However, the TLC also noted that such a provision would extend only to *positive* duties, and that an attempt by a settlor to exclude *negative* duties (eg not to invest other than in a prescribed manner) would raise several further complications.

each trust can be so various that what normally cannot be justified can be justified in special circumstances”.³³

(3) Law Commission of England and Wales Consultation Paper on Trustee Exemption Clauses

7.23 The Law Commission of England and Wales also tackled the issue of trustee exemption clauses in a Consultation Paper published in 2002.³⁴ This paper to a large extent built on the earlier observations of the TLC, and indeed agreed with many of the key proposals of the TLC paper, whilst also providing an account of more recent developments under English law in this area.

7.24 Commenting on recent trends in this area, the Law Commission noted that:

“as the powers of trustees have increased as a result both of express provisions in trust instruments and by legislation, so has the breadth of trustee exemption clauses. When coupled with the less restrictive approach recently adopted by the courts to the construction of exemption clauses, it can be strongly argued that the protection offered to beneficiaries, one of the prime concerns of trust law, is weaker than in the past”.³⁵

7.25 The Law Commission considered the decision of Millett LJ in *Armitage v Nurse*,³⁶ and gave a detailed consideration to the proper construction to be afforded to the 19th century case law from both England and Scotland on the question of exclusion of liability for negligence and gross negligence on public policy grounds. The Law Commission suggested that:

“the authority of *Armitage v Nurse* (as a decision of the Court of Appeal and not the House of Lords) is not entirely free from doubt. The view taken of the nineteenth century Scottish cases does not accord with the understanding of these decisions north of the border, where it is generally

³³ *Op cit* paragraph 7.15.

³⁴ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2002).

³⁵ *Op cit* at (vi).

³⁶ [1997] 2 All ER 705.

believed that trustees cannot invoke an exemption clause to escape liability for gross negligence...”.³⁷

Although it was accepted that there was no reason why English and Scottish law should be identical, the Law Commission nevertheless suggested that the reliance placed by Millett LJ on the Scottish cases was central to the conclusions ultimately reached, and thus if the reliance was shown to have been misplaced, the authority of the decision could be called into question.

7.26 One issue to which the Law Commission gave particular consideration was the economic implications of regulating trustee exemption clauses. To this end, the Law Commission circulated questionnaires to professional and lay trustees, and also to legal advisers to trustees and settlors, with a view to ascertaining the precise impact of greater regulation of this area of trust law. Of particular concern was the possibility that the location of a trust might be influenced by regulatory concerns, that is trust operations might be moved to a jurisdiction with less stringent controls. However, such concerns have since been superseded by developments within the Organisation for Economic Co-operation and Development (“OECD”), whereby a “blacklist” of jurisdictions has been identified by the OECD’s Committee on Fiscal Affairs as unco-operative tax havens.³⁸

7.27 However, a concern which remains in respect of greater regulation is the possibility of professional trustees increasing their charges for trust management, particularly in relation to increased insurance costs in the event of a prohibition on the exclusion of liability for negligence or gross negligence.³⁹ Other concerns

³⁷ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2002) at paragraph 2.54.

³⁸ OECD “List of Un-Cooperative Tax Havens” 18 April 2002. The effect of being named as an unco-operative tax haven is considered by J.C. Sharman, in a paper entitled “International Organisations, Blacklisting and Tax Haven Regulation”, presented at the European Consortium on Political Research Joint Sessions Uppsala, Sweden, 13-18 April 2004, where he notes that inclusion on this blacklist has the potential to damage tax havens’ reputations among investors, and thus lead to “capital flight and material economic damage”.

³⁹ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2002) at paragraph 3.61.

included the possibility that regulation of trustee exemption clauses would lead to an increase in “over-cautious or defensive trusteeship”,⁴⁰ including excessive use of lawyers, accountants and other professionals which would incur greater costs, as well as encouraging the pursuit of low-risk investment portfolios.

7.28 The Law Commission accepted that greater regulation of trustee exemption clauses would have “some impact” on the level of remuneration sought by professional trustees. In terms of the effect of greater regulation on lay trustees, it was suggested that they might be caused to seek to have their own insurance costs paid out of the trust fund. The question which then fell to be considered is whether in the light of such factors, there was still a strong case to be made for interfering with settlor autonomy in dictating the terms of the trust.

7.29 The compromise ultimately reached by the Law Commission agreed with the proposal of the TLC that a distinction should be drawn between professional and lay trustees. As the Law Commission noted:

“[t]he lay trustee is still of immense importance in relation to family trusts (where he or she will often be a family member) and in relation to charitable trusts. Such trusts often rely on the sense of duty and public-spiritedness of individuals to take on the responsibilities of trusteeship altruistically”.⁴¹

7.30 In contrast, professional trustees are remunerated for their services, on the basis of their professional qualifications to hold such posts. As such, it would not seem unfair to require them to meet a standard of conduct befitting that of a reasonable, prudent professional trustee. The Law Commission also noted that many, if not most, professional trustees would already be covered by indemnity insurance, so that their insistence that the trust instrument contain a trustee exemption clause is more of a “belt and braces” approach, rather than reflecting a genuine need for professional trustees to be protected from any finding of liability consequent upon a breach of trust.

⁴⁰ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2002) at paragraph 3.70.

⁴¹ *Ibid* at paragraph 4.4.

7.31 The Law Commission recommended that the definition by which the distinction between professional and lay trustees would be made should follow the formulation set out in the *Trustee Act 2000*. Section 28(5) of the 2000 Act provides that a trustee acts in a professional capacity if he or she acts in the course of a profession or business:

“which consists of or includes the provision of services in connection with-

(a) the management or administration of trusts generally or a particular kind of trust, or

(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.”

Section 28(6) deals with the definition of lay trustees, providing:

“For the purposes of this Part, a person acts as a lay trustee if he-

(a) is not a trust corporation, and

(b) does not act in a professional capacity.”

The Law Commission also noted that this definition was broader than that proposed by the TLC, which suggested that the definition of a professional trustee should be based on whether the trustee was being remunerated in the circumstances for his or her services as trustee.⁴²

7.32 In terms of whether the prohibition on trustee exemption clauses for professional trustees should extend to negligence or be restricted to gross negligence, the Law Commission found the views of the TLC on this issue to be convincing,⁴³ although it was accepted that:

“any legislative provision denying professional trustees resort to exemption clauses where they have been guilty of gross negligence would have to reflect the fact that the

⁴² Trust Law Committee *Consultation Paper on Trustee Exemption Clauses* (1999) at paragraph 7.7.

⁴³ See above, paragraph 7.20.

definition is at best imprecise, and that the courts would inevitably be afforded an element of latitude in determining when trustee misconduct is sufficiently severe as to be termed gross negligence”.⁴⁴

7.33 The Law Commission was of the view that such a proposal would introduce an undesirable level of uncertainty into the law in this area, in the light of the insufficiently clear definition of the concept of gross negligence. Instead, the Law Commission sought submissions on the proposal that professional trustees should be unable to rely on a trustee exemption clause where their conduct was “so unreasonable, irresponsible or incompetent” that it should not be excused.⁴⁵ The Law Commission further provisionally proposed that professional trustees should not be permitted to rely on any trustee exemption clause to excuse breach of trust arising from negligence, and that clauses purporting to confer such exemption should not be given effect.⁴⁶

7.34 Finally, the Law Commission also considered the possibility of placing restrictions on the various other mechanisms by which trustees may seek to restrict or exclude their liability in the event of a breach of trust.⁴⁷ In relation to indemnity clauses, it was provisionally suggested that insofar as professional trustees would be prevented from excluding liability for breach of trust, they should not be permitted to claim indemnity from the trust fund. The issues of duty exclusion clauses and extended powers clauses proved somewhat more problematic, and the Law Commission was of the view that such clauses such not be prohibited altogether. Instead, it was proposed that:

“in determining whether professional trustees have been negligent, the courts should have the power to disapply duty exclusion clauses or extended powers clauses where reliance on such clauses would be inconsistent with the overall purposes of the trust and it would be unreasonable in

⁴⁴ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2002) at paragraph 4.77.

⁴⁵ *Ibid* at paragraph 4.78.

⁴⁶ *Ibid* at paragraph 4.85.

⁴⁷ See paragraph 7.04 above.

the circumstances for the trustee to be exempted from liability”.⁴⁸

C Scotland

7.35 The Scottish Law Commission also recently considered the issue of immunity clauses restricting the liability of trustees.⁴⁹ Beginning with a comprehensive review of the 19th century Scottish case law which was referred to in *Armitage v Nurse*, the Scottish Law Commission noted Millett LJ’s view that these cases did not represent a general principle, but rather were a product of the construction on their own facts. The Scottish Law Commission strongly disagreed with this interpretation, concluding that

“the Scottish law on immunity clauses remains as stated in the 19th century cases. Gross negligence or gross breach of duty is regarded as tantamount to dole or fraud and cannot be excused: *culpa lata dolo aequiparatur*”.⁵⁰

7.36 Nevertheless, the Scottish Law Commission accepted that there was a need for legislative intervention in this area, if only to counteract any lingering uncertainty in the wake of the decision of Millett LJ in *Armitage v Nurse*. The Scottish Law Commission thus recommended that:

“[a]n immunity clause which purports to exclude liability for fraud should ... be ineffective as a matter of public policy. Fraud in this context means a deliberate disregard for the interests of the beneficiaries or reckless indifference to their interests and contains an element of dishonesty.”⁵¹

7.37 The Discussion Paper also considered the question of whether it would be preferable to confer upon the courts a discretionary power to strike down trustee exemption clauses (as was recommended by the Law Commission of England and Wales) or to

⁴⁸ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2002) at paragraph 4.97.

⁴⁹ Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003).

⁵⁰ *Ibid* at paragraph 3.17, meaning “Gross negligence is equivalent to intentional wrong”.

⁵¹ *Ibid* at paragraph 3.19.

have a fixed rule on immunity clauses which would apply in all cases. The Scottish Law Commission was of the view that the discretionary power would provide insufficient certainty, and that it would take several years to build up a body of case law clarifying the scope of any such rule.

7.38 The Scottish Law Commission suggested that there were three main options for a fixed rule on trustee exemption clauses:

- (a) An immunity clause could be declared ineffective in so far as it purports to exclude liability for negligence, gross negligence or fraud.
- (b) An immunity clause could be effective to exclude liability for negligence but not for gross negligence or fraud.
- (c) An immunity clause could be effective to exclude liability for negligence and gross negligence, but not fraud.⁵²

7.39 The Discussion Paper acknowledged that there had been much debate as to whether or not gross negligence is a “workable concept”. Reference was made to cases such as *The Hellespont Arden*⁵³, and other areas of civil law where the concept of gross negligence has been applied by the common law courts,⁵⁴ the Commission concluded that there was no reason in principle why the concept of gross negligence would not continue to be a workable concept in Scottish law.⁵⁵ However, it was acknowledged that “it is impossible to draw a hard and fast line between negligence and gross

⁵² Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.22.

⁵³ [1997] 2 Lloyds Rep 547.

⁵⁴ Discussed above at fn 21. The Scottish Law Commission also referred to the *dicta* of Rolfe B in *Wilson v Brett* (1843) 11 M & W 113, 116 where he stated that he “could see no difference between negligence and gross negligence, that it was the same thing, with the addition of a vituperative epithet”. Weir *Tort Law* (OPU 2002) at p. 65 “vituperatively” disagrees, saying “it is nothing of the sort; it is no more difficult to say whether a person fell far below the acceptable standard than whether he fell below it at all. There is no real difficulty in saying whether conduct is more or less negligent...”. (See *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.27).

⁵⁵ This was based partly on the already established position of gross negligence under Scottish law; the Scottish Law Commission accepted that the concept was not so well grounded in other common law jurisdictions.

negligence, but difficulties in establishing boundaries occur throughout the law, for example whether or not an agreement was fair in all the circumstances”.⁵⁶

7.40 The Scottish Law Commission also agreed with the conclusions of its English counterpart, that a distinction should be made between professional and lay trustees, with professionals being “liable for breaches of their duty of care, whatever the terms of the immunity clause.”⁵⁷ Thus, it was recommended that lay trustees would be liable for breaches of trust constituting gross negligence only, but that trustee exemption clauses would be effective to exculpate lay trustees from liability for ordinary negligence. Professional trustees, however, would be held liable for any breach of trust caused by negligence, whether ordinary or gross, irrespective of the contents of any immunity clause within the trust instrument.

7.41 In terms of other means of restricting the liability of trustees, the Discussion Paper considered the issues of duty exclusion clauses and extended powers clauses, but ultimately agreed with the conclusions of the TLC doubting “the utility of such complex provisions as in the circumstances of a specified trust a particular abridgement clause might be justifiable”.⁵⁸ However, on the issue of indemnity clauses the Scottish Law Commission accepted that the regulation of such clauses follows inevitably from the regulation of exemption clauses⁵⁹ and thus proposed that indemnity clauses in trust instruments should be ineffective to the same extent as trustee exemption clauses.

D British Columbia

7.42 In 2002 the British Columbia Law Institute (“BCLI”) published a report on *Exculpation Clauses in Trust Instruments*,⁶⁰

⁵⁶ Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.30.

⁵⁷ *Ibid* at paragraph 3.41.

⁵⁸ *Ibid* at paragraph 3.58.

⁵⁹ This arises because the effect of an indemnity clause is to entitle trustees who incur personal liability in respect of the trust to be reimbursed from the trust funds; as noted by the Scottish Law Commission, this “effectively recycles the liability back to the beneficiaries”: *ibid* at paragraph 3.61.

⁶⁰ (BCLI Report No 17 2002).

under the aegis of its “Committee on the Modernization of the Trustee Act”.

7.43 Addressing first the extent to which a trustee may be permitted to exclude liability without trespassing upon the “irreducible core of obligations” owed by trustees to the beneficiaries, the BCLI noted the divergence in approach taken by various jurisdictions. Thus, whilst it noted that the English Court of Appeal in *Armitage v Nurse* saw:

“no public policy or other ground to find such exculpatory clauses unenforceable, the courts of the United States generally view the exoneration of a trustee’s gross negligence to be against public policy”.⁶¹

Indeed, the BCLI noted that statute law in the State of New York and the island of Jersey render such exemption clauses unenforceable.⁶²

7.44 The legal position in Canada in relation to the acceptable scope of trustee exemption clauses is unclear. The BCLI found only one authority directly on the point, *Re Poche*.⁶³ In this case, the testator by his will created a trust, which named his wife and daughter as beneficiaries, and appointed his sister as trustee. The trustee failed to convert trust assets into income-generating securities, despite being advised by her solicitor and others that it was necessary under Canadian law to do so. She also failed to keep accounting records, and was unable to account for sums amounting to approximately \$7,000 from the trust fund. A previous application to remove the trustee had been successful, and the question which then fell to be considered by the court was whether the trustee was absolved of liability by reason of the trustee exemption clause contained in the trust instrument.

7.45 The trust instrument contained a clause providing that the trustee was not to be liable for any loss except that which was caused

⁶¹ *Ibid* at 1. The English authority referred to is *Armitage v Nurse*, whilst the source of the American material is cited as Scott *The Law of Trusts* (4th ed W Fratcher) Vol III at paragraphs 222 and 222.3.

⁶² Article 5(c) of the *Trusts (Amendment)(Jersey) Law 1989* provides that: “Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence”.

⁶³ (1984) 6 DLR (4th) 40 (Alta Surr Ct).

by her own dishonesty or wilful breach of trust. Nevertheless Hetherington J held that under Canadian law, such a clause could not exempt a trustee from gross neglect, of which he found as a matter of fact that the trustee had been guilty. In reaching this conclusion, Hetherington J relied on a relatively old line of English and Scottish authorities which stated that it was contrary to public policy to allow a trustee to be exempted from liability for grossly negligent conduct.⁶⁴ These were the same cases which Millett LJ in *Armitage v Nurse* subsequently confined to their own facts, rejecting the proposition that they expressed a binding general principle of public policy disallowing such clauses. Thus, Hetherington J concluded:

“I am persuaded by the reasoning in these [English and Scottish] cases. In my opinion, a trustee must be held responsible for any loss resulting from his gross negligence, regardless of any provision in the trust instrument relieving him from such liability”.⁶⁵

7.46 As a result of the conflict in the reading of these cases given by Millett LJ in *Armitage v Nurse* and Hetherington J in *Re Poche*, the BCLI suggested that the issue of the valid extent to which trustee exemption clauses could exclude liability remained “very much open in all Canadian judicial forums except the trial level courts of Alberta”.⁶⁶

7.47 Considering that the legal status of exculpation clauses was thus a matter “ripe for legislative restatement of one form or another”,⁶⁷ the BCLI went on to examine the desirability of a principle which would prohibit trustee exemption clauses operating to exclude liability for gross negligence. Describing the trustee exemption clause, at its simplest level, as a risk allocation device, the BCLI also referred to the comments of the TLC on the distinction between professional and lay trustees, and how this informs the debate on trustee exemption clauses. The BCLI also noted the relevance in this

⁶⁴ See eg *Wilkins v Hogg* (1861) 31 LJ Ch 41, *Pass v Dundas* (1880) 43 LT 665, *Seton v Dawson* (1841) 4 D 310, *Knox v Mackinnon* (1888) 13 App Cas, *Rae v Meek* (1889) 14 App Cas 558, *Carruthers v Carruthers* [1896] AC 659.

⁶⁵ *Op cit* at 55.

⁶⁶ (BCLI Report No 17 2002) at 2.

⁶⁷ *Ibid.*

area of section 96 of the *British Columbia Trustee Act*,⁶⁸ which confers upon the courts of British Columbia a discretion to exonerate a trustee (either wholly or in part) who has committed a breach of trust, where the court is satisfied that the trustee has acted honestly and reasonably and ought fairly to be excused in all the circumstances of the case.

7.48 The BCLI commended the flexibility inherent in this section, noting that it allows the court, if it sees fit, to distinguish between “professional trustees and unrewarded family members”. The BCLI was also satisfied that section 96 was working well, and considered the question of whether any further legislative provision was required. In its *Consultation Paper on Exculpation Clauses in Trust Instruments*,⁶⁹ the BCLI recommended the introduction of a provision nullifying the effect of trustee exemption clauses and to make section 96 of the *Trustee Act* as the sole source of relief for trustees in default.⁷⁰ This proposal was the subject of “uniformly critical”⁷¹ responses, although such responses were almost wholly submitted by the trustee sector, who expressed concern that the proposal took insufficient regard for the principle of settlor autonomy, and also the potential for “trustee chill”, bringing reluctance to take on trusteeship.

7.49 Having considered these responses, the BCLI in its final report on the subject moved away from the proposal for a blanket ban on trustee exemption clauses; instead, an alternative regime of discretionary relief was suggested. Under such scheme, a trustee exemption clause would be regarded as effective according to its terms, and the onus would be placed on a beneficiary to apply to court

⁶⁸ [RSBC 1996].

⁶⁹ (October 2000).

⁷⁰ This mirrored the recommendation made by the Ontario Law Reform Commission in its *Report on the Law of Trusts* (Ontario 1984) at 40, which suggested that clauses exempting trustees, whether professional or lay, from liability for breach of trust should be deprived of effect, with the remedy instead for a trustee seeking to be absolved of liability to make an application pursuant to the Ontario equivalent of section 96 of the *British Columbia Trustee Act* [RSBC 1996]. (This recommendation was not acted upon by the Ontario legislature).

⁷¹ (Report No 17 2002) at 10.

and to establish that relief from the legal consequences of the clause is justified.⁷²

E New Zealand

7.50 In 2002, the New Zealand Law Commission issued a Report entitled “Some Problems in the Law of Trusts”,⁷³ which addressed nine separate aspects of modern trust law which were thought to be in need of reform. Amongst the matters considered was the issue of “exculpating trustees” by way of trustee exemption clauses.

7.51 Section 13D(1) of the *Trustee Act 1956* effectively provides that certain duties imposed on trustees under the 1956 Act apply “if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust or any Act”. The Law Commission notes that the effect of this provision is to accept the possibility of valid trustee exemption clauses under New Zealand law.

7.52 However, the Law Commission also notes the effect of section 8(b) of the *Superannuation Schemes Act 1989* which disapplies section 13D(1) in the context of superannuation schemes, thus rendering clauses which purport to exculpate negligent trustees in respect of such schemes of no effect. The New Zealand Law Commission suggested that “the existence of this provision provides one answer to the suggestion that restricting the effectiveness of exculpation provisions would result in ‘trustee chill’”, in that the provision had been operative since 1989 without leading to the demise of trusteeship of superannuation schemes in New Zealand.⁷⁴

7.53 In formulating an acceptable proposal for reform of this area, the New Zealand Law Commission noted that the issue of trustee exemption clauses could not be considered in isolation, but

⁷² The formulation suggested in the Report was as follows:

“Where it appears to the court that the conduct of a trustee would constitute a breach of trust, and has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be excused the court may declare that any exemption clause contained in the trust instrument is ineffective in relation to the breach of trust, and the liability of the trustee for breach of trust be determined as if the trust instrument did not contain the clause.”

⁷³ (Report 79 2002).

⁷⁴ *Ibid* paragraph 8, fn 9.

rather must be considered in conjunction with section 73 of the *Trustee Act 1956*. This section confers a discretion on the New Zealand courts to relieve trustees from personal liability for breach of trust where it appears to the court that the trustee acted “honestly and reasonably, and ought fairly to be excused for the breach of trust”.⁷⁵

7.54 The option for reform ultimately favoured by the New Zealand Law Commission involved drawing a distinction between professional and lay trustees. The recommendations of the Ontario Law Reform Commission had not drawn such a distinction on the basis that “a professional trustee should be carrying insurance, and a non-professional trustee who is sufficiently unsure of his competence to require such safeguards should not accept the office”.⁷⁶ However, the New Zealand Law Commission disagreed with this approach, because it:

“overlooks the fact that many trustees are appointed not because of their professional expertise but because of such factors as closeness to the family and the testator’s or the settlor’s confidence in the reliability of their judgement in such matters as the exercise of the powers of appointment”.⁷⁷

7.55 Ultimately, the New Zealand Law Commission characterised the fundamental question underlying this debate as whether losses should be borne by trustees or beneficiaries. Thus, it noted “it is appropriate in considering loss allocation, as between two classes, to take into account which class is in a better position to insure against the loss”.⁷⁸ However, in order to avoid penalising lay trustees who act out of a sense of civic duty or familial obligation, and who may not be aware of the need for such insurance or may

⁷⁵ Similar provisions are of course a familiar feature of trust law in many common law jurisdictions; indeed, the New Zealand Law Commission notes that this originally English measure “has been copied in all the provinces of Canada except Prince Edward Island, and in all Australian states”: *Some Problems in the Law of Trusts* (Report 79 2002) at paragraph 9.

⁷⁶ Ontario Law Reform Commission *Report on the Law of Trusts* (Ontario 1984) at 40.

⁷⁷ New Zealand Law Commission *Some Problems in the Law of Trusts* (Report 79 2002) at paragraph 11.

⁷⁸ *Ibid* at paragraph 14.

simply be unable to obtain such cover, the formulation proposed was as follows:

“a provision of a trust instrument purporting to exonerate a trustee who acts as such for reward from liability for failure to exercise the degree of care, diligence and skill required by the law, shall have no effect”.

7.56 The New Zealand Law Commission also addressed the issue of duty exclusion clauses, which may also be used to limit the scope of a trustee’s liability for breach of trust. The Trust Law Committee of England and Wales declined to make specific recommendations on this issue as a result of the complexities which any provision regulating such clauses would necessarily contain.⁷⁹ However, the provision proposed by the Law Commission of New Zealand appears to be admirably clear and concise, providing:

“... a provision in the instrument creating a trust limiting the degree of care, diligence and skill required of a trustee shall, in the case of a trustee who acts as such for reward, be of no effect”.

F Options for Reform

(1) *The case for regulation*

7.57 The first issue which must be considered is whether there should be any regulation of trustee exemption clauses at all. The arguments against regulation of this area may be summarised as follows:

- (a) The principle of settlor autonomy states that settlors should enjoy freedom to dictate the terms of the trust instrument;
- (b) Beneficiaries obtain their interest as a gift, and thus ought not to be permitted to query the terms on which such gift is made, as dictated by the settlor;
- (c) Regulation of trustee exemption clauses could result in “trustee chill”, *ie* a reluctance of professional trustees to take on the duties of trusteeship;

⁷⁹ Trust Law Committee in its *Consultation Paper on Trustee Exemption Clauses* (1999) at paragraph 7.15.

(d) Those trustees who would be willing to accept the duties of trusteeship under a new regulatory scheme would inevitably charge more for their services, thus increasing the cost of trust administration.

7.58 The contrary arguments, in favour of regulation of trustee exemption clauses, may be stated as follows:

(a) Some commentators question whether the existence of trustee exemption clauses is attributable to an exercise of settlor autonomy, suggesting that it is more a product of standard form drafting procedures and a lack of awareness on the part of the settlor.⁸⁰

(b) Whilst the beneficiary's entitlement comes about by way of a gift, they will ultimately be the ones affected by the operation of a trustee exemption clause, not the settlor, and thus should be permitted some input into the process, particularly in respect of matters such as trustee exemption clauses which can impact heavily upon the beneficiaries;

(c) There are a number of jurisdictions which have introduced legislation restricting the effectiveness of immunity clauses,⁸¹ and there is no evidence to suggest that such regulation has had any impact on willingness to accept trusteeship;

(d) Whilst there would be increased costs to the trust as a result of trustees passing on the effect of higher insurance premiums, it might be argued that as a matter of risk allocation, it is more satisfactory to require trustees to insure against liability than to allow them rely on trustee

⁸⁰ See also the comments of the British Columbia Law Institute, who suggested that "while the concept of settlor autonomy is entitled to great respect, it should not be permitted to override the protection of beneficiaries which has been the central concern of the law of trusts for hundreds of years": *BCLI Report on Exculpation Clauses in Trust Instruments* (No 17 2002) at 10.

⁸¹ Notably Jersey and Guernsey; in 1989, Article 26(9) of the *Trusts (Jersey) Law 1984* was amended to provide: "Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence". In 1990, Guernsey amended section 1(f) of its *Trust Law 1990* to bring it into line with that of Jersey.

exemption clauses, particularly in light of the fact that it may not be possible for beneficiaries to obtain such insurance.⁸²

7.59 *The Commission recommends that there is a need for regulation of trustee exemption clauses, such that liability for breach of the irreducible core obligations of trustees may not be excluded.*

(2) *Distinguishing between professional and lay trustees*

7.60 Before considering the extent of any regulation of trustee exemption clauses, it is necessary to consider whether a distinction should be drawn between professional and lay trustees or whether a single standard should apply to all trustees.

7.61 The argument in favour of differentiating between these two types of trustees rests mainly on the issue of qualifications. Professional trustees hold themselves out as having some particular ability or expertise which qualifies them to hold the office of trustee, and they charge for their services accordingly. Indeed, as noted by the Scottish Law Commission, the professionals who tend to operate as professional trustees (solicitors, accountants, bankers etc) “do not generally act for their clients in other areas of work on the basis that they are to be immune from claims for negligence”.⁸³ Thus, it may be asked why an anomaly in trust law should allow this otherwise abnormal situation to continue.

7.62 From the perspective of lay trustees, it may be argued that they should not be held to the same standard as professional trustees because they do not purport to have the same level of qualification or expertise to hold the office of trustee, but may instead agree to take on the position as a result of some personal connection to the settlor

⁸² Indeed, the Scottish Law Commission notes that:

“even adult vested beneficiaries may find it difficult to obtain this. Insurance for contingent beneficiaries and young children would present additional problems, while it would be impossible for unascertained future beneficiaries to insure themselves”: see *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.34.

⁸³ *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.41. The Scottish Law Commission also notes that professional trustees can easily obtain insurance against negligence claims, and indeed, certain professionals may be subject to an obligation to have professional indemnity insurance before being entitled to practice.

or a more general community-based sense of obligation. Furthermore, whilst professional trustees are generally well remunerated for their services, lay trustees may not receive any remuneration at all.⁸⁴

7.63 Support for the proposition that it is fair to distinguish between professional and lay trustees in respect of liability for negligent breach of trust may be found in the proposals of the Trust Law Committee, Law Commission of England and Wales, Scottish Law Commission, British Columbia Law Institute and the New Zealand Law Commission.

7.64 It would appear that only the Ontario Law Reform Commission was of the view that lay trustees should be subject to the same standard as professional trustees, on the basis that persons who are unsure of their ability to act competently as trustees should decline to take up the position.⁸⁵ Many commentators have rejected this analysis as overly-simplistic, pointing out that this approach might well discourage potential lay trustees from taking up positions, to the great detriment not only of family settlements but also public trusts which benefit greatly from the input of lay trustees.⁸⁶

7.65 In addition to the academic support for distinguishing between lay and professional trustees, it is also necessary to consider the attitude of the courts to this question. There has long been judicial support for drawing such a distinction; indeed, the approach of the courts to the standard and duty of care to which a trustee is subject has long recognised the inequity which would be caused by the application of one uniform standard of care.⁸⁷ In the context of

⁸⁴ Indeed, Delany notes “[a]s a general principle, a trustee is not entitled to remuneration for work carried out by him in his capacity as trustee”, and unless the trust instrument makes provision for such remuneration, there exist only a limited number of situations in which a court may order such remuneration to be paid”; see *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall) at 416-418.

⁸⁵ *Report on the Law of Trusts* (No 79 1984).

⁸⁶ See Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 3.45.

⁸⁷ See further Chapter 3 above, on the duty of care, and such cases as *Bartlett v Barclays Bank* [1980] Ch 515. A similar suggestion was made by Harman J (*obiter*) in *Re Waterman’s Will Trusts* [1952] 2 All ER 1054, at 1055. See also *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260.

trustee exemption clauses, there is also support for this distinction. A recent English case of interest in this context is *Walker v Stones*.⁸⁸ The claimants were the beneficiaries of a discretionary trust, the only asset of which was the shares in a company which owned a majority of the shares in another company. The claimants alleged that the trustees had committed breaches of the trust by applying the trust assets or exercising their discretions thereunder for the benefit of others. An exemption clause in the trust deed excluded the trustees from liability for anything done “in the professed execution of the trusts and powers hereof” other than dishonesty.

7.66 Rattee J at first instance had refused to allow claims of dishonesty to be made against one of the trustees because the trustee, although knowing that he was breaching the trust, had acted in a genuine belief that what he was doing was for the benefit of the beneficiaries. Support for this proposition was derived from the judgment of Millett LJ in *Armitage v Nurse*.⁸⁹ However, the Court of Appeal added a qualification to this statement, stating that in the case of a solicitor-trustee it was necessary to consider whether the trustee's so-called “honest belief”, though actually held, was so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries. Sir Christopher Slade stated that this proposition was limited to the present case of a solicitor-trustee because the test of honesty varied from case to case, depending on, among other things, the role and calling of the trustee.

7.67 Reference should also be made to the case of *Wight v Olswang*.⁹⁰ The defendants were solicitor-trustees of a settlement which held shares in a company. The plaintiff beneficiaries alleged that the solicitor-trustees had failed to carry out certain share sales which they ought to have done, with a resulting loss caused to the trust fund for which they sought to have the trustees made liable. The Court of Appeal held that where there were two conflicting trustee indemnity clauses in the same deed, one which applied to all trustees

⁸⁸ [2001] QB 902.

⁸⁹ [1998] Ch 241, 250-251, where he stated “by consciously acting beyond their powers 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 interests of the beneficiaries their conduct is not fraudulent”.

⁹⁰ *The Times* 18 May 1999.

(whether paid or unpaid), and the other which applied only to unpaid trustees, the latter prevailed and the professional trustees were thus not entitled to rely on the more generous provision. In addition to its relevance to the applicability of trustee exemption clauses to professional trustees, this decision also reflects the general rule of construction in respect of such clauses known as the “*contra proferentum*” rule, which says that any provision in a trust deed which benefits trustees must be construed strictly, *ie* any doubt or ambiguity must be resolved so as to provide as little benefit as possible to the trustees.

7.68 Finally, consideration should be given the position of a trustee who has been involved in the drafting of a trust instrument which contains an exemption clause which could subsequently operate in favour of that trustee. This issue arose in the English case of *Bogg v Raper*.⁹¹ In this case, the testator’s estate was sworn for probate at a value of £8million. The executors of the will were a solicitor and an accountant. Within two years of the date of death of the testator, the holdings were virtually worthless, and the beneficiaries sought to have the trustees declared liable for the losses on the basis that they had been caused by the negligence of the trustees. In a preliminary application, the solicitor-trustee sought to have the claim struck out on the basis that it was bound to fail as the conduct complained of fell within the terms of an exemption clause contained in the trust instrument. In response, the beneficiaries sought to argue that the solicitor-trustee was not entitled to rely on the exemption clause contained in the will because of his involvement in drawing up the will, and furthermore that it was to be inferred that in breach of his duty to the testator, the solicitor-trustee had failed to explain the effect of the exemption clause to him.

7.69 This argument was forcefully rejected by the Court of Appeal. According to Millett LJ, the “fundamental fallacy in the argument is that [the exemption clause] does not confer a benefit on the persons responsible for advising the testator on the contents of his will.”⁹² Millett LJ did not regard the inclusion of the exemption clause as a transaction in which the testator and those advising him had conflicting interests; it was “not a transaction in which one would

⁹¹ (1998/1999) 1 ITLER 267.

⁹² *Ibid* at paragraph 47 of the judgment.

expect the testator to be separately represented".⁹³ In so far as a benefit was conferred, it was a benefit which could be enjoyed by any person assuming the role of trustee and was not exclusive to those who had participated in the preparation of the testator's will.

7.70 Thus, the court accepted that the duty of a trustee in this position would be to advise the testator as to the terms on which trustees could be asked to accept office, extending even to a solicitor-trustee in such a position informing the testator that he himself would not accept the office of trustee without the inclusion of a wide exemption clause. However, Millett LJ did accept that if a trustee who is also the drafter of a trust instrument includes an exculpatory clause in the trust instrument without calling the settlor's attention to it and ensuring the effect of such provision is understood, such trustee may not be permitted subsequently to rely on that clause.

7.71 The decision in *Bogg v Raper* has been the subject of some criticism. Hayton and Marshall have queried the correctness of Millett LJ's statement that no benefit could be said to accrue to a trustee in such a position, noting that such benefit might be found in the fact that the solicitor would be saved the expense of obtaining insurance which would otherwise be payable to protect him from liability.⁹⁴ The Trust Law Committee considered a number of options in this regard,⁹⁵ including:

- A requirement that testators and settlors be required to sign a form verifying that the exemption clause had been brought to their attention and explained prior to the execution of the trust instrument;
- The introduction of a provision invalidating trustee exemption clauses unless the trustee can show that the settlor was offered an option that did not include the clause;⁹⁶

⁹³ *Bogg v Raper* (1998/1999) 1 ITLR 267 at paragraph 47.

⁹⁴ *Law of Trusts and Equitable Remedies* (11th ed 2001) paragraph 9-311.

⁹⁵ *Consultation Paper on Trustee Exemption Clauses* (1999) at paragraph 7.3 *et seq.*

⁹⁶ Subject however to the possibility of higher remuneration being paid to the trustee as a result.

- The introduction of a provision which would prevent a trustee from relying on an exemption clause unless it can be shown that the settlor had received legal advice on the effect of the clause prior to execution of the trust instrument (consideration was given to requiring that such legal advice be given independently of the trustee).

7.72 The Law Commission of England and Wales also addressed the difficulties which can occur where a trustee has been involved in the drafting of the trust instrument.⁹⁷ However, the Law Commission ultimately concluded that there were “serious limitations” on this type of reform. Although it urged as a matter of good practice that all drafters of trusts bring the existence of trustee exemption clauses to the attention of the settlor, explain clearly its implications and explain the alternatives which may be available, it did not consider that a statutory requirement of this kind was appropriate. This was justified on the basis that there would be “considerable evidential difficulties” facing a beneficiary who wished to prove that the settlor had not been made aware of the inclusion of the clause. Furthermore, it was felt that to focus on the settlor in this manner would not be likely to achieve the desired result of balancing the rights of trustees and beneficiaries, since it is only the settlor’s consent to the inclusion of the clause would be material, and the beneficiary would have no power over the settlor in this regard.

7.73 However, there continue to be concerns as to the frequency with which exemption clauses are included in trust instruments almost as a matter of course, despite the warnings given by Millett LJ (above at paragraph 7.70) in respect of good practice in such matters. Thus, Kessler⁹⁸ argues that exemptions for negligence are wrong in principle and cites in support of this view precedents recommending that the exempting form should only be used in “special circumstances”⁹⁹ or, if used, that they should be restricted to unpaid trustees.¹⁰⁰

⁹⁷ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at paragraph 4.41-4.45.

⁹⁸ *Drafting Trusts and Will Trusts A Modern Approach* (3rd edition) at 57-58.

⁹⁹ Prideaux’s *Forms and Precedents in Conveyancing* (25th edition 1959) at 158.

¹⁰⁰ Hallet’s *Conveyancing Precedents* (Sweet & Maxwell 1965) at 801.

7.74 *The Commission considers that it is not necessary to draw a distinction between professional and lay trustees for the purposes of trustee exemption clauses, as this issue is addressed by the flexible statutory duty of care recommended in Chapter 3.*

(3) *Negligence, gross negligence and fraud*

7.75 The single most difficult issue which arises in the context of trustee exemption clauses may be how to define the acceptable scope of such clauses. The Scottish Law Commission outlined what it saw as the three main options in this regard:

- (a) Prohibit trustee exemption clauses which purport to exclude liability for negligence, gross negligence, or fraud.
- (b) Allow trustee exemption clauses to exclude liability for negligence, but not for gross negligence or fraud
- (c) Allow trustee exemption clauses to exclude liability for negligence and gross negligence, but not fraud.

7.76 It is accepted that a clause exonerating a trustee from the consequences of his or her own fraud is contrary to public policy, if not also ignoring the “irreducible core of obligations” which is fundamental to the creation of a trust.¹⁰¹ Thus, option (a), as it includes fraud, would not be permissible as a matter of law. The question therefore narrows down to whether trustees may be exonerated from the consequences of a negligent breach of trust but not of gross negligence, or whether they may be exonerated from neither negligent nor grossly negligent breach of trust.

7.77 There is much debate as to whether or not gross negligence is a “workable concept.” As a result of the use of the concept under Scottish law for centuries, this issue was not ultimately one of great difficulty for the Scottish Law Commission. However, the Law Commission of England and Wales was more wary, stating that it “[did] not consider that the concept of gross negligence is sufficiently clear or distinctive as to form the basis of regulation of trustee exemption clauses”.¹⁰² Ultimately, the Law Commission of England

¹⁰¹ See *Armitage v Nurse* [1997] 2 All ER 705, per Millett LJ at 710-711; also Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 502: “To allow protection in cases of fraud would be contrary to public policy”.

¹⁰² *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at paragraph 4.78.

and Wales did not reach a firm conclusion on this issue, preferring instead to seek further submissions on a proposal which would avoid these difficulties, by reframing the question as whether trustees should be permitted to rely on exemption clauses where their conduct has been “so unreasonable, irresponsible or incompetent that in fairness to the beneficiary the trustee should not be excused”.¹⁰³

7.78 The principle of gross negligence is a familiar feature of a number of areas of Irish law. The concept of gross negligence manslaughter is well established,¹⁰⁴ while the phrase “gross negligence” is occasionally used in commercial law cases in respect of directors’ conduct,¹⁰⁵ and in the context of some recent personal injuries cases.¹⁰⁶ Whilst it might be said that the distinction between negligence and gross negligence presents little difficulty, in practice it may be difficult to define precisely. For this reason, it is suggested that it would be preferable that a clearer formula be introduced in order to distinguish between classes of trustees’ conduct.

7.79 The Law Commission of England and Wales noted similar difficulties in respect of the concept in the law of that jurisdiction. In order to overcome the difficulties that would arise in trying to formulate an effective way to differentiate between conduct which is merely negligent, and conduct which is so bad as to amount to gross

¹⁰³ *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at paragraph 4.78. This was also the proposal of the BCLI in its *Report on Exculpation Clauses in Trust Instruments* (No 17 2002).

¹⁰⁴ See Charleton McDermott & Bolger *Criminal Law* (Butterworths 1999) at 7.121-7.126.

¹⁰⁵ See eg, *Cahill v Grimes* High Court 1 March 2001, where Smyth J stated in the context of an application to disqualify the respondent from acting as a liquidator pursuant to section 160 of the *Companies Act 1990*:

“To seek, as the Respondent sought in this case, to argue that ‘the books and records were not destroyed, they were just dumped’ displays a sense of gross negligence or total incompetence, and on the facts a complete failure to appreciate the gravity of the action taken”: at 11.

¹⁰⁶ *Fletcher v Commissioners of Public Works* [2003] 2 ILRM 94, where the plaintiff’s exposure to asbestos in the course of his employment was described by the trial judge as grossly negligent. The defendants did not appeal this aspect of the judge’s findings. See also *Swaine v Commissioners for Public Works in Ireland* [2003] 2 ILRM 252 where Keane CJ stated “I do not think it is possible to dissent from the trial judge’s finding that it was ‘negligence of the grossest kind’ ”, at 255.

negligence, the Law Commission proposed moving the debate outside of those categories altogether. Thus, views were invited on a provision modelled on that suggested by the British Columbia Law Institute, namely that:

“professional trustees should be unable to rely upon a trustee exemption clause where their conduct has been so unreasonable, irresponsible or incompetent that in fairness to the beneficiary that the trustee should not be excused”.¹⁰⁷

7.80 In terms of lay trustees, an approach which seems to command agreement is to allow trustee exemption clauses to exempt lay trustees from liability for negligence *simpliciter*, but not gross negligence.

7.81 *The Commission considers that approaches based on the distinction between negligence and gross negligence, or on the conduct of the trustee, would be of little assistance in a practical context, because of the difficulties which can arise in precisely defining this distinction. The Commission considers that it is preferable for the issue of trustee exemption clauses to be addressed in relation to the standard of the “irreducible core obligations” of trusteeship, in conjunction with the statutory duty of care which is recommended in Chapter 3.*

(4) Discretionary power of the court to relieve trustees from liability for breach

7.82 A further matter which must be considered in this context is the conferring upon the courts of a discretionary power allowing a trustee to be relieved from liability for breach where certain criteria are satisfied.

7.83 Trust codes in most common law jurisdictions often include such a provision; in England section 61 of the *Trustee Act 1925* provides:

“if it appears to the court that a trustee ... is or may be personally liable for any breach of trust ... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such

¹⁰⁷ *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at paragraph 4.78.

breach, then the court may relieve him either wholly or partly from personal liability for the same”.¹⁰⁸

7.84 This provision has been mirrored in many other common law jurisdictions, including British Columbia (section 61 of the *Trustee Act*), New Zealand (section 73 of the *Trustee Act 1956*), while Keeton and Sheridan note that “[t]he Trustee Acts of all the Australian states have provisions providing that the court may relieve a trustee who has acted honestly and reasonably, and who ought fairly to be excused, in terms which are substantially the same as the English section 61”.¹⁰⁹

7.85 Martin notes that “the courts have preferred not to lay down formal rules for the application of [this] section”.¹¹⁰ Despite the reluctance of the English courts to set down fixed rules governing the applicability of the section, a number of observations may be drawn from the case law. The onus is on the trustee to establish the honesty and reasonableness of his or her actions,¹¹¹ relief is not prospectively granted,¹¹² and in exercising the discretion, three factors must be considered: “the trustee’s honesty, reasonableness and the question whether he ought fairly be excused”.¹¹³ Oakley says that honesty in this context means “good faith”, while Kekewich J in *Re Second East Dulwich Building Society* stated that “a trustee who does nothing,

¹⁰⁸ The New Zealand Law Commission notes that the forerunner of this provision was section 3 of the *Judicial Trustees Act 1896*, which was introduced to give effect to the views of the Select Committee on Trust Administration, which was concerned that “the existing rules of law placed an excessive burden on trustees, particularly in respect of technical breaches” and recommended a discretionary power of relief as a result: see *Some Problems in the Law of Trusts* (Report 79 2002) at 5.

¹⁰⁹ Keeton & Sheridan *The Comparative Law of Trusts in the Commonwealth and the Irish Republic* (Barry Rose 1976) at 181.

¹¹⁰ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 667.

¹¹¹ *Re Stuart* [1897] 2 Ch 583.

¹¹² Thus, an application pursuant to section 61 may only be made in respect of acts done; the phrase “may be ... liable” has been interpreted as referring to uncertainty in respect of potential liability, rather than referring to future acts: *Re Tollemache* [1903] 1 Ch 457 and *Re Rosenthal* [1972] 1 WLR 1273.

¹¹³ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 668, referring to *Marsden v Regan* [1954] 1 WLR 423.

swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations” would be found to have acted dishonestly.¹¹⁴ The reasonableness of a trustee’s conduct is a question of fact which must be determined according to the circumstances of each individual case.¹¹⁵

7.86 Martin notes that “there is some uncertainty as to the standard to be applied in determining reasonableness, although the usual standard is that of a prudent man of business managing his own affairs”.¹¹⁶ It was established in *Re Grindey* that the amount of money in issue is a relevant factor in determining the reasonableness of the conduct.¹¹⁷ It has also been held that the seeking out of legal advice is a relevant factor, although it will not automatically entitle a trustee to relief.¹¹⁸

7.87 Although the section does not explicitly distinguish between professional and lay trustees, the English courts have taken a firm stance on this issue. In *Re Pauling’s Settlement Trusts*,¹¹⁹ the court accepted that it would be a misconstruction of section 61 of the *Trustee Act 1925* to say that it can never apply to trustees who act for remuneration. However, reference was also made to the case of *National Trustees Co. of Australasia v General Finance Co. of Australasia*,¹²⁰ where the Privy Council stated that the fact that a trustee acts as a professional for remuneration is a factor to be taken into account in deciding on an application for relief pursuant to this section. Thus, *Lewin on Trusts* concludes that where a trustee acting for remuneration seeks relief under section 61, “a much stronger case

¹¹⁴ (1899) 79 LT 726 at 727.

¹¹⁵ (Oakley ed) Parker & Mellows *The Modern Law of Trusts* (7th ed Sweet & Maxwell 1998) at 700.

¹¹⁶ Hanbury & Martin *loc cit* at 668, referring to *Re Grindey* [1898] 2 Ch 593, *Re Lord de Clifford’s Estate* [1900] 2 Ch 707 and *Re Stuart* [1897] 2 Ch 583.

¹¹⁷ *Ibid.*

¹¹⁸ See *National Trustees Co. of Australasia v General Finance Co. of Australasia* [1905] AC 373 and *Re Evans* [1999] 2 All ER 777.

¹¹⁹ [1963] 3 All ER 1.

¹²⁰ [1905] AC 373.

for relief must be made out, especially if the trustee has put itself into a position of conflict".¹²¹

7.88 Although the courts have been at pains to stress the unique nature of each application which must be considered on its own merits, it is instructive to consider examples of cases where the application for relief has succeeded, and also where it has been refused.¹²²

7.89 Thus, relief pursuant to section 61 was granted in *Perrins v Bellamy*,¹²³ where the trustees acted under the erroneous assumption that they possessed a power of sale. The trustees sold settled leaseholds and thus diminished the income of the tenant for life (who was entitled in specie).¹²⁴ The Court of Appeal noted that the sale would have been a proper one if the trustees had in fact possessed a power of sale, and in the circumstances of the case decided it would be just to exercise the court's discretion in favour of the trustees. In *Re Grindey*¹²⁵ the court excused a failure of the trustees to call in an outstanding debt, in circumstances where their failure to act was based on a misconstruction of the terms of the will.¹²⁶ In *National Trustees Co. of Australasia v General Finance Co. of Australasia*¹²⁷ the trustees, acting on erroneous advice from their solicitors, made an unauthorised distribution. The court relieved the lay trustees from liability, but held that a different standard applied to professional trustees seeking to invoke section 61.¹²⁸ The English courts have also

¹²¹ Mowbray, Tucker, Le Poidevin & Simpson (eds) (17th ed Sweet & Maxwell 2000) at paragraph 39-101, referring to *Re Waterman's Will Trusts* [1952] 2 All ER 1054, *Re Pauling's Settlement Trusts* [1964] Ch 303 and *Bartlett v Barclays Bank Trust Co. Ltd* [1980] 1 All ER 139.

¹²² Much of the following analysis draws on the comprehensive catalogue of cases discussed in *Lewin on Trusts (ibid)* at paragraphs 39-98 – 39-100.

¹²³ [1899] 1 Ch 797.

¹²⁴ That is the tenant for life was entitled to the assets in their existing form, rather than an entitlement to the proceeds of the sale of the asset.

¹²⁵ [1898] 2 Ch 593.

¹²⁶ The court described the trustees' construction of the terms of the will as reasonable, although ultimately incorrect. A further factor in the decision to exercise the court's discretion to relieve was the smallness of the amount owed.

¹²⁷ [1905] AC 373.

¹²⁸ See paragraph 7.87.

relieved trustees from liability where payments were made from the trust fund to the wrong person as a result of a reasonable misinterpretation of the terms of the trust instrument.¹²⁹ It was also held in *Re Wightwick's Will Trusts*¹³⁰ that the court may exercise its discretion to relieve from liability trustees who acted on foot of a common understanding about the law of charities which was subsequently held to be erroneous. As *Lewin on Trusts* notes, “the maxim that ignorance of the law is no defence does not prevent relief in such cases”.¹³¹

7.90 Examples of cases where relief has not been granted pursuant to section 61 include *Re Turner*,¹³² where the court held that it was not reasonable for a trustee to rely exclusively on a solicitor co-trustee in relation to a mortgage (although it was accepted that the trustee might be entitled to an indemnity from the solicitor). In *Bartlett v Barclays Bank Trust Co. Ltd*¹³³ the beneficiaries instituted proceedings seeking a declaration that the bank was liable as trustee to make good losses suffered by the trust fund. The application was founded on the argument that the losses were caused by the failure of the trustee bank to ensure that it received an adequate and regular flow of information on the activities of a company in which the trust held all but a few of the shares. The bank was refused relief under section 61 as a result of its failure in this regard, which Brightman J described as honest, but nevertheless unreasonable.

7.91 In *Re Evans*¹³⁴ the administratrix of an estate, acting on legal advice, took out insurance to cover the share of a beneficiary presumed missing¹³⁵ and then distributed the estate. The beneficiary subsequently reappeared and claimed his share of the estate, but the

¹²⁹ *Re Allsop* [1914] 1 Ch 1.

¹³⁰ [1950] Ch 260.

¹³¹ Mowbray Tucker Le Poidevin & Simpson (eds) *Lewin on Trusts* (17th ed Sweet & Maxwell 2000) at paragraph 39-100.

¹³² [1897] 1 Ch 536.

¹³³ [1980] Ch 515.

¹³⁴ [1999] 2 All ER 777.

¹³⁵ The beneficiary had not been heard from for nearly 30 years. An alternative procedure would have been to apply to court for a *Benjamin* order (see *In re Benjamin, deceased* [1902] 1 Ch 723), as occurred in *In re Mieth, deceased* [1986] ILRM 175.

insurance policy covered only the capital sum to which he was entitled, and not the interest thereon. The administratrix sought to invoke the protection of section 61 to absolve her of liability in respect of the interest. McCombe QC sitting as a Deputy High Court judge held that the trustee had acted honestly and reasonably in all the circumstances of the case. However, it was held that it would be wrong not to satisfy the interest claim to the extent that it was capable of being realised out of trust property which remained in the trustee's hands, but should this asset fail to satisfy the full amount, the trustee was to be absolved of any further liability.

7.92 Many jurisdictions regard the discretionary power of the courts to relieve trustees from liability for breach of trust where they have acted reasonably and honestly as a fair and useful provision, offering protection for trustees against claims by beneficiaries in respect of what might be described as technical or less culpable breaches of trust. There is an obvious interaction between such a provision and the issue of trustee exemption clauses; indeed, many common law jurisdictions have considered reform of the law on trustee exemption clauses based upon a tandem approach of limited prohibitions on trustee exemption clauses with the possibility of trustees applying to court for relief from liability. Thus, the British Columbia Law Institute recommended the following draft provision in its *Report on Exculpation Clauses in Trust Instruments*:¹³⁶

(1) If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but [the trustee]

(a) has acted honestly and reasonably, and

(b) ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach,

then the court may relieve the trustee either wholly or partly from that personal liability.

(2) Without limiting subsection (1) and subject to subsection (3), an exemption clause in a trust instrument is effective according to its terms to relieve a trustee of liability for a breach of trust.

¹³⁶

(No 17 2002).

- (3) where it appears to the court that the conduct of a trustee
 - (a) would constitute a breach of trust, and
 - (b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be excusedthe court may declare that
 - (c) any exemption clause contained in the trust instrument is ineffective in relation to the breach of trust, and
 - (d) the liability of the trustee for breach of trust be determined as if the trust instrument did not contain the clause.

7.93 The Commission considers that the factors set out in the British Columbia draft provisions are matters which are relevant to an evaluation of the conduct of trustees. However, the Commission considers that the evaluation of such conduct ultimately falls to the courts to consider on the facts of each individual case. For that reason, the Commission considers that the formula employed by the English legislation, which allows the courts a larger degree of flexibility in the assessment of the conduct of trustees, is to be preferred.

7.94 *The Commission considers that there is a need for a provision under Irish law conferring upon the courts a discretion to relieve trustees from liability for breach of trust in certain circumstances.*

7.95 *The Commission considers that the formulation of such provision should be based on section 61 of the English Trustee Act, ie that a trustee has acted "honestly and reasonably, and ought fairly to be excused for the breach of trust."*

(5) *Scope of application of proposed reforms*

7.96 The final question to be considered is the scope of application of any proposed reform of the law on trustee exemption clauses in this jurisdiction. Two issues need to be considered, namely the geographical scope of application, and the time limits of application.

(a) *Geographical Scope of Application*

7.97 As noted above, a concern which has arisen in the debate on greater regulation of trustee exemption clauses is the possible

economic impact of more stringent regulation in this area. The *Hague Convention on the Law Applicable to Trusts and on their Recognition 1985* recognises the free choice of the settlor in respect of the law which shall govern the trust which he or she executes. Thus, in the event of any reforms in the area of trustee exemption clauses, it might be possible for a settlor to circumvent such legislation because under the Convention it would be possible for the settlor to indicate that the law governing the trust was not to be the law of Ireland, but instead some other jurisdiction with less stringent legislative controls. Although the Convention has not yet been implemented in this jurisdiction, its implementation at a future date is likely, and so it is proper to consider its potential impact on this topic.

7.98 The remedy proposed by the Law Commission of England and Wales was as follows:

“in order to prevent such steps being taken to avoid the impact of legislative regulation, we consider that any legislation concerning trustee exemption clauses should apply to all persons carrying on a trust business in England and Wales (even though the particular trust may have a choice of law clause indicating that its governing law is that of some other jurisdiction)”¹³⁷.

7.99 Furthermore, it should be noted that an additional barrier to settlors seeking to take advantage of any future regulation of trustee exemption clauses by exercising the freedom of choice under the Hague Convention is presented in the form of Irish tax law. All trusts which are resident in Ireland are subject to an exit tax under capital gains legislation if the trustees seek to relocate the trust to another jurisdiction.¹³⁸

7.100 In terms of the concern that legislative regulation of this area might have a detrimental economic impact on trust business in Ireland, reference may be made to the experiences of Jersey and Guernsey, which introduced stricter controls in this area in 1989, but do not appear to have suffered adverse economic consequences.¹³⁹

¹³⁷ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at paragraph 4.99.

¹³⁸ See section 579 of the *Taxes Consolidation Act 1997*.

¹³⁹ As noted by the Law Commission of England and Wales *ibid* at paragraphs 3.48-3.92.

7.101 *In the light of existing provisions of Irish law, and in particular the provisions of the tax code, the Commission does not consider that there is a need to introduce further provisions dealing with the relocation of trusts outside the jurisdiction.*

(b) *Temporal Scope of Application*

7.102 Finally, it falls to consider the time limits placed on any reforming legislation in the area of trustee exemption clauses. The Law Commission of England and Wales recommended that any legislative reform should be prospective in approach, applying only to breaches of trust which occur after the date of any legislation coming into force. This was thought to be necessary because:

“as a matter of principle, a trustee should not incur liability for actions (or omissions) committed at a time when the trustee had every cause to believe that a trustee exemption clause would deny the beneficiaries a remedy”.¹⁴⁰

7.103 However, the Law Commission did not consider that there was any reason to prevent reforming legislation from applying to trust instruments executed before the date of such legislation coming into force. This was justified on the basis that “it is incumbent on trustees to keep under review the terms of their appointment”,¹⁴¹ and that any trustee who was unhappy with continuing in office as a result of the legislative changes would be free to resign their position. The Law Commission regarded this as a preferable solution to the undesirability of any reforming legislation applying only to trust instruments created after the coming into force of the legislation, as such a proposal would inevitably result in the creation of a “two tier” trust system.

7.104 *The Commission agrees that trustees should not be exposed to retrospective liability for any breach of trust which they believed would be governed by a trustee exemption clause.*

7.105 *The Commission recommends that reforming legislation on trustee exemption clauses should apply to all trust instruments, irrespective of whether they were executed before the coming into force of the reforming legislation. The Commission would welcome*

¹⁴⁰ Law Commission *Consultation Paper on Trustee Exemption Clauses* (No 171 2003) at paragraph 4.100.

¹⁴¹ *Ibid* at paragraph 4.101.

submissions on the need for a “lead-in” period to precede the coming into force of such legislation.

G Charities

7.106 The government’s Consultation Paper – *Establishing a Modern Statutory Framework for Charities* recommends that a statutory exoneration be provided for lay trustees against liabilities arising out of acts committed honestly, reasonably and in good faith.¹⁴²

7.107 The detailed discussion of principles above in relation to general trusts applies equally to charities. The issues of duty of care, liability of trustees, exemption clauses, professional indemnity insurance and statutory exoneration are all inextricably linked and should not be considered in isolation.

7.108 The questions that arise in relation to liability issues for charities are:

- Should there be a distinction between lay trustees and professional trustees to take account of the status or more particularly the expertise and skill of the trustee? The skill and expertise would relate to the duty of care required.
- Should charity trustees be allowed to have the benefit of exclusion clauses?
- If so, is there a need for regulation of such clauses to prevent contracting out of an ‘irreducible core of obligations’?
- Should charity trustees be allowed to purchase insurance out of charity funds?

(1) Professional and Lay Trustees

7.109 As discussed above, in Ireland, there is no statutory distinction between lay and professional trustees. Traditionally, trustees have fallen into two categories; first non-professional or lay trustees, who in private trusts are often family members or close associates of the settlor or testator, or are volunteers in the case of a charity, each of whom agree to act out of a sense of duty; and secondly professional trustees, usually banks and financial institutions

¹⁴² *Establishing a Modern Statutory Framework for Charities* at 16.

who undertake the role only in circumstances where suitable provision is made for their remuneration.

7.110 In England and Northern Ireland, the terms “lay trustee” and “professional trustee” have been defined for the purposes of determining the trustee’s entitlement to remuneration. In relation to liability, the question arises as to whether a distinction should be drawn between professional and lay trustees or should a single standard apply to all trustees. The argument in favour of differentiating between the two types of trustees rests mainly on the issue of qualifications. However, this is an issue in relation to the standard of care rather than an exemption from liability. As discussed above, the courts have long held that there is a distinction in the standard of care and pointed to the unfairness which would be caused by the application of one uniform standard.¹⁴³

7.111 In any event, the question arises as to whether there are situations where professional trustees act as trustees to charitable trusts? Bearing in mind the Revenue prohibition on remuneration of charity trustees, whether or not they are incorporated, the question of having professional trustees act as trustees of charitable trusts is not an option at present. Charities do of course purchase professional advice where it is required.

7.112 In this context the Law Commission of England and Wales discussed the issue of the remuneration of charitable trustees and while recognising that it could sometimes be in the best interests of a charity to be able to remunerate trustees, appreciated that there was force in certain reservations which had been expressed about the wisdom of giving a default charging power to professional trustees of charitable trusts.¹⁴⁴ Such a power might be perceived to run counter to the principle that charities exist for the public benefit, and this perception might damage public confidence in charities.¹⁴⁵

(2) Duty of Care

7.113 *The duty of care has been dealt with in Chapter 3 and the Commission’s recommendations in relation to charity trustees are contained at paragraphs 3.45-3.66. The Commission is of the view*

¹⁴³ *Bartlett v Barclays Bank* [1980] Ch 515.

¹⁴⁴ See Chapter 2 above.

¹⁴⁵ *The Law of Charities* Luxton (Oxford University Press 2001).

that this duty of care should at least consist of an irreducible core of obligations for charity trustees.

(3) Exemption Clauses

7.114 As discussed in detail above, there has been a wide ranging debate in other jurisdictions on the issue of exemption or exoneration clauses and whether there should be a statutory limitation to debar what is now a standard practice of inserting trustee exemption clauses into trust instruments relieving trustees from liability which results from an act or omission that would otherwise be regarded as a breach of trust.

(4) Exoneration

7.115 In Ireland, unlike in many other jurisdictions, there are no statutory provisions granting power to the courts to exonerate trustees from breaches of trust committed honestly and in good faith.

7.116 Clause 36 of the English *Charities Bill* gives power to the Charity Commission “to relieve trustees ... from liability for breach of trust or duty”. Clause 36 provides that:

- “(1) This section applies to a person who is or has been –
 - (a) a charity trustee or trustee for a charity
 - (b) an auditor of a charity’s accounts ...
 - (c) an independent examiner or reporting accountant appointed in respect of a charity’s accounts
- (2) If the Commission considers –
 - (a) that a person to whom this section applies is or may be personally liable for a breach of trust or breach of duty committed in his capacity as a person within paragraph (a), (b) or (c) of subsection (1) above, but
 - (b) that he has acted honestly and reasonably and ought fairly to be excused for the breach of trust or duty,the Commission may make an order relieving him wholly or partly from any such liability
- (3) An order under subsection (2) above may grant the relief on such terms as the Commission think fit

(4) Subsection (2) does not apply in relation to any personal contractual liability of a charity trustee or trustee for a charity.

(5) This section does not affect the operation of –

(a) Section 61 of the *Trustee Act 1925* (power of court to grant relief to trustees)

(b) Section 727 of the *Companies Act 1985* (power of court to grant relief to officers or auditors of companies), or”

7.117 In Scotland section 32 of the *Trusts (Scotland) Act 1921* provides:

“If it appears to the court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the court may relieve the trustee either wholly or partly from personal liability for the same.”

7.118 Many jurisdictions regard the discretionary power of the courts to relieve trustees from liability for breach of trust where they have acted reasonably and honestly as a fair and useful provision, offering protection for trustees against claims by beneficiaries in respect of what are technical or less culpable breaches of trust. There is an obvious interaction between such a provision and the issue of trustee exemption clauses; indeed, many common law jurisdictions have considered reform of the law on trustee exemption clauses based upon a tandem approach of limited prohibitions on trustee exemption clauses with the possibility of trustees applying to court for relief from liability.

(5) Indemnity Insurance

7.119 In England, the Charity Commissioners have addressed the issues of charities obtaining fidelity insurance and trustee indemnity insurance. Fidelity insurance provides cover to make good any loss to the charity caused by fraud or dishonesty on the part of any of its employees where they are dealing with the charity’s cash or other valuables. It may also be possible to extend this cover to include also fraud or dishonesty on the part of any of the trustees and/or

volunteers. As the Charity Commissioners note, “[t]his type of cover (now commonly known as ‘theft by employee insurance’) is not a substitute for sound financial and personnel risk management and is usually provided only if the charity can demonstrate that its administrative arrangements are both adequate and properly supervised.”¹⁴⁶ This type of cover may also be extended to protect the charity against any fraudulent or dishonest conduct of the trustees which causes loss to the charity.

7.120 Trustee indemnity insurance, on the other hand, indemnifies trustees against the risk of personal liability, whether to the charity or to a third party, arising from their breach of trust. Where the charity is incorporated or where it carries out a part of its business through a separate company, the trustees’ personal liability for their wrongful acts as a company’s directors or officers may also be covered. What distinguishes trustee indemnity insurance from, for example, fidelity insurance, is that it provides cover against liabilities which are those of the trustees, rather than those of the charity.

7.121 The Charity Commissioners have noted that “[t]rustee indemnity insurance provides a personal benefit to the trustees it insures.”¹⁴⁷ This, like any other form of personal benefit for trustees, requires specific authorisation in the trust instrument in order for a charity to be permitted to obtain such cover. Otherwise, authorisation for the purchase of such insurance must be given by the Charity Commissioners.¹⁴⁸ Alternatively, trustees may arrange and pay for their own insurance privately, at their own expense, without the need to obtain authorisation.

7.122 The Charity Commissioners have noted that as a matter of public policy, trustee indemnity insurance cannot provide an indemnity to a trustee for his or her personal liability for:

- (a) fines;

¹⁴⁶ CC49 *Charities and Insurance* (revised 2003) at paragraph 44.

¹⁴⁷ Although such benefit is negative rather than positive, because it removes the trustee’s obligation to meet a liability from his or her own funds.

¹⁴⁸ The criteria for such authorisation are set out in the Operational Guidance paper on Trustee Indemnity Insurance (OG 100), namely that the Charity Commissioners must be satisfied that it is expedient in the interests of the charity to do so.

(b) the costs of unsuccessfully defending criminal prosecutions for offences arising out of the fraud or dishonesty or wilful or reckless misconduct of a trustee;

(c) liabilities to the charity which result from conduct which the trustee knew, or must be assumed to have known, was not in the interests of the charity or which the trustee did not care whether it was in the best interests of the charity or not.¹⁴⁹

7.123 Thus, any authority provided by the Charity Commissioners in order to facilitate the purchase of trustee indemnity insurance will be conditional on the inclusion in the policy of provisions which reflect these public policy restrictions.

7.124 The Scottish Law Commission in its discussion paper on *Breach of Trust*¹⁵⁰ considered the question of payment of indemnity insurance out of the trust fund. With regard to charitable trusts, the Commission noted the moves that were afoot to introduce a new simple form of charitable organisation which would have limited liability and a legal personality separate from the trustees and members. This proposal had arisen from concern about the personal liability of trustees of charities.¹⁵¹ The paper acknowledged that public trusts are probably the main type of trusts where the problems of paying for insurance to cover the personal liability of trustees may cause difficulties in obtaining or retaining the services of lay trustees. The paper noted that, apart from the actual cost to the charity in providing insurance for trustees, the other main concern is that trustees may purchase insurance where there is clearly no need to do this.

7.125 The English *Charities Bill* does not contain any provision to allow charity trustees purchase indemnity insurance. The report of the Joint Committee¹⁵² on the draft Bill noted that some respondents considered that lack of indemnity insurance for personal liability

¹⁴⁹ CC49 *Charities and Insurance* (2003 revised version) paragraph 61.

¹⁵⁰ (No 123 2003).

¹⁵¹ Cabinet Office Performance and Innovation Unit *Charitable Incorporated Organisation* (December 2001).

¹⁵² Report of the Joint Committee on the Draft Charities Bill (HL167-1 HC 660-1 30 September 2004).

deterred people from being a trustee. Some regarded the present position, in relation to the ability of trustees to take out indemnity insurance, as unsatisfactory and suggested that the Bill should include a power for trustees to take out such insurance subject to safeguards similar to those in clause 34¹⁵³.

7.126 In Ireland the Revenue Commissioners do not regard the provision of insurance as a charitable object.¹⁵⁴

(6) Recommendations

7.127 *The Commission is of the view that the simplest and clearest approach as to liability is to avoid the distinction between lay and professional trustees, to avoid having to stipulate what breaches should be excused and to give the court discretion to excuse trustees of liability where they have acted honestly, reasonably and in good faith.*

7.128 *The issue of trustee exemption clauses should be addressed in relation to the standard of the “irreducible core obligations” of trusteeship, in conjunction with the statutory duty of care.*

7.129 *The Commission is of the view that trustees should not be allowed to purchase indemnity insurance out of charity funds.*

¹⁵³ This clause deals with remuneration of charity trustees for services provided to the charity.

¹⁵⁴ Revenue Commissioners’ precedent number APP 11332 – 2 February 1995 which states that “the provision of insurance is not a charitable object”.

CHAPTER 8 POWER TO INSURE

A The Position in Ireland

(1) *Common law power to insure*

8.01 As Delany notes, “trustees originally had no power to insure unless this was conferred by the trust instrument”.¹ However, it has been suggested that the decision of the Chancery Division of Ireland in *Re Kingham (deceased)*² recognised the existence of a common law power to insure trust property. The testator directed his executors and trustees to allow his wife to occupy his house during her life, and after her death the same was to be sold and the proceeds divided amongst the testator’s children. The executors applied on originating summons for an order determining, *inter alia*, whether the testator’s widow was liable to pay fire insurance premiums in respect of the property for the duration of her occupation, or if not, seeking directions as to from which funds such premiums were to be paid. Chatterton VC held that “the trustees are bound to take care that the premises are insured against fire, so as to preserve the property for their *cestuis que trust*, and that they cannot require those premiums to be repaid to them by the widow...”. It has been suggested that this *dictum* establishes not only the existence of a common law *power* to insure, but also contemplates the existence of a *duty* to insure in some cases.³ The question of a power to insure as against a duty to insure will be considered in greater detail below.

(2) *Statutory power to insure*

8.02 The power of trustees to insure trust property is now governed in this jurisdiction by section 18 of the *Trustee Act 1893*.

¹ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 428

² [1897] 1 IR 170.

³ See Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No 146 1997) at paragraph 9.4.

Section 18(1) provides that trustees may insure against “loss or damage by fire any building or other insurable property” to any amount not exceeding three quarters of the full value of such building or property. Section 18 also provides that the premiums for such insurance may be paid out of the income of the trust property in question, or the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income. Section 18(2) would appear to exclude bare trusts from the application of this statutory power to insure, providing “[t]his section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so”.

8.03 Whilst there has been little criticism of this provision in Ireland, section 19 of the English *Trustee Act* of 1925, which re-enacted section 18 of the 1893 Act attracted strong criticism on a number of grounds, and it is instructive to consider the reforms to the power of insurance in that jurisdiction.

B The Position in England

(1) Common law power to insure

8.04 The position at common law was explained in *Re Betty*⁴ where North J suggested that at common law, trustees ought to insure the trust property “at the expense and for the benefit of the estate”. However, there were two older decisions in which it had been held that executors who failed to insure trust property were not guilty of “wilful default”. In *Bailey v Gould*,⁵ after the death of the testator his executors continued to run the deceased’s business jointly with his former partner. The business premises were not insured and were destroyed by fire. Alderson B concluded that there was no wilful default by the executors because the surviving partner had not insured the property either. Noting that it would be a “strong thing” to hold the executors liable for wilful default for failing to do what the surviving partner had also not done, Alderson B declined to make a finding of wilful default against the executors. Thus holding, Alderson B stated that the best criterion by which to judge whether the trustees had complied with the “reasonable man” test was by

⁴ [1899] 1 Ch 821, 829.

⁵ (1840) 4 Y & C Ex 221.

reference to the actions of the partner in the facts of the particular case.

8.05 In *Fry v Fry*⁶ the testator held a lease in premises which he was required to insure, pursuant to a covenant in the lease. The insurance lapsed two days before he died and was not renewed. The property burned down two months after the testator's death, and three weeks before the executors had proved the will. At the time of the fire, the executors had not been bound to perform the covenant to insure, and were therefore found not to be liable.

8.06 As noted by the Law Commission,⁷ both these cases very much turned on their own "special facts". Nevertheless, these cases were subsequently taken by Eve J in *Re McEacharn*⁸ as establishing the general rule that, even where there was a power to insure, "the court will not hold an executor or trustee liable on the footing of wilful default for losses occasioned by fire on premises left uninsured by him".⁹ The issue in that case was whether the trustees, who had a statutory power (pursuant to section 18 of the *Trustee Act 1893*) to insure the premises held in trust against fire, were under a *duty* to exercise that particular power. One of the trustees was the life tenant and she objected to the exercise of the power. The Law Commission inferred that she did so because the insurance would be paid out of income and therefore at her expense.¹⁰ The court concluded that the statute conferred only a *power* and not a *duty* to insure, and would therefore not compel the exercise of this power, pursuant to the well established principle that the powers of trustees must be exercised unanimously.

8.07 Eve J left open the question of whether the trustees "ought to insure the premises at the expense of the estate generally", as the only question on the summons was whether such insurance ought to

⁶ (1859) 28 LJ Ch 591.

⁷ *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at paragraph 9.3.

⁸ (1911) 103 LT 900.

⁹ *Ibid* at 902. This was so, even though as the judge acknowledged, "most persons having property subject to loss or damage by fire would agree in considering an insurance against fire to be a prudent and proper precaution to adopt".

¹⁰ *Op cit* at paragraph 9.3.

be maintained at the expense of the tenant for life. The Law Commission suggested that Eve J's choice of words indicated that he was mindful of North J's remarks in *Re Betty* that trustees had an obligation to insure at common law, meeting the cost out of capital at the expense of the estate.¹¹

(2) Statutory power to insure

8.08 The statutory power to insure trust property in England dates back to section 7 of the *Trustee Act 1888*. As noted above, section 18 of the *Trustee Act 1893* was re-enacted as section 19 of the *Trustee Act 1925*. The 1925 Act governed the power of trustees to insure trust property until recently.

8.09 Section 19(1) of the *Trustee Act 1925*, as amended by the *Trusts of Land and Appointment of Trustees Act 1996*,¹² applied to trustees of personal property, and provided as follows:

(1) A trustee may insure any personal property against loss or damage to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the property, and pay the premiums for such insurance out of the income thereof or out of any income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This section does not apply to any personal property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

8.10 Section 6(1) of the *Trusts of Land and Appointment of Trustees Act 1996* conferred upon trustees of land¹³ “all the powers of an absolute owner” in relation to land subject to the trust. Section 6(1) further provides that those powers are given “for the purpose of exercising their functions as trustees”, which the Law Commission

¹¹ *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at paragraph 9.4.

¹² See sections 25(1), (2); Schedule 3, paragraph 3; Sched 4.

¹³ As defined by section 1 of the *Trusts of Land and Appointment of Trustees Act 1996*, namely trustees of “property which consists of or includes land” other than settled land or land subject to the *Universities and College Estates Act 1925*.

interpreted as meaning that the powers must be exercised “in accordance with trustees’ fundamental obligations to act in the best interests of the trust and to take reasonable care of the trust property”.¹⁴ Thus, the Law Commission’s view was that, subject to that qualification, trustees of land enjoy a power to insure the trust property whenever a beneficial owner of land might do this.

8.11 The Law Commission made a number of comments on the effect of the 1996 Act on the power to insure, noting that where the statutory power to insure applied, trustees were entitled to charge the cost of premiums on the income without obtaining the consent of those entitled to that income.¹⁵ It was therefore different from the common law power to insure under which the premiums are charged to capital. Furthermore, although the effect of the *Trusts of Land and Appointment of Trustees Act 1996* was to limit the power to insure to trustees of personal property, whereas prior to 1997 it applied to all trustees, the new provision was wider in scope because it empowered trustees to insure “against loss or damage” and not merely against “loss or damage by fire”.¹⁶

8.12 However, the Law Commission also noted that the power to insure remained subject to two significant restrictions. The Law Commission was critical of the limitation on the power to insure under the 1925 Act, namely that trustees can only insure up to three quarters of the value of the property. Concern was also expressed that the power to insure under the 1925 Act did not apply where trustees held personal property under a bare trust. The Law Commission suggested that the underlying aim of this restriction was to cater for beneficiaries under a bare trust who might not wish the trustees to insure the property.¹⁷ However, the Law Commission believed that there were better ways of overcoming this difficulty than by the complete exclusion of the statutory power to insure.

¹⁴ *Consultation Paper on Trustees’ Powers and Duties* (No 146 1997) at paragraph 9.6.

¹⁵ *Op cit* at paragraph 9.7.

¹⁶ *Ibid.*

¹⁷ Bearing in mind the decision in *Re Brockbank* [1948] Ch 206 that although a beneficiary under a bare trust can direct the trustees to convey the property at his or her direction, he or she cannot direct them as to the exercise of their powers.

8.13 The Law Commission criticised the law in England in relation to the power to insure on the basis of its uncertainty and lack of clarity,¹⁸ and also on the grounds that it might well conflict with trustees' general duties to the trust.¹⁹ A further criticism was that "the statutory power to insure conferred on trustees of personal property by section 19 of the *Trustee Act 1925* was unsatisfactory, even in the wider form into which it was cast by the *Trusts of Land and Appointment of Trustees Act 1996*".²⁰ The Law Commission was particularly dissatisfied with the limitation of the power to insure to three quarters of the value of the trust property, and also the exclusion of property held subject to a bare trust. Finally, it was considered unsatisfactory that trustees of personal property and trustees of land should have different statutory powers of insurance; and that trustees of the settlement of settled land should have no statutory powers to insure but must rely on their common law powers.

8.14 The Law Commission considered that there was an overwhelming case for providing a clear statutory power to insure that adequately protected the interests of the beneficiaries (or other objects of the trust). The Law Commission emphasised five issues that required consideration:

1. What default powers of insurance should trustees have?
2. In what circumstances, if any, should they be under a duty to exercise that power?
3. Should special provision be made where land is held either upon a bare trust or for beneficiaries who are all of

¹⁸ Based on difficulties in advising trustees as to the extent of their obligations to insure trust property, and also the fact that some authorities appear to establish the existence of an implied power at common law to insure, and there are suggestions in some cases that this is a positive duty.

¹⁹ The Law Commission considered that two of the most basic duties of trustees were (1) "to exercise their powers in the best interests of the present and future beneficiaries of the trust"; and (2) "to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs": *op cit* at paragraph 9.10. This point was also made by the Law Reform Committee in its *Report on the Powers and Duties of Trustees* (1982) Cmnd 8733, at paragraphs 4.29 - 4.37.

²⁰ *Op cit* at paragraph 9.11.

full age and capacity and, taken together, absolutely entitled to the trust property?

4. Should premiums be payable out of income or capital?

5. To which trusts should the powers apply?²¹

(a) *Default powers of insurance*

8.15 The Law Commission considered that all trustees should have the same powers to insure as a beneficial owner. This was the change effected in relation to land held on a trust of land by the *Trusts of Land and Appointment of Trustees Act 1996*, and such proposal would have the benefit of simplifying the law on this matter by conferring upon all trustees the same power to insure. It was also suggested that a power in such wide terms would obviate the need for any express powers of insurance in trust instruments in future (although settlors would obviously be free to modify, exclude or restrict such a power).²² The only objection that the Law Commission could conceive to such a broad power was that trustees might insure in cases where it is unnecessary. However, the Law Commission believed this could be avoided by limiting the power in the same way as it is in relation to trusts of land. It would be given “for the purpose of exercising their functions as trustees”; this would carry with it the obligation to act in the best interests of the trust and to take reasonable care of the trust property. Thus, “[t]rustees would ... be expected to strike a balance between wasting trust money by insuring unnecessarily and placing the trust property at risk by failing to insure it when common prudence demanded it.”²³

8.16 This provisional recommendation was strongly supported on consultation, and confirmed in the *Report on Trustees’ Powers and Duties*.²⁴ Section 34(1) of the *Trustee Act 2000* now provides that “A trustee may (a) insure any property which is subject to the trust against risks of loss or damage due to any event”.

²¹ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997) at paragraph 9.16.

²² *Ibid.*

²³ *Ibid* at paragraph 9.17.

²⁴ *Report on Trustees’ Powers and Duties* (No 260 1999) at paragraphs 6.4-6.5.

(b) *A duty to insure?*

8.17 The Law Commission in its Consultation Paper considered that there were circumstances where trustees should not merely have a power to insure, but should be under a duty to insure. Thus, it was proposed that the statutory power to insure should be elevated to the status of a duty where it would be imprudent not to insure the trust property. The Law Commission emphasised that it was not intended to impose an obligation on trustees to insure against all risks and in all circumstances. The test proposed was one of reasonableness which necessarily takes into account whether insurance is the most cost effective way of protecting the property; thus, if a reasonable person would not insure because the cost was prohibitive, then the duty to insure would not apply, and the trustees would no doubt take other steps to ensure the safe-keeping of the property.²⁵

8.18 The proposal of the Law Commission that trustees might occasionally be subjected to a duty to insure was not welcomed on consultation.²⁶ The Commission noted that “the underlying concern of those who objected to this proposal appears to have been the risk of uncertainty as to when the duty would arise, and the fact that this might lead trustees to insure when it was unnecessary, thereby wasting trust assets.”²⁷ Accordingly, the Law Commission decided not to continue with its original proposal for a statutory duty to insure. However, the Law Commission noted that trustees *will* sometimes be under a duty to insure the trust property because they must act in the best interests of the trust, irrespective of whether that duty is stipulated in statutory form.

8.19 Furthermore, although the Law Commission accepted that the circumstances in which trust property is insured should be left to the discretion of the trustees (and to their common law duties), it was considered that once the trustees have resolved to exercise their powers of insurance, the manner in which they do so should be subject to the new statutory duty of care. Consequently, the duty of

²⁵ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) at paragraph 9.20.

²⁶ See *Report on Trustees' Powers and Duties* (No 260 1999) at paragraph 6.8.

²⁷ *Ibid.* The Commission noted that there was also a concern that some trusts might lack the resources to insure, particularly small museums and galleries.

care would apply to the selection of an insurer and to the terms on which the insurance cover is taken out. The exercise of the statutory power to insure as contained in section 34 of the *Trustee Act 2000* is now subject to the duty of care set out in section 1 of the 2000 Act.²⁸

(c) *Payment of premiums from trust income or capital*

8.20 Addressing the issue of whether insurance premiums should be paid out of trust capital or income, the Law Commission noted that the statutory power to insure contained in section 19 of the *Trustee Act 1925*, as amended, allowed the trustees to meet the costs of premiums out of income. However, if the power to insure is exercised pursuant to the common law power, trustees were entitled to charge the premiums to capital.²⁹ It was noted that the statutory power to insure could create obvious difficulties for trustees if there is no income out of which to meet the costs of the insurance.³⁰ The Law Reform Committee had considered this point in some detail in its *Report on the Powers and Duties of Trustees*, and the Law Commission noted that nearly all those who gave evidence to it considered that trustees should have a discretion to apportion the premiums to capital or income as they thought fit. Section 34(1)(b) of the *Trustee Act 2000* gives effect to this recommendation, providing that trustees may “pay the premiums out of the trust funds”.³¹

(d) *Scope of application of recommendations*

8.21 In relation to the scope of application of the proposed power and duty to insure, the Law Commission in its Consultation Paper considered that the proposed power to insure should apply to all types of trust, whatever the nature of the property held, whether the trust was private, charitable or pension trust, and whenever created unless a contrary intention was expressed in the instrument creating the trust.

8.22 The Law Commission considered in its *Report on Trustees’ Powers and Duties* that there remained “an overwhelming case for providing a clear statutory power for trustees to insure the trust

²⁸ See Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 574.

²⁹ See above, paragraph 8.11.

³⁰ *Op cit* at paragraph 9.26.

³¹ Section 34(5) provides that “In this section ‘trust funds’ means any income or capital funds of the trust”.

property as if they were the absolute beneficial owners of it”.³² This suggestion was strongly supported on consultation, and proposed to bring the powers to insure of all trustees into line with those that are already enjoyed by trustees of land under the 1996 Act. Although the Law Commission considered that the statutory power should be couched in broad terms, it should be limited to a power to insure the “trust property”. There should not, for instance, be a default power for trustees to insure against their own liability for breach of trust. Accordingly, the Commission recommended that trustees should have power to insure any property which is subject to the trust against risks of loss or damage due to any event.³³

8.23 Under this proposal, the power to insure was conferred on all trustees, including bare trustees. The Law Commission confirmed its view that the fact that property is held on a bare trust should not alter or exclude the trustees’ statutory powers of insurance. However, it also took the view that, where there is either a bare trust or all the beneficiaries are of full age and capacity and, taken together, are absolutely entitled to the trust property, the beneficiaries should be at liberty to direct the trustees not to insure the trust property (or not to insure it except in accordance with specified conditions) if that is their unanimous wish. In such circumstances, the beneficiaries should be entitled to carry out the cost-benefit analysis involved in deciding whether or not to insure in the same way as an absolute owner.

8.24 Section 34(2) of the *Trustee Act 2000* now provides:

“In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries-

(a) that any property specified in the direction is not to be insured;

(b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.”³⁴

³² *Report on Trustees’ Powers and Duties* (No 260 1999) at paragraph 6.4.

³³ *Ibid.*

³⁴ Section 34(3) provides: “Property is held on a bare trust if it is held on trust for (a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust, or (b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.”

(3) Approaches in other jurisdictions

(a) Northern Ireland

8.25 Section 19 of the *Trustee Act (Northern Ireland) Act 1958* as enacted provided:

“A trustee may insure against loss or damage by fire, explosion, impact, lightning, thunderbolt, storm, tempest, flooding, subsidence or landslip any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.”

8.26 The Law Commission of England and Wales noted in its comparative overview of the power to insure that “[a]lthough the range of insurable risks is limited - it does not include theft for example - there are no restrictions on the extent to which the property may be insured, nor does it exclude property held upon a bare trust.”³⁵

8.27 Following on from the reforms to trust law in England by the *Trustee Act 2000*, the power to insure in Northern Ireland has recently been amended, by the *Trustee Act (Northern Ireland) 2001*. Section 37 of the 2001 Act is substituted for section 19 of the 1958 Act, providing:

“A trustee may-

(a) insure any property which is subject to the trust against risks of loss or damage due to any event, and

(b) pay the premiums out of any income or capital funds of the trust”.

8.28 Section 37(3) of the 2001 Act provides that “the amendments made by this section apply in relation to trusts whether created before or after its commencement.” The provisions of the 2001 Act largely mirror those of the English *Trustee Act 2000*, as indeed appears to be the case in relation to the power to insure.

³⁵ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No 146 1997) at paragraph 9.13.

(b) *New Zealand*

8.29 Section 24(1) of the *Trustee Act 1956* empowers a trustee to insure any of the trust property up to the full insurable value, or, with the consent of the life tenant or of the High Court any of the trust property on a replacement basis “against any risk or liability against which it would be prudent for a person to insure if he was acting for himself”.³⁶ Section 24(2) provides that “[t]he trustee may recover the costs of any premiums paid in respect of any such insurance from the life tenant or other person entitled to or in receipt of the rents and profits of the building or property concerned.”

8.30 The New Zealand Law Commission in its report, *Some Problems in the Law of Trusts*³⁷ considered whether the statutory power to insure set out in the 1956 Act was in need of reform. The New Zealand Law Commission considered that the main difficulty with this provision was the need for the consent of the life tenant, rather than the remainderman, to replacement cover; the New Zealand Law Commission presumed that this provision reflected “what was thought to be the unfairness of the life tenant’s income being reduced by the additional cost of replacement cover.”³⁸

8.31 In its preliminary paper,³⁹ the New Zealand Law Commission invited discussion on the possibility of substituting, for the existing section 24(1) and (2), a new provision along the following lines:

³⁶ The full section reads as follows:

“(1) A trustee may insure against loss or damage, whether by fire or earthquake or otherwise, any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding the full insurable value of the building or property, or (with the consent of the person entitled to the income or of the Court) the full replacement value of the building or property; and may also insure against any risk or liability against which it would be prudent for a person to insure if he were acting for himself; and may pay the premiums for the insurance out of the income of the building or property concerned or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to that income.”

³⁷ (NZLC R79 2002) at paragraphs 25-26.

³⁸ *Ibid* at paragraph 25.

³⁹ *Some Problems in the Law of Trusts* (NZLC PP48 2002) at paragraph 21.

“(1) A trustee may insure any property which is subject to the trust against risks of loss or damage due to any event and upon such terms (including terms requiring replacement by the insurer) as he thinks fits and may also insure against any risk or liability against which it would be prudent for a person to insure if he were acting for himself. (2) Subject to the express provisions of the instrument creating the trust the trustee may apportion the cost of premiums between income and capital as he thinks fit.

(2A) Nothing in this section authorises a trustee to apply any asset of the trust in payment of a premium under a policy of insurance indemnifying the trustee against the trustee’s personal liability for breach of the trustee’s obligations as trustee.”

8.32 No opposition to this proposal was received, and the New Zealand Law Commission thus affirmed it as a recommendation in its Report.⁴⁰

8.33 It is interesting to note that the New Zealand Law Commission did not propose any amendment to the existing section 24(3), which provides that “[n]othing in this section shall impose any obligation on a trustee to insure”. In considering the issue of a duty to insure, the New Zealand Law Commission agreed with the view of the English Law Commission on this matter that trustees should be under no general obligation to insure.⁴¹ However, the New Zealand Law Commission also noted that “[t]he absence of a blanket obligation does not preclude trustee liability in the event of failure to insure in circumstances in which the prudence of so doing is clear”.⁴²

(c) *Australia*

8.34 The Law Commission of England and Wales in its *Consultation Paper on Trustees’ Powers and Duties* noted that “[a] number of Australian states have legislation in similar form”, suggesting that whilst there existed some differences between the

⁴⁰ (NZLC R79 2002) at paragraph 25.

⁴¹ See above, at paragraph 8.17-8.19.

⁴² *Report on Some Problems in the Law of Trusts op cit* at paragraph 26.

various legislative schemes, section 41 of the *Trustee Act 1925 (NSW)* could be “taken as typical”.⁴³ Section 41 provides that:

“(1) A trustee may insure against loss or damage, whether by fire or otherwise, any insurable property, and against any risk or liability against which it would be prudent for a person to insure if he were acting for himself.

(2) The insurance may be for any amount, provided that, together with the amount of any insurance already on foot, the total does not exceed the insurable value or liability.”

8.35 Meagher & Gummow note that “it was a disputed question whether a power to insure existed in cases where the trustee held the trust property on trust for persons in succession, unless the life tenant consented”, and conclude that “section 41 [was] clearly aimed at dispensing with any requirement of a life tenant’s consent.”⁴⁴

8.36 Meagher & Gummow also reviewed the “orthodox theory” which suggests that there is no duty to insure, noting the authorities which confirm this approach, whilst also noting the authorities which are indicative of the existence of such an obligation.⁴⁵ Overall however, they suggest that there is no such duty to insure in New South Wales, pointing out that if such a duty did exist, “it is not easy to see why it was necessary to enact section 41”.⁴⁶

(4) Charitable Trusts and the power to insure

8.37 As noted in *Tudor on Charities*,⁴⁷ “[c]harity trustees have the usual statutory power to insure the charity property against risks of loss or damage due to any event and to pay the premiums out of the

⁴³ (CP 146 1997) at paragraph 9.14, noting that only Tasmania chose to adhere to the form adopted in the English *Trustee Act 1925*, section 19, as originally enacted. See also section 23 of the *Trustee Act 1958* (Victoria), section 47 of the *Trustee Companies Act 1968* (Queensland), and section 46 of the *Trustees Act 1962* (Western Australia).

⁴⁴ Meagher & Gummow (eds) *Jacobs’ Law of Trusts in Australia* (6th ed Butterworths 1997) at paragraph 2036.

⁴⁵ *Ibid.* See further, paragraphs 8.17-8.19 above.

⁴⁶ *Ibid.*

⁴⁷ Warburton (9th ed Thomson Sweet & Maxwell 2003).

trust fund”.⁴⁸ The nature of this power in the context of charities is further elaborated by the Charity Commissioners, stating as follows:

“Trustees’ general duty to protect the property of their charity means that they should give proper consideration to the use of this power, so that the property of the charity is adequately insured against loss or damage, where such insurance is appropriate.... The governing document of a particular charity may go further and apply a positive duty to purchase insurance. If there is a doubt about the scope of such a duty when expressed in the governing document, the trustees should seek suitable legal advice or approach the Commission.”⁴⁹

8.38 The Charity Commissioners also note that “where trustees have a power to take out insurance against loss or liability, and unreasonably refuse to exercise it, or have a duty to take out such insurance, and fail to discharge the duty, they may become personally responsible for any loss or liability which results.”⁵⁰

8.39 The position in Ireland, in the absence of an express provision in the trust instrument, in respect of the common law power to insure has been outlined in paragraph 8.01, and in respect of the statutory power to insure under section 18 of the *Trustee Act 1893* at paragraph 8.02 above. Only the case of *Re Kingham (deceased)*⁵¹ appears to have a bearing on trustees’ power to insure. The dearth of cases in Ireland on this topic is difficult to account for, although one explanation is that in respect of charitable trusts, in the event of a problem arising in respect of insurance matters, the trustees under section 2 of the *Charities Act 1961* are enabled to apply to the Commissioners for Charitable Donations and Bequests for their opinion or advice regarding the administration of the charity, and this procedure together with indemnity if the advice is then followed may explain the dearth of cases. Whilst the procedure under section 2 of the *Charities Act 1961* clearly offers a solution for trustees of

⁴⁸ *Op cit* at paragraph 6-009.

⁴⁹ CC49 *Charities and Insurance* (revised 2003) at paragraph 20, available at <http://www.charity-commission.gov.uk/publications/cc49.asp#5>

⁵⁰ *Ibid* at paragraph 14.

⁵¹ [1897] 1 IR 170.

charitable trusts, the absence of a similar solution for trustees of general trusts is clearly in need of remedy.

(5) Recommendations

8.40 *The Commission considers that section 18 of the Trustee Act 1893 is in need of reform. The Commission recommends that a new statutory provision be introduced, extending the trustees' existing power of insurance beyond the current limit of "loss or damage caused by fire". The Commission recommends that trustees be empowered to insure trust property up to the replacement value. The exercise of the statutory power to insure should be subject to the general duty of care.*

8.41 *The Commission recommends that any new legislation should not impose upon trustees a duty to insure.*

8.42 *The Commission recommends that special provision be made where land is held either upon a bare trust or for beneficiaries who are all of full age and capacity and, taken together, absolutely entitled to the trust property ie that there should be a power to insure property subject to a bare trust, subject to directions from the beneficiaries (a) that any property should not be insured, or (b) certain property should only be insured according to certain conditions.*

8.43 *The Commission recommends that a new statutory power to insure should confer upon trustees a discretion to pay insurance premiums from the "trust funds", with trust funds defined as comprising either trust income or capital.*

8.44 *The Commission recommends that the new statutory power to insure should apply to all existing and new trusts subject to a contrary expression of intention by the settlor.*

CHAPTER 9 POWER TO COMPOUND LIABILITIES

A The Current Law

9.01 As Pettit notes, “[i]t is thought advantageous that trustees should enjoy wide and flexible powers of compromising and settling disputes, bearing in mind that such powers, however wide, must be exercised with due regard for the interests of those whose interests it is the duty of the trustees to protect.”¹ In Ireland, the power to compound liabilities is contained in section 21 of the *Trustee Act 1893*, which provides that trustees may “compromise, compound, abandon, submit to arbitration or otherwise settle” any debt or claim without being responsible for any loss occasioned by any act done by them in this regard. Although the words “in good faith” are not contained in section 21 of the *Trustee Act 1893*, whereas the English *Trustee Act 1925* contains this express proviso, nonetheless Delany² notes that Overend J stated in *Re Boyle*³ in relation to this power, which is also conferred on executors and administrators: “... that an executor has power to compromise even a doubtful claim, if he *bona fide* believes it to be in the interest of the estate”.

9.02 The power to compound liabilities in England is contained in section 15 of the *Trustee Act 1925*, which provides that trustees may:

- (a) accept any property, real or personal, before the time at which it is made transferable or payable; or
- (b) sever and apportion any blended trust funds or property;
or

¹ Pettit *Equity and the Law of Trusts* (9th ed Butterworths 2001) at 462.

² Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 428. See also Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at paragraph 10.16, citing Jessel MR in *Re Owens, Jones v Owens* (1882) 47 LT 61 at 63.

³ [1947] IR 61, 69.

- (c) pay or allow any debt or claim on any evidence that he or they think sufficient; or
- (d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or
- (e) allow any time for payment of any debt; or
- (f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust;

without being responsible for any loss occasioned by any act or thing so done in good faith.

9.03 A number of decisions of the English court have elucidated some of the principles underlying the exercise of the power to compound liabilities. The decision in *Re Ridsdel*⁴ decided the fairly obvious point that although a payment under section 15(f) must be made in compromise of a claim, it does not follow that, to justify a compromise payment, it must be established that the claim, if there had not been a compromise, would have succeeded. Pettit notes that, “as the judge observed, if this were so, the power of compromise would be reduced in effect to a nullity.”⁵

9.04 In terms of the types of cases to which section 15 has been held to apply, Martin notes that section 15 has been held to authorise the settlement of a dispute with a person claiming to be a beneficiary,⁶ and also litigation between the trustees and beneficiaries on the question of whether certain property is subject to the trust or not: *Re Earl of Strafford*.⁷ It was further established in *Re Earl of Strafford* that section 15 is concerned with external disputes, that is cases in which there is some issue between the trustees on behalf of the trust as a whole and the outside world, as opposed to internal disputes between beneficiaries under the trust. The Court of Appeal also

⁴ [1947] 2 All ER 312.

⁵ See Pettit *op cit*.

⁶ Referring to *Eaton v Buchanan* [1911] AC 253 and *Abdallah v Rickards* (1888) 4 TLR 622.

⁷ [1978] 3 All ER 18, affirmed at [1979] 1 All ER 513 (CA).

clarified in this decision, that in exercising the power, the only criterion is whether the compromise is desirable and fair as regards all the beneficiaries.

9.05 Trustees may accept compositions for debts; allow time for payment of debts; compromise, abandon, submit to arbitration or otherwise settle any claim; and may enter into such agreements and execute such instruments as may be necessary for the efficient performance of those duties: *Re Shenton*.⁸ Martin notes that “[a] wide power of this nature is of great practical importance in enabling the trustee to make a reasonable compromise instead of being obliged to litigate in respect of every possible claim, or risk liability for breach of trust if he fails to do so”.⁹

9.06 Section 21 of the 1893 Act originally applied to personal representatives and trustees. The provisions relating to personal representatives were replaced by section 60(8) of the *Succession Act 1965*. This section enlarged the powers conferred on personal representatives by section 21 of the 1893 Act by allowing them to accept any property before the time at which it is transferable or payable¹⁰.

9.07 It was also established in the decision in *Re Greenwood*¹¹ that in order for trustees to avail of the statutory protection from liability, the trustees must “exercise an active discretion and not just passively fail to take proper steps for example to collect debts”.¹² Thus, as the Law Commission noted, section 15 “provide[s] no defence to a case where the loss arose from the inaction of the trustee or personal representative, but only to a mistaken but *bona fide*

⁸ [1935] Ch 651.

⁹ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 575, referring to the decision in *Re Brogden* [1948] Ch 206.

¹⁰ Section 15(1) of the *Trustee Act (Northern Ireland) Act 1958* also includes this provision and allows personal representatives and trustees to “sever and apportion any blended trust funds or property”.

¹¹ (1911) 105 LT 509.

¹² McGhee (ed) *Snell's Equity* (30th ed Sweet & Maxwell 2000) at paragraph 12-27.

exercise of the statutory power by him or her. In short, honest but perhaps foolish action would be excused but not negligent inaction.”¹³

9.08 As Frost has noted:

“Although there are no changes to the existing text of section 15 of the *Trustee Act 1925* (indeed there have never been any since 1925), the statutory duty of care is now attached to this power to compound liabilities or any similar express power, but the duty can be excluded by the trust instrument”¹⁴.

B Charities

9.09 In addition to the provisions of the *Trustee Act 1893*, section 22 of the *Charities Act 1961* allows the trustees of a charity to compromise any claims brought by or against the charity. The trustees must submit a proposal for a compromise to the Commissioners of Charitable Donations and Bequests and the Commissioners, after such inquiry as they think necessary, may approve the compromise if they are of the opinion that the proposal, with or without modification, is fit and proper and for the benefit of the charity.

9.10 The 1961 Act also grants the Commissioners power to advise the trustees of a charity on any question or dispute relating to the charity or its property. Where the Commissioners give their opinion or advice in relation to any matter, a trustee who acts on or in accordance with the opinion or advice is deemed to have acted in accordance with the trust. A trustee is not indemnified for any act done if the trustee has been guilty of fraud, concealment or misrepresentation in obtaining the opinion or advice.

¹³ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at paragraph 4.23.

¹⁴ See Frost “The Trustee Act 2000 isn’t just about default powers” Association of Corporate Trustees Review (Issue No 16-July 2001) at <http://www.trustees.org.uk/2001/2000%20Trustee%20Act.htm>

C Recommendations

9.11 The Commission considers that section 21 of the *Trustee Act 1893* is in need of reform. The wording of section 21 is complex,¹⁵ and the Commission believes a simplification of the provision is desirable. It is instructive in this context to refer to section 60(8) of the *Succession Act 1965*, which provides as follows:

- “The personal representatives of a deceased person may—
- (a) accept any property before the time at which it is transferable or payable;
 - (b) pay or allow any debt or claim on any evidence they may reasonably deem sufficient;
 - (c) accept any composition or security for any debt or property claimed;
 - (d) allow time for payment of any debt;
 - (e) compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim or other matter relating to the estate of the deceased;
 - (f) settle and fix reasonable terms of remuneration for any trust corporation appointed by them under section 57 to act as trustee of any property and authorise such trust corporation to charge and retain such remuneration out of that property,

¹⁵ Section 21 of the *Trustee Act 1893* reads as follows:

“(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the testator’s or intestate’s estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith”.

and for any of those purposes may enter into such agreements or arrangements and execute such documents as seem to them expedient, without being personally responsible for any loss occasioned by any act or thing so done by them in good faith.”

9.12 *The Commission is of the view that section 21 of the Trustee Act 1893 is in need of reform. The Commission recommends that any new legislative code on trustees’ powers and duties should simplify and clarify the power to compound liabilities. Section 60(8) of the Succession Act 1965 provides a useful model in this regard.*

9.13 *The Commission recommends that the power to compound liabilities should be made subject to the proposed statutory duty of care.*

CHAPTER 10 POWER OF MAINTENANCE AND ADVANCEMENT

A Maintenance

(1) *The Position in Ireland*

10.01 Where any person has a contingent interest in property, “the question arises as to the use which should be made of the income until the gift vests”.¹ It is common for an express provision to be made in the trust instrument allowing the trustees to apply the income of the trust property for an infant’s benefit. Statutory powers of maintenance are also conferred on trustees by sections 42 and 43 of the *Conveyancing Act 1881*.

10.02 Section 42 of the 1881 Act deals with the management of land, and receipt and application of income during minority. Section 42(4) provides that:

“[t]he trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant’s age, for his or her maintenance, education or benefit, or pay thereout any money to the infant’s parent or guardian to be applied for the same purposes”.

10.03 Section 43 of the 1881 Act governs the application by trustees of income of property held in trust for an infant, for the purpose of maintenance, and provides:

“[w]here any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant’s parent or guardian, if any, or otherwise apply for or towards the infant’s maintenance,

¹ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 589.

education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not".

10.04 Effectively, section 43 provides that trustees are empowered to pay:

“the whole or part of the income of any property to which the infant is entitled under the trust for or towards his maintenance, education or benefit. The power exists where the infant is entitled;

(a) For life, or for a greater interest than life, absolutely; or

(b) For life, or for a greater interest than life, contingently on attaining 18 or on the occurrence of some event before attaining that age”.²

10.05 Thus, where the infant is absolutely entitled, no difficulty arises in relation to trustees' powers of maintenance. However, if the vesting of the interest is contingent on the occurrence of some future event, the statutory power may not be employed. Keane cites the example of a familiar provision in a trust instrument, namely that property is not to vest until the infant reaches the age of 25 or marries before that time. In such cases, the trustees have no statutory power to pay money for the maintenance of the infant.³

10.06 A further limitation on the statutory power of maintenance is that it only applies where the trust property “carries the intermediate income”, *i.e.* the income which arises between the time of the coming into effect of the trust and the time the infant attains his majority, or (in the case of a contingent gift) the contingency occurs.⁴

² Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at 119.

³ *Ibid.* However, as Keane points out, there is nothing to prevent the settlor from expressly empowering the trustees to apply the income of the infant's property for his maintenance, and suggests that “this is invariably done in modern settlements”.

⁴ Martin defines gifts carrying the intermediate income as “gifts which entitle the donee to claim the income earned by, or interest upon, the subject matter of the gift between the date of the gift and the date of payment”: Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 590.

Keane states that “the property will not carry the intermediate income in this sense if it is payable to someone other than the infant or if there is an express direction by the settlor to the trustee to accumulate the income and add it to the corpus when it vests it in the infant”.⁵

Delany also notes that:

“[a]s a general principle, a future or contingent gift will not be regarded as carrying the intermediate income which could be applied for maintenance, except where it is a gift of residual personalty, as in such cases the income can go to no-one except the residual legatee.”⁶

10.07 Other types of future or contingent legacies will only carry the intermediate income in limited circumstances, as set out by Kerr.⁷ First, future or contingent legacies will be regarded as carrying the income where the donor was the parent of, or stood *in loco parentis* to, the infant beneficiary and had provided no other fund for maintenance. This principle was expressly recognised by O’Connor MR in *Re Ferguson*.⁸ The second exception is where the income was expressly or impliedly to be applied for maintenance, as in *Re Churchill*,⁹ where the testatrix had given a legacy to her grand-nephew and directed that any part of it should be paid towards his advancement in life or otherwise for his benefit. The third exception is where the testator expressly or impliedly directed that the gift was to be separated immediately from the rest of the estate. This principle was considered by Chatterton VC in *Johnston v O’Neill*,¹⁰ where he stated:

“it is, no doubt, the general rule that general legacies payable at a future day, even though vested, do not carry interest before the day of payment, except legacies given to a child by a parent, or a person *in loco parentis*. But to this general rule there are exceptions, one of which is, that

⁵ Referring to *Re Turner’s Will Trusts* [1937] Ch 15; Keane *op cit* at 120.

⁶ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 426.

⁷ (1953) 17 Conv 273, at 276-278.

⁸ (1915) 49 ILTR 110.

⁹ [1909] 2 Ch 431.

¹⁰ (1879) 3 LR Ir 476.

where a fund is directed to be presently separated for the future payment of certain legacies, it carries the interest accruing up to the time of payment, to the legatees, with the capital sum. In such cases, the rule that the interest follows the capital prevails, and the legatee with its interim accretions.”¹¹

10.08 In addition to the provisions of the *Conveyancing Act 1881*, there exists a further statutory power to permit the court to make payments of income or capital. Section 11(1) of the *Guardianship of Infants Act 1964* provides:

“Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.”¹²

10.09 Keane has noted that “in England and Northern Ireland, the Court has power to make an order for the payment of maintenance of an infant’s capital under express statutory provisions to that effect”.¹³ Whilst there exists no such statutory power in the specific context of trusts in Ireland, it has been held that the High Court enjoys an inherent jurisdiction to make such payments in appropriate cases. This inherent jurisdiction was considered in *Re O’Neill*,¹⁴ where Maguire P accepted the view expressed by Kekewich J in *In re Tollemache*,¹⁵ where he stated:

“the most common application going beyond the administration of a trust according to the instrument creating it is one for advances for the benefit of an infant out of capital not sanctioned by the instrument creating the trust. I have never hesitated to do this where satisfied that the advancement is certainly beneficial, and where the

¹¹ (1879) 3 LR Ir 476 at 480-481.

¹² Section 2 of the 1964 Act defines “welfare” in relation to an infant, as comprising the “religious and moral, intellectual, physical and social welfare of the infant.”

¹³ Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at 120. The statutory provisions in England on the maintenance of infant beneficiaries will be considered below.

¹⁴ [1943] IR 562.

¹⁵ [1903] 1 Ch 457.

infant is contingently interested, as, for instance, entitled only on attaining majority, I have included in the advance the sum necessary to effect a policy of insurance to cover the contingency. This is an illustration of the maxim that necessity has no law".¹⁶

10.10 Whilst Maguire P in *Re O'Neill* accepted the existence of an inherent jurisdiction, he stressed that such jurisdiction should not be exercised lightly. Thus, Maguire P stated "where a minor is actually destitute the way is clear, but where the minors, as here, are not destitute, the question of the existence of a sufficient element of necessity becomes a difficult problem".¹⁷ In all the circumstances of the case, and bearing in mind that both the guardians of the children and their mother were strongly in favour of the application, Maguire P held that the expenditure was not only to the children's advantage, but was also necessary, and in those circumstances, he allowed the application.

(2) The Position in England

10.11 Pettit has noted that the first statutory power in relation to maintenance "was contained in Lord Cranworth's Act in 1860".¹⁸ The current provision is contained in section 31 of the *Trustee Act 1925*, which sets out:

"a comprehensive code dealing with the application of income for the maintenance of an infant beneficiary, the accumulation of any income not so applied, the entitlement to such accumulations and the right of the infant to receive income as it arises after attaining his or her majority".¹⁹

10.12 Section 31 of the 1925 Act (as amended), which has been described as "by no means easy to follow",²⁰ provides as follows:

"Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or

¹⁶ [1903] 1 Ch 457 at 459.

¹⁷ [1943] IR 562, at 565.

¹⁸ Pettit *Equity and the Law of Trusts* (9th ed Butterworths 2001) at 464.

¹⁹ Lloyd Gibson Finely & Wells *A Practitioner's Guide to Powers and Duties of Trustees* (Tolley LexisNexis 2002) at 227.

²⁰ *Per Evershed MR in Re Vestey's Settlement* [1951] Ch 209.

contingent, then, subject to any prior interest or charges affecting that property-

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is-

- (a) any other fund applicable to the same purpose; or
- (b) any person bound by law to provide for his maintenance or education; and

(ii) if such person attaining the age of eighteen years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest...”.

10.13 A settlor may adopt section 31 fully, or with variations, or may exclude it by contrary intention,²¹ whether express or implied. The section “makes clear that the power of maintenance cannot affect prior interests and charges”,²² and section 31(3) limits the scope of the section by providing that it only applies in the case of a contingent interest if the limitation or trust carries the intermediate income of the property.²³ Pettit notes that:

“in many cases, quite irrespective of the relationship between the testator and the devisee or legatee, a testamentary disposition will carry the intermediate income

²¹ Section 69(2) of the 1925 Act provides:

“The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.”

²² Pettit *Equity and the Law of Trusts* (9th ed Butterworths 2001) at 465.

²³ Section 31(3) also provides “but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee”.

(unless otherwise disposed of) under section 175 of the Law of Property Act 1925, which provides that this shall be so in the case of a contingent or future specific devise or bequest of property, whether real or personal; a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory”.²⁴

10.14 Martin has also commented, in relation to the question of whether a gift carries the intermediate income, that the issue is governed by “some complex and technical rules which do not provide any conceptual unity. Some rules are based on case law, and some on statute. It is unfortunate that there is not a single comprehensive code”.²⁵ It should also be noted that the statutory duty of care enshrined in section 1 of the *Trustee Act 2000* does not apply to powers of maintenance and advancement.²⁶

10.15 Thus, the power of maintenance under section 31 can only arise where a person is entitled to the income, whether by virtue of a vested interest, or by virtue of a contingent interest which carries the intermediate income. If the income is applicable in favour of a prior interest, no question of its use for maintenance can arise. It has also been held that a member of a discretionary class is not entitled to any income and the section does not therefore apply to payments made by trustees in the exercise of their discretion.²⁷

10.16 Martin has also noted that “the question of application of income for the child’s maintenance, education or benefit, whether his interest is vested or contingent, is a matter for the trustees’ discretion.”²⁸ The decision to apply income for such maintenance must be taken as a result of a conscious exercise of their discretion, and not automatically. It was held in *Pilkington v IRC*²⁹ and *Re Halsed’s Will Trusts*³⁰ that once the power of advancement is

²⁴ Pettit *Equity and the Law of Trusts* (9th ed Butterworths 2001) at 465.

²⁵ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 590.

²⁶ *Ibid* at 586.

²⁷ *Re Vestey’s Settlement* [1951] Ch 209.

²⁸ Hanbury & Martin *op cit* at 593.

²⁹ [1964] AC 612.

³⁰ [1937] 2 All ER 570.

exercised for the benefit of a beneficiary, the fact that third parties, such as the parents of the child beneficiary, may benefit incidentally is no objection. The trustees should, so far as practicable, arrange for maintenance payments to be shared proportionately among the various funds available for the purpose (section 31(1) proviso). The payments are usually made to the parent or guardian whose receipt is a sufficient discharge for the trustees.

10.17 Section 31(2) of the 1925³¹ deals with the accumulation of surplus income, providing that the residue of the income not applied for maintenance shall be accumulated by investment until the person contingently entitled reaches majority. Martin has noted that “income from such investments becomes available for future maintenance, and the accumulations themselves may be applied, before the beneficiary reaches majority, as if they were income arising in the then current year”.³² If a beneficiary with a vested interest in the income attains majority or marries under that age, such beneficiary is entitled to the accumulation absolutely.³³ In any other case, “the trustees hold the accumulation as an accretion to the capital of the property from which the accumulation arose, and as one with such capita for all purposes.”³⁴

B Advancement

(1) The Position in Ireland

10.18 Delany has stated that “while ‘maintenance’ usually refers to the payment of income for the benefit of infant beneficiaries, the term ‘advancement’ is used to describe payments made out of the trust capital to a beneficiary before he becomes entitled to an interest

³¹ Minor amendments were effected to this section by Schedule 2, paragraph 25 of the *Trustee Act 2000*.

³² Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 588.

³³ Similarly, Lloyd et al note that if the beneficiary attains majority or marries and thereby becomes entitled to the capital of the fund in fee simple, absolute or determinable, or absolutely, or for an entailed interest, he is entitled to the accumulations absolutely: Lloyd Gibson Finely & Wells *A Practitioner’s Guide to Powers and Duties of Trustees* (Tolley LexisNexis 2001) at 229-230.

³⁴ Lloyd et al *ibid* at 230.

under the trust.”³⁵ In *Pilkington v IRC*,³⁶ Viscount Radcliffe explained that the general purpose and effect of a power of advancement was to enable trustees:

“in a proper case to anticipate the vesting in possession of an intended beneficiary’s contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of the tenant for life); and where the contingency upon which the vesting of the beneficiary’s title depended failed to mature or there was a later defeasance or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement”.³⁷

10.19 A power to make advancements out of capital may be expressly conferred by the trust instrument. In addition, there exists in Ireland a statutory provision empowering a guardian of an infant to apply to court for directions in any matter affecting the welfare of the infant, and the court may make such order as it thinks proper. This provision is contained in section 11 of the *Guardianship of Infants Act 1964*.

(2) The Position in England

10.20 A power of advancement may be conferred on trustees in England by express words in the trust instrument, or by incorporating the statutory power contained in section 32 of the *Trustee Act 1925*. If the trust instrument is silent “then section 32 will apply unless it is expressly or impliedly excluded by other provisions of the deed.”³⁸

³⁵ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2001) at 428.

³⁶ [1964] AC 612.

³⁷ *Ibid* at 633.

³⁸ Lloyd Gibson Finely & Wells *A Practitioner’s Guide to Powers and Duties of Trustees* (Tolley LexisNexis 2002) at 234.

10.21 Section 32(1) of the 1925 Act provides:

“Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that –

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.”

10.22 The term ‘advancement’ has been interpreted as “the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment”.³⁹ Section 32 of the 1925 Act also allows the power of advancement to be exercised for the “benefit” of a beneficiary; this is a more general concept, and Lloyd et al suggest that “taken as a whole, the phrase authorises any use of money which

³⁹ *Pilkington v IRC* [1964] AC 612, 634.

will improve the material situation of the beneficiary”.⁴⁰ In *Re Hampden’s Settlement Trusts*,⁴¹ which concerned an express power of advancement, the court accepted that under a wide power of advancement, trustees may deal with trust capital in any way which, viewed objectively, could fairly be regarded as being to the benefit of the object of the power, where they believed subjectively that this was the case.

C Duty of Trustees to See to the Application of the Money Advanced

10.23 As noted above, it is a precondition of the valid exercise of a power of advancement that such advancement is for the benefit of the beneficiary. The English courts have also considered the further question of whether the trustees, having exercised their power to make an advancement, are then under an obligation to see that the money is applied for the purpose for which it was advanced.

10.24 This issue was considered by the Court of Appeal in *Re Pauling’s Settlement Trusts*.⁴² The trustees of a marriage settlement made a number of advancements to the children of the marriage with their mother’s consent, and although nominally paid to the children, the money was applied for family purposes, in circumstances where the Court made a finding of fact that the family was living beyond its means. The beneficiaries subsequently brought an action claiming that the sums had been improperly paid out, on the basis of undue influence of their parents in seeking the advancements. The trustees sought to rely on the consent and acquiescence of the beneficiaries in the exercise of the powers of advancement which were now impugned.

10.25 The Court of Appeal held, in finding the trustees liable for breach of trust in respect of some of the transactions, that when making an advance for a particular stated purpose, trustees could properly pay it to the child beneficiary if reasonably satisfied that the child could be trusted to carry out the prescribed purpose. However, it was held that:

⁴⁰ Lloyd Gibson Finely & Wells *A Practitioner’s Guide to Powers and Duties of Trustees* (Tolley LexisNexis 2002) at 237.

⁴¹ [2001] WTLR 195.

⁴² [1963] 3 All ER 1.

“what they cannot do is prescribe a particular purpose, and then raise and pay the money over to the advancee leaving him or her entirely free, legally and morally, to apply it for that purpose or to spend it in any way he or she chooses without any responsibility on the trustees even to inquire as to its application”.⁴³

D Recommendations

10.26 *The Commission regards the provisions of the English Trustee Act 1925 as overly complex, and further notes that the introduction of legislation on such terms in this jurisdiction, particularly in respect of accumulation, could result in liability to taxation as discretionary trusts. The Commission considers that the general terms of section 11 of the Guardianship of Infants Act 1964 adequately cover the issues of the powers of maintenance and advancement in Irish trust law. The Commission is of the view that the recommendations contained in Chapter 11 on the issue of Variation of Trusts, once adopted, would further enhance the scope of the schemes of maintenance and advancement in this jurisdiction. However, the Commission would welcome submissions on this point.*

10.27 *The Commission recommends that the powers of maintenance and advancement should be subject to the proposed statutory duty of care.*

⁴³ [1963] 3 All ER 1 at 8.

CHAPTER 11 VARIATION AND TERMINATION OF TRUSTS

A Variation of Trusts

11.01 The primary duty of any trustee is to administer the trust exactly in accordance with the terms of the trust instrument. The corollary of this fundamental principle is that the trustee is not entitled to deviate from the terms of the trust in any way. This “no variation” rule, while desirable in most circumstances, has the potential to give rise to difficulties when rigidly applied.

11.02 The topic of variation of trusts was considered in detail by the Commission in its report *The Variation of Trusts*.¹ The Commission ultimately concluded that there is no logical reason why the courts should be constrained by the settlor’s intention at the time of the settlement and that the court’s sole point of reference should be whether or not a given variation will be for the benefit of the beneficiary on whose behalf the court’s consent is being sought. The proposed legislation envisages granting the court power to approve any arrangement varying, resettling or revoking all or any of the trusts, or enlarging, adding to or restricting the powers of the trustees to manage or administer any of the property subject to the trusts.

11.03 The report on *Variation of Trusts* was published at the same time as, and was designed to be read with, the Commission’s *Report on the Rule against Perpetuities*,² which recommended that Rule’s abolition. The abolition of the Rule, which barred prolonged trusts, is an added justification for introducing Variation of Trusts legislation. In particular it was accepted that abolition of the Rule might lead to the creation of some long trusts. The proposed Variation of Trusts legislation would be capable of dealing with events which would have been unforeseeable at the time any such long trust was made.

¹ (LRC 63-2000).

² (LRC 62-2000).

11.04 In relation to general trusts, because the topic of variation of trusts, which would include any proposals to terminate the trust, has been dealt with comprehensively in the above publications, the Commission does not propose to expand on these matters any further in this publication. The question of the termination or merger of charities does warrant some further consideration and these issues are considered in the following paragraphs.

11.05 In its Report, the Commission recommended that charitable trusts be included within the scope of the proposed Variation of Trusts legislation. The Commission noted that charities already had the option of applying to the Commissioners of Charitable Donations and Bequests for a *cy-près* scheme but did not see this as a reason for excluding charitable trusts from the proposed legislation.³ Since the publication of the Report, the Commissioners now have power to deal with all *cy-près* applications without the previous ceiling limit on the value of the assets of the charity involved.⁴

11.06 The Commission noted that, in reality, the overlap between the existing and proposed jurisdictions would be very slight. Any possible overlap between *cy-près* and Variation of Trusts legislation would be confined to those marginal cases where there is a gift to a charity and a gift to a person who falls within one of the categories on whose behalf the court is empowered by Variation of Trusts legislation to consent.⁵ The other marginal case in which an overlap might possibly occur is where the charity's interest in the trust property is contingent. It was further contended that, even if there were a case in which the old and new jurisdictions were to coincide, trustees would usually prefer to approach the Commissioners of Charitable Donations and Bequests, rather than going through the trouble and expense of an application to court.

11.07 Finally, the Commission noted that not all trusts which are classified as "charitable" are amenable to *cy-près* jurisdiction and so if they were excluded from the reach of the Variation of Trusts

³ Because, for example, some charitable trusts may fail to satisfy the some of the tests required to come within the *cy-près* jurisdiction.

⁴ Section 16 of the *Social Welfare (Miscellaneous Provisions) Act 2002* – previously the Commissioners' jurisdiction applied only to charitable gifts of less than £250,000.

⁵ Where there is a beneficiary who is not *sui juris*, who cannot be found or who has a contingent interest.

legislation, those charitable trusts which fall between the existing and proposed jurisdictions would be unjustifiably left without any solution when difficulties arise.

11.08 *The Commission does not consider that any amendments are required to the existing cy-près provisions. The Commission also confirms its view that Variation of Trusts legislation should apply to charitable trusts and recommends that the recommendations contained in its Report on Variation of Trusts (LRC 63-2000) should be implemented.*

B Termination / Merger of Charities

(1) Introduction

11.09 There are many reasons why a charity may have to be dissolved. A distinction must be made between the termination of a charity's legal structure and its charitable content. While the legal structure of a charity may be easily dissolved, it has been suggested that a gift to a charity continues absolutely and perpetually.⁶ This is recognised by its exclusion from the rule against inalienability and from the rule against perpetuities.

11.10 As an alternative to winding-up, two or more charities may wish to merge their operations.⁷ This may be achieved by the transfer of assets from one charity to the other and the dissolution of the first or by the formation of a new charity and the dissolution of the merging charities. Difficulties may arise as to the power to merge and the use of charity property following the merger.

(2) How does a charity terminate?

(a) By the Trustees

11.11 The governing instrument may make provision for the termination of the charity once a specified goal has been met. In this instance, the trustees will be given an express power to wind up the

⁶ See, for example, *National Anti-Vivisection Society v IRC* [1948] AC 31 – “[a] charity once established does not die and its property, being irrevocably devoted to charity, is applied for other charitable purposes” – *per* Lord Simonds at 74.

⁷ It should be noted that the *Competition Act 2002* which deals with mergers only applies to an undertaking which operates for gain – this definition would usually be expected to exclude purely charitable institutions.

charity and make arrangements for the distribution of any remaining funds and assets.

(b) Lack of Assets

11.12 A charity cannot operate or serve any useful purpose if its assets, including property, have been exhausted. In such instances, the trustees simply wind up the charity.

(c) Cessation of objects

11.13 If the objects for which the charity was established cease to exist and there are funds remaining, the *cy-près* doctrine⁸ will usually be invoked so as to apply the funds towards some other charitable purpose.

(d) Objects no longer charitable

11.14 It is possible that the objects of a charitable trust may cease to be charitable due, for example, to a change in social circumstances. Again the *cy-près* doctrine will usually be invoked so as to apply any remaining funds towards some other charitable purpose in the spirit of the original gift.

(e) Termination of the Legal Structure

11.15 A charitable trust may be set up for a limited time or for a limited purpose. Once the time or purpose has expired the trust may be wound up. Alternatively a charitable trust may be wound up due to lack of funds. The termination may be voluntary in the sense that the charity has distributed all of its funds in accordance with its charitable objects or it may be involuntary in the sense that its liabilities exceed its assets.

11.16 The trustees of a charitable trust may decide to incorporate pursuant to a power to do so contained in the trust instrument. In such instances, although the purposes of the trust remain unchanged,

⁸ *Cy-près* has been interpreted as meaning “as near as possible” to the spirit of the original gift. The doctrine allows the High Court, or the Commissioners of Charitable Donations and Bequests to give effect to a donor’s charitable intention where it is impossible or impracticable to give effect to the donor’s wishes in the precise terms intended, for example, where the gift can be better used in conjunction with other property and can suitably, regard being had to the spirit of the original gift, be made applicable to common purposes. See also paragraph 10 of the Introduction.

the trust ceases to exist and the new incorporated charity will be a separate entity. These distinctions may be important for example where a gift is made to the original trust subsequent to incorporation.

11.17 The principles relating to the winding-up of unincorporated associations are similar to those applying to the charitable trust. Even if the association has been dissolved, the members will hold its assets as trustees until the assets have been applied for charitable purposes. The rules of the association will normally make provision for wind up and transfer of assets to a similar charitable purpose or charity.

11.18 If a charity is operating through a company and the company is dissolved, the charity itself will automatically be terminated. If some of the property is held impressed with the trust of the charity, then the dissolution of the company may not necessarily cause the termination of the charity. The procedure for winding up a charitable company is governed by the *Companies Acts 1963-2003*. The memorandum of association of a charitable company will usually provide that any surplus on winding up should not be transferred to the members but should be transferred to another charity with similar charitable objects. If such a provision has not been made, then a *cy-près* application may be made.

(3) What happens when a charity terminates

(a) Governing Instrument

11.19 The governing instrument of a charitable organisation should contain powers and rules relating to the wind up of the charity and the distribution of the charitable assets. If the governing instrument does not make such provision, difficulties may arise.

(b) Cy-Près

11.20 There is no statutory power to authorise the dissolution of a charitable trust but both the court and the Commissioners of Charitable Donations and Bequests have wide powers to step in and advise and assist the trustees in relation to the termination of the trust or to vary the terms of the trust which, in some instances, may mean that the charitable trust can continue, albeit in a different form, without termination.

11.21 The Commissioners' *cy-près* jurisdiction derives from section 29 of the *Charities Act 1961*.⁹ Section 47(4) of the 1961 Act

⁹ As amended by section 8 of the *Charities Act 1973*.

places a duty on trustees, where, the case permits and requires the property or some part of it to be applied *cy-près*, to secure its effective use for charity by taking steps to enable it to be so applied.¹⁰

11.22 Section 47 of the *Charities Act 1961* sets out the circumstances in which property may be applied *cy prè*s. These are where the original purposes:

- are already fulfilled;
- cannot be carried out according to the directions given and to the spirit of the gift;
- provide a use for part only of the property available by virtue of the gift;
- or where charitable property can be more effectively used in conjunction with other property, regard being had to the spirit of the gift (this provides for the possibility of using the *cy-près* procedure to merge two or more charities);
- or where the original purposes refer to an area or class which has ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift;
- the original purposes are adequately provided for;
- or cease to be charitable; or
- cease in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.

(c) *Revenue Commissioners*

11.23 The Revenue Commissioners require that a clause be inserted in the governing document providing that on the winding up or dissolution of a charity, where there remains after the satisfaction of all its debts and liabilities any property whatsoever, that such property will not be distributed among the members of the charity but will be given to some other charity having similar main objects to that of the charity and which also prohibits the distribution of its income

¹⁰ This is similar to the position in England where charity trustees are under a duty, where the case permits and requires the property or some part of it to be applied *cy prè*s, to secure its effective use for charity by taking steps to enable it to be so applied – section 13(5) of the *Charities Act 1993*.

and property among its members. In circumstances where effect cannot be given to this provision, such property shall be given to some charitable object.

(4) Merger

11.24 If a merger involves the transfer of property from one charity to another, questions may arise as to the power of the charity to transfer the property and the extent of the objects of the charity to which the property is to be transferred. If property is transferred to a charity with wider objects than those of their own charity, the trustees may be acting in breach of trust.

11.25 In the case of charities established or regulated by a statute or by a charter, section 4 of the *Charities Act 1973* allows the Commissioners of Charitable Donations and Bequests to frame a scheme to carry into effect an agreement with the trustees of one or more charities whereby the property of each of the charities would come under common control and be applied or used for the benefit of a common charitable purpose to be specified in the application.¹¹

(5) Position in England

(a) Charity Commissioners

11.26 Once a charity has been dissolved, the trustees are under a duty to notify the Charity Commissioners that the charity has ceased to exist.¹²

11.27 The Charity Commissioners have power to present a winding up petition to the court¹³ but only after they have instituted an inquiry under section 8 of the *Charities Act 1993* and are satisfied that there has been misconduct or mismanagement in the administration of the charity or that it is necessary to act to protect the property of the charity.

¹¹ Section 4(2)(d) of the *Charities Act 1973* – note that property vested for the furtherance of education cannot be used for the benefit of a charitable purpose which is not for the furtherance of education.

¹² Section 3(7)(b) of the *Charities Act 1993*.

¹³ Section 63(2) of the *Charities Act 1993*.

11.28 The Commissioners also have power to apply to the court for a declaration that the dissolution of a charitable company which has already taken place is void.¹⁴

11.29 In the absence of an express power in the governing instrument, the charity trustees of a small charity¹⁵ can, with the concurrence of the Charity Commissioners, transfer all the property of the charity to one or more other charities.¹⁶

(b) *Charity Bill*

11.30 The matters to which the court or the Charity Commissioners must have regard to in relation to *cy-près* schemes have been expanded. These are now; the spirit of the original gift, the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and the need for the relevant charity to be able to make a significant social or economic impact.

11.31 At present, section 74 of the *Charities Act 1993* gives the charity trustees of certain unincorporated charities with low annual income (currently £5,000 or less) the power, subject to specified controls and conditions, to make a resolution:

to transfer all the property of the charity to one or more other charities; or

to modify the trusts of the charity by replacing all or any of the purposes of the charity with other charitable purposes; or

to modify particular powers and procedures in the trusts of the charity.

11.32 Section 74 removes the need for charity trustees who wish to make any such transfer or modification, but who do not otherwise have the power to do so, to apply to the Charity Commissioners to make a scheme effecting the transfer or modification. Under section 74 the Commissioners' concurrence in writing to the resolution is needed before the transfer or modification can take effect, but for

¹⁴ Section 63(3) of the *Charities Act 1993*.

¹⁵ Gross income in the preceding year less than £5,000, not an exempt charity or a corporation and not holding land on trust to devote to its purposes.

¹⁶ Section 73 of the *Charities Act 1993*.

small charities the process of obtaining that concurrence is normally much simpler and quicker than the process of applying for a scheme.

Clauses 37 – 39 of the Bill preserve the essence of the current section 74 arrangements for low-income charities while modifying and extending some elements of them.

11.33 The provisions in relation to charitable incorporated organisations (CIOs) allow for amalgamation of two or more CIOs and also provides for the transfer of all the property, rights and liabilities of one CIO to another. Provisions in relation to winding-up are to be dealt with by way of Regulations.

(6) Scotland

11.34 The *Charities and Trustee Investment (Scotland) Bill* provides that the following actions by a charity require consent from the Office of the Scottish Charity Regulator:

- amending its constitution so far as it relates to its purposes;
- amalgamating with another body;
- winding itself up or dissolving itself;
- applying to the court in relation to any of the above actions.¹⁷

(7) Options for Reform

11.35 The Law Society in its report¹⁸ recommended that legislation should provide for the dissolution of a charity constituted as a company or unincorporated association and distribution of its property along the lines of the present requirements of the Revenue Commissioners. They recommended that the power of dissolution and distribution should be exercisable by special resolution of the members of the charity and require a two thirds majority and that prior approval should be obtained from the Charities Office. In the case of a charity constituted as a trust, they recommended that the Charities Office should be given a discretionary power to dissolve the trust and distribute the property by order on the application of at least two thirds of the trustees.¹⁹

¹⁷ Section 16 of the *Charities and Trustee Investment (Scotland) Bill*.

¹⁸ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002).

¹⁹ *Ibid* at 216.

11.36 The Law Society further recommended that the Charities Office should have discretion to reverse or confirm an unauthorised distribution.²⁰ In relation to mergers they recommend that

the proposed merger be subject to a special resolution and require a two thirds majority of the respective members or trustees of the two or more charities;

the prior approval of the Charities Office be sought; and

the two or more charities have the same or similar objects.²¹

11.37 The Commission is of the view that the procedures to be adopted in relation to winding-up or merger will depend on a number of factors:

does the charity have any remaining funds or assets?

does the governing instrument make any provisions in relation to wind-up or merger?

if the charity proposes to transfer funds to another charity, or to merge with another charity, is that other charity a registered charity?

11.38 If there are no funds or assets remaining in the charity, then there should be no great difficulty in winding up the charity. The trustees should simply notify the Registrar of Charities of the position and furnish any outstanding final accounts and returns.

11.39 If a charity wishes to wind-up its operations and there are funds or assets remaining in the charity, the first step will be to consider what provisions have been made in the governing instrument. If the governing instrument makes provisions which conform with the current Revenue Commissioners' requirements (to the effect that the proceeds will be given to some other charity having similar main objects to that of the charity being wound up and the receiving charity also prohibits the distribution of its income and property among its members), and the other charity is a registered charity, then there should be no difficulty and a simple notification to the Registrar of Charities should suffice. If the other charity is not a registered charity, then an application should be made to the Registrar

²⁰ Law Society of Ireland *Charity Law: The Case for Reform* (July 2002).at 217.

²¹ *Ibid* at 218.

of Charities. Of course this situation should not arise because it is envisaged that all charities will be obliged to register and that a failure to do so will be dealt with by means of appropriate sanctions.

11.40 If two or more charities wish to merge operations and each of the charities is registered and if their governing instruments allow for merger, in terms with which they can comply, there should be no need for approval of the merger by the Registrar of Charities. The Registrar of Charities should be notified of the merger.

11.41 If the governing instrument makes no provision regarding the winding-up of the charity then a *cy-près* application will have to be made.

11.42 *The Commission recommends that, in relation to charitable trusts which expressly provide for mergers or winding-up, the current Revenue Commissioners' requirements should be put on a statutory footing, that is, that on the winding up or dissolution of such a charity, where there remains after the satisfaction of all its debts and liabilities any property whatsoever, that such property will not be distributed among the members of the charity but will be given to some other charity having similar main objects to that of the charity and which also prohibits the distribution of its income and property among its members.*

11.43 *The Commission recommends that, unless the governing instrument provides otherwise, any proposed dissolution or merger should be subject to a special resolution and require a two-thirds majority of the trustees.*

CHAPTER 12 SUMMARY OF RECOMMENDATIONS

The provisional recommendations contained in this Paper may be summarised as follows:

Chapter 1 The Office of Trustee

12.01 The Commission provisionally recommends that a minor, whether married or not, should be prohibited from acting as a trustee, and that any purported appointment of a minor to act as trustee in relation to any settlement or trust shall be void from when the appointment would take effect. [paragraph 1.28]

12.02 The Commission's recommendation at paragraph 1.28 in relation to the issue of minors acting as trustees applies equally to charitable trusts. [paragraph 1.35]

12.03 The Commission considers that qualifying criteria for the appointment of charity trustees should be embodied in legislation and recommends that a charity trustee shall be disqualified from being and shall cease to be a charity trustee if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;

- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*;
- has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts. [paragraph 1.37]

12.04 The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities. [paragraph 1.38]

12.05 The Commission recommends that guidelines on checking the eligibility of charity trustees be issued by the Registrar of Charities. [paragraph 1.40]

12.06 The Commission agrees with the approach of the Saskatchewan Law Reform Commission and does not see any need to restrict the number of trustees. [paragraph 1.79]

12.07 The Commission recommends that, in the case of non-charitable trusts, two trustees or a corporate trustee should be required. [paragraph 1.87]

12.08 In line with its recommendation at paragraph 1.79, the Commission does not consider it necessary to impose any maximum number of trustees in the case of charitable trusts. However, see paragraph 1.203 where it is recommended that the power to appoint additional charity trustees (where not specifically provided for in the trust instrument) is to be subject to the consent of the Registrar of Charities. [paragraph 1.91]

12.09 The Commission recommends that a minimum of three trustees be required to act for a charitable trust or three officers in the case of an unincorporated association. A corporate trustee may act as sole trustee but in such circumstances the Commission recommends that there should be at least three directors on the board of directors. If the numbers fall below three, and the person or persons having power to appoint new trustees are unable or unwilling to do so, the Registrar of Charities should have power to appoint additional trustees to bring the numbers back up to the statutory requirement.

This is without prejudice to the existing powers of the Commissioners of Charitable Donations and Bequests under section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973* and to the need for timely liaison with the Commissioners. [paragraph 1.96]

12.10 In the case of a charity operating through a company, the Commission also recommends that there should be at least three directors on the board of directors. However, the Commission notes that any legislation in this regard will need to form part of the current review and consolidation of company law and would ask the Company Law Review Group to consider this recommendation as part of its proposals. [paragraph 1.97]

12.11 The Commission is of the view that sections 50(3) and 57 of the *Succession Act 1965* should be amended to make it clear that a sole personal representative has the power to appoint trustees under the relevant provisions. [paragraph 1.101]

12.12 The Commission is of the view that a non-judicial power to appoint additional trustees would be useful in practice and would reduce the need for recourse to the courts. Accordingly, it is recommended that such a power be introduced. [paragraph 1.156]

12.13 The Commission is of the view that the statutory provision regarding the removal of a trustee on the ground of absence from the jurisdiction for twelve months or more should be deleted as it is no longer an appropriate ground for the replacement of a trustee under the non-judicial power of appointment. [paragraph 1.164]

12.14 The Commission is of the view that instances where a trustee is made a ward of court or a power of attorney comes into effect should be specifically included as grounds for the exercise of the non-judicial power of appointment. [paragraph 1.168]

12.15 The Commission is of the view that bankruptcy of a trustee should be specifically included as a ground for the exercise of the non-judicial power of appointment. [paragraph 1.170]

12.16 The Commission believes that where a corporate trustee is in liquidation or has been wound-up, an application to court should not be necessary. It is recommended that in such circumstances, the corporate trustee may be subject to replacement under the non-judicial statutory power. [paragraph 1.172]

12.17 The Commission is of the view that section 36(2) of the English *Trustee Act 1925* is a useful provision which supplements an apparent deficiency in the drafting of the trust instrument. Accordingly it is recommended that where a trustee has been removed under a power contained in the trust instrument, that trustee may be subject to replacement under the non-judicial statutory power. [paragraph 1.174]

12.18 The Commission recommends that a person nominated to remove and replace trustees should not lose the authority conferred by the trust instrument unless that person (1) refuses to exercise the authority, or (2) lacks the capacity to exercise the authority. [paragraph 1.182]

12.19 The Commission recommends that any new legislative provision governing the appointment of trustees should make clear that any person who has disclaimed the trust is excluded from the definition of “refusing trustee”. [paragraph 1.184]

12.20 While the Commission is not aware that the lack of a similar provision to section 36(4) of the *Trustee Act 1925* has caused any difficulties in this jurisdiction, it is of the view that to put the matter beyond doubt, a provision should be inserted indicating that the power of appointment given to the personal representatives of a last surviving or continuing trustee is deemed to be exercisable by the executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee, without the concurrence of any executor who has renounced or has not proved. [paragraph 1.188]

12.21 Bearing in mind the overall aim of facilitating non-judicial appointments, the Commission is of the view that winding up of the trust is not the answer and that to put the matter beyond doubt, a clear statutory power of appointment by sui juris beneficiaries who are absolutely entitled to the entire beneficial interest in the trust should be introduced along similar lines to that contained in the English *Trusts of Land and Appointment of Trustees Act 1996*. [paragraph 1.197]

12.22 The Commission is of the view that, where a corporate trustee is in liquidation or has been wound-up, the liquidator should be allowed to exercise the power of appointment of a new trustee if there is no person nominated for that purpose in the trust instrument. If there are other remaining trustees, the liquidator should join in the

appointment (if there is no person nominated in the trust instrument with power to appoint) and if the corporate body was a sole trustee the liquidator may make the appointment solely. [paragraph 1.199]

12.23 The Commission is of the view that in relation to the appointment of new trustees of charitable trusts, even where such trusts have the power to appoint new trustees, the Registrar of Charities will have an important role to play. This is particularly important in the protection of the public interest in respect of such trusts. The Commission therefore recommends that:

- The Registrar of Charities should have power to appoint replacement or additional charity trustees. This power is currently exercisable by the Commissioners of Charitable Donations and Bequests under section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973*.
- The non-judicial statutory power to appoint additional charity trustees should be subject to the consent of the Registrar of Charities before any such appointment.
- Any change in charity trustees made pursuant to the non-judicial powers of appointment should be notified immediately to the Registrar of Charities. This could form part of the periodic return to the Registrar of Charities.

The Commission would welcome further submissions on the role of the Registrar of Charities in relation to the appointment of charity trustees. [paragraph 1.203]

12.24 The Commission is of the view that nothing in the trust instrument should be capable of restricting the right of a trustee to retire from the trust or a part thereof and that any such provision should be invalid. [paragraph 1.220]

12.25 The question of appointment of trustees by sui juris beneficiaries was discussed at paragraphs 1.192-1.197, and the Commission is again of the view that winding up of the trust is not the answer and that to put the matter beyond doubt, sui juris beneficiaries who are absolutely entitled to the entire beneficial interest in the trust should have power to direct a trustee or trustees to retire from the trust. [paragraph 1.223]

12.26 The Commission is of the view that there is an anomaly between the appointment and retirement provisions and recommends that the retirement provisions should be clarified to make it clear that a trustee can retire from part of a trust where any part of the trust property is held on trusts distinct from those relating to any other part or parts of the trust property. [paragraph 1.225]

12.27 In view of the recommendation at paragraph 1.87, the Commission recommends that a trustee should not be permitted to retire unless at least two trustees or a corporate trustee remains. [paragraph 1.227]

12.28 The recommendations made at paragraphs 1.220 and 1.225 should apply equally to charitable trusts and will benefit the administration of charitable trusts in the same way as general trusts. [paragraph 1.228]

12.29 In view of the recommendation at 1.96, the Commission recommends that a trustee should not be permitted to retire from a charitable trust or an unincorporated association unless at least three trustees or officers of an unincorporated association or a corporate trustee remains. [paragraph 1.229]

12.30 The Commission recommends that a charity trustee must vacate office if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*;

- has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts. [paragraph 1.231]

12.31 The Law Society further recommends that a trustee of a charity should be able to resign at any time by notice in writing. The Commission does not agree and is of the view that, as in the case of general trusts, the consent of co-trustees to retirement should be obtained but that if same is not forthcoming the trustee wishing to retire should be able to apply to the Registrar of Charities for assistance. [paragraph 1.232]

12.32 The question of appointment of trustees by sui juris beneficiaries was discussed at paragraphs 1.192-1.199 and as indicated the Commission is of the view that winding up of the trust is not the answer and that to put the matter beyond doubt, a clear statutory power of removal by sui juris beneficiaries who are absolutely entitled to the entire beneficial interest in the trust should be introduced along similar lines to that in the English *Trusts of Land and Appointment of Trustees Act 1996*. [paragraph 1.255]

12.33 In view of the recommendation at paragraph 1.87, the Commission recommends that non-judicial removal without replacement should not be permitted unless at least two trustees or a corporate trustee remains.. [paragraph 1.257]

12.34 The Commission is of the view that the inclusion of enumerated grounds does provide some guidance for the public as to the situations where the court will exercise its jurisdiction and recommends that bankruptcy of a trustee, liquidation of a corporate trustee, conviction of an indictable offence, or where an individual is sentenced to a term of imprisonment by a court of competent jurisdiction, should all form grounds for the removal of a trustee and the appointment of a replacement by the court. The court also has general power to appoint new trustees in any case where the court is of the view that it is necessary to do so to ensure the proper administration of the trust. [paragraph 1.261]

12.35 The recommendation at paragraph 1.261 applies equally in the case of charitable trusts. [paragraph 1.264]

12.36 In view of the recommendation at paragraph 1.96, the Commission recommends that, in the case of charitable trusts or unincorporated associations, non-judicial removal without

replacement should not be permitted unless at least three trustees or officers of an unincorporated association or a corporate trustee remain. [paragraph 1.265]

12.37 The Commission, having carefully considered the matter, is of the view that the Registrar of Charities should have power to remove charity trustees from office but that this should be accompanied by an appropriate appeals process to the courts taking account of Constitutional protections. This power will form part of the Registrar of Charities' overall inquiry and investigative functions. [paragraph 1.270]

12.38 The power to remove a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee may also be removed by the Registrar of Charities if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*. [paragraph 1.271]

12.39 The Commission recommends that the Registrar of Charities should have power, as part of its inquiry and investigative functions, to disqualify persons from acting as charity trustees and should maintain a list of persons so disqualified or removed. The

Registrar of Charities should have further powers to impose sanctions on any person purporting to act while disqualified. [paragraph 1.288]

12.40 The power to disqualify a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee will also be disqualified if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*;
- has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts. [paragraph 1.289]

12.41 The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities. [paragraph 1.290]

12.42 The Commission recommends that the Registrar of Charities should have power to suspend persons from acting as charity trustees, for a period not exceeding 6 months, following the institution of an investigation or inquiry. The Registrar of Charities

should have further powers to impose sanctions on any person purporting to act while suspended. [paragraph 1.298]

Chapter 2 Remuneration of Trustees

12.43 The Commission does not consider it appropriate to introduce a statutory default provision in relation to trustee remuneration, being of the view that, in most instances where appropriate and warranted, a charging provision is invariably included in the trust instrument. [paragraph 2.48]

12.44 The Commission does not consider it appropriate to introduce a statutory default provision in relation to remuneration of charity trustees, being of the view that the voluntary nature of charitable activities should be maintained to ensure public confidence in the administration of charities. [paragraph 2.54]

12.45 The Commission is of the view that legislation allowing for remuneration of trustees for non-trustee services should be introduced. Any such provision should contain safeguards which would emphasise that it does not apply to remuneration for services provided by a person acting in the capacity of trustee. [paragraph 2.60]

Chapter 3 Duty of Care

12.46 The Commission recommends the introduction of a statutory duty of care for trustees, to be founded on a hybrid objective and subjective standard. The Commission considers that section 1 of the English *Trustee Act 2000* provides a useful model in this regard. [paragraph 3.43]

12.47 The Commission is of the view that charity legislation should provide for a general statutory duty of care rather than set out specific statutory duties. It considers that further specific requirements for charity trustees should be dealt with by way of guidelines issued by the Registrar of Charities. [paragraph 3.56]

12.48 The Commission recommends that the term “charity trustees” be defined as “the persons having the general control and management of a charity”. [paragraph 3.61]

12.49 The Commission recommends the following duty of care for charity trustees:

A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular:

- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and
- (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person. [paragraph 3.65]

12.50 The Commission recommends that the duty of care should apply to all charity trustees, including the trustees of charitable trusts, trustees and committee members of unincorporated associations, the directors of charitable companies and the governors of bodies incorporated by charter, but would welcome submissions in this regard. [paragraph 3.66]

Chapter 4 Powers of Investment

12.51 The Commission restates its recommendation that legislation conferring greater powers on the courts in relation to the variation of trusts should be enacted, in accordance with the draft legislation appended to the Commission's *Report on the Variation of Trusts*. [paragraph 4.42]

12.52 The Commission considers that the introduction of a statutory power to allow trustees to invest trust property as if they were absolute beneficial owners of that property would be, on balance, inappropriate and inadvisable. The Commission has reached this conclusion bearing in mind the particular needs of default trusts, and trustees of such trusts, and also having regard to the relatively broad powers of investment conferred by the statutory scheme of "authorised investments" which currently operates in this jurisdiction. The Commission recommends that the default powers of trustees in Ireland as to investment should continue to be governed by the statutory scheme of authorised investments, as contained in section 1 of the *Trustee (Authorised Investments) Act 1958* as amended. [paragraph 4.43]

12.53 The Commission recommends that the statutory duty of care should apply to trustees' exercise of the power of investment, subject to a contrary intention in the trust instrument. [paragraph 4.44]

12.54 The Commission is of the view that such matters as the need for trustees to obtain legal advice when exercising the power of investment, adherence to the modern portfolio theory and standard investment criteria properly fall to be considered in the context of trustees' compliance with the duty of care. The Commission accordingly considers that these matters do not require separate consideration. [paragraph 4.45]

12.55 The Commission is of the view that legislative intervention to allow trustees to follow an ethical investment policy is inappropriate and that such powers, if any, should be dictated only by the terms of the trust instrument. [paragraph 4.58]

12.56 In line with the recommendations in relation to general trusts, the Commission recommends that the authorised list of investments should continue to regulate the investment of charity funds. The Commission recommends that it should be clarified that the list compiled by the Commissioners of Charitable Donations and Bequests would be reviewed periodically by reference to the list compiled by the Minister for Finance. [paragraph 4.63]

12.57 The Commission recommends that the proposed statutory duty of care should apply to trustees' exercise of the power of investment, subject to a contrary intention in the trust instrument. [paragraph 4.64]

12.58 The Common Investment Fund is particularly useful for charities with limited funds and the Commission recommends that the scheme be retained. [paragraph 4.67]

12.59 The Commission considers that it would be helpful if guidelines on the investment of charitable funds could be issued in this jurisdiction in relation to charity investments. [paragraph 4.69]

Chapter 5 Power of Sale, Purchase and to Issue Receipts

12.60 The Commission does not recommend granting charities a general default power to acquire land. [paragraph 5.14]

12.61 The Commission proposes to give full consideration to the power of sale, not only in relation to the aspects of trust law involved, but also those of land law. It is intended that this paper shall be made available at the earliest possible date. In the light of this future publication, the Commission considers it appropriate at this stage to reserve its views on the matter, although submissions from any

interested parties on this area would be particularly welcomed. [paragraph 5.47]

12.62 If a charity's governing instrument does not contain a power of sale or if the terms of the power of sale are unclear, the Commission recommends that the charity trustees should obtain appropriate consent, which at present is by way of application to the Commissioners of Charitable Donations and Bequests. [paragraph 5.49]

Chapter 6 Power to Delegate

12.63 The Commission considers that trustees' powers of delegation are in need of reform. The Commission recommends the introduction of legislation in terms similar to the provisions of section 11 of the *Trustee Act 2000*, which provides:

“ (1) Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees' delegable functions consist of any function other than-

(a) any function relating to whether or in what way any assets of the trust should be distributed,

(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,

(c) any power to appoint a person to be a trustee of the trust, or

(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.” [paragraph 6.25]

12.64 The Commission recommends that the proposed statutory duty of care shall apply to trustees' power of delegation. [paragraph 6.26]

12.65 Provision should also be made in relation to the terms of appointment and remuneration of custodians and nominees. [paragraph 6.27]

12.66 The Commission recommends the introduction of default statutory powers of delegation similar to those in the English *Trustee Act 2000*. The classes of functions which trustees of charitable trusts should be permitted to delegate are as follows:

- (a) any function consisting of carrying out a decision that the trustees have taken;
- (b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, administrative powers or procedures relating to the management of the land or the creation or disposition of an interest in the land);
- (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;
- (d) any other function prescribed by Ministerial Regulations. [paragraph 6.34]

12.67 The Commission recommends that the statutory duty of care shall apply to trustees' power of delegation. [paragraph 6.35]

12.68 Charitable trustees should be required to act in accordance with any guidance given by the Registrar of Charities concerning the selection of a person for appointment as a nominee or custodian. This is without prejudice to the powers currently exercised by the Commissioners of Charitable Donations and Bequests in respect of investment and delegation under sections 32 and 33 of the *Charities Act 1961*, as amended by sections 9 and 10 of the *Charities Act 1973*. Arrangements for timely liaison in respect of these matters would need to be carefully considered. [paragraph 6.36]

12.69 Provision should also be made in relation to the terms of appointment and remuneration of custodians and nominees. [paragraph 6.37]

Chapter 7 Liability of Trustees

12.70 The Commission recommends that there is a need for regulation of trustee exemption clauses, such that liability for breach of the irreducible core obligations of trustees may not be excluded. [paragraph 7.59]

12.71 The Commission considers that it is not necessary to draw a distinction between professional and lay trustees for the purposes of trustee exemption clauses, as this issue is addressed by the flexible statutory duty of care recommended in Chapter 3. [paragraph 7.74]

12.72 The Commission considers that approaches based on the distinction between negligence and gross negligence, or on the conduct of the trustee, would be of little assistance in a practical context, because of the difficulties which can arise in precisely defining this distinction. The Commission considers that it is preferable for the issue of trustee exemption clauses to be addressed in relation to the standard of the “irreducible core obligations” of trusteeship, in conjunction with the statutory duty of care which is recommended in Chapter 3. [paragraph 7.81]

12.73 The Commission considers that there is a need for a provision under Irish law conferring upon the courts a discretion to relieve trustees from liability for breach of trust in certain circumstances. [paragraph 7.94]

12.74 The Commission considers that the formulation of such provision should be based on section 61 of the *English Trustee Act*, ie that a trustee has acted “honestly and reasonably, and ought fairly to be excused for the breach of trust.” [paragraph 7.95]

12.75 In the light of existing provisions of Irish law, and in particular the provisions of the tax code, the Commission does not consider that there is a need to introduce further provisions dealing with the relocation of trusts outside the jurisdiction. [paragraph 7.101]

12.76 The Commission agrees that trustees should not be exposed to retrospective liability for any breach of trust which they believed would be governed by a trustee exemption clause. [paragraph 7.104]

12.77 The Commission recommends that reforming legislation on trustee exemption clauses should apply to all trust instruments, irrespective of whether they were executed before the coming into force of the reforming legislation. The Commission would welcome submissions on the need for a “lead-in” period to precede the coming into force of such legislation. [paragraph 7.105]

12.78 The duty of care has been dealt with in Chapter 3 and the Commission’s recommendations in relation to charity trustees are contained at paragraphs 3.45-3.66. The Commission is of the view

that this duty of care should at least consist of an irreducible core of obligations for charity trustees. [paragraph 7.113]

12.79 The Commission is of the view that the simplest and clearest approach as to liability is to avoid the distinction between lay and professional trustees, to avoid having to stipulate what breaches should be excused and to give the court discretion to excuse trustees of liability where they have acted honestly, reasonably and in good faith. [paragraph 7.127]

12.80 The issue of trustee exemption clauses should be addressed in relation to the standard of the “irreducible core obligations” of trusteeship, in conjunction with the statutory duty of care. [paragraph 7.128]

12.81 The Commission is of the view that trustees should not be allowed to purchase indemnity insurance out of charity funds. [paragraph 7.129]

Chapter 8 Power to Insure

12.82 The Commission considers that section 18 of the *Trustee Act 1893* is in need of reform. The Commission recommends that a new statutory provision be introduced, extending the trustees’ existing power of insurance beyond the current limit of “loss or damage caused by fire”. The Commission recommends that trustees be empowered to insure trust property up to the replacement value. The exercise of the statutory power to insure should be subject to the general duty of care. [paragraph 8.40]

12.83 The Commission recommends that any new legislation should not impose upon trustees a duty to insure. [paragraph 8.41]

12.84 The Commission recommends that special provision be made where land is held either upon a bare trust or for beneficiaries who are all of full age and capacity and, taken together, absolutely entitled to the trust property *ie* that there should be a power to insure property subject to a bare trust, subject to directions from the beneficiaries (a) that any property should not be insured, or (b) certain property should only be insured according to certain conditions. [paragraph 8.42]

12.85 The Commission recommends that a new statutory power to insure should confer upon trustees a discretion to pay insurance

premiums from the “trust funds”, with trust funds defined as comprising either trust income or capital. [paragraph 8.43]

12.86 The Commission recommends that the new statutory power to insure should apply to all existing and new trusts subject to a contrary expression of intention by the settlor. [paragraph 8.44]

Chapter 9 Power to Compound Liabilities

12.87 The Commission is of the view that section 21 of the *Trustee Act 1893* is in need of reform. The Commission recommends that any new legislative code on trustees’ powers and duties should simplify and clarify the power to compound liabilities. Section 60(8) of the *Succession Act 1965* provides a useful model in this regard. [paragraph 9.12]

12.88 The Commission recommends that the power to compound liabilities should be made subject to the proposed statutory duty of care. [paragraph 9.13]

Chapter 10 Power of Maintenance and Advancement

12.89 The Commission regards the provisions of the English *Trustee Act 1925* as overly complex, and further notes that the introduction of legislation on such terms in this jurisdiction, particularly in respect of accumulation, could result in liability to taxation as discretionary trusts. The Commission considers that the general terms of section 11 of the *Guardianship of Infants Act 1964* adequately cover the issues of the powers of maintenance and advancement in Irish trust law. The Commission is of the view that the recommendations contained in Chapter 11 on the issue of Variation of Trusts, once adopted, would further enhance the scope of the schemes of maintenance and advancement in this jurisdiction. However, the Commission would welcome submissions on this point. [paragraph 10.26]

12.90 The Commission recommends that the powers of maintenance and advancement should be subject to the proposed statutory duty of care. [paragraph 10.27]

Chapter 11 Variation and Termination of Trusts

12.91 The Commission does not consider that any amendments are required to the existing *cy-près* provisions. The Commission also confirms its view that Variation of Trusts legislation should apply to charitable trusts and recommends that the recommendations contained

in its *Report on Variation of Trusts* (LRC 63-2000) should be implemented. [paragraph 11.08]

12.92 The Commission recommends that, in relation to charitable trusts which expressly provide for mergers or winding-up, the current Revenue Commissioners' requirements should be put on a statutory footing, that is, that on the winding up or dissolution of such a charity, where there remains after the satisfaction of all its debts and liabilities any property whatsoever, that such property will not be distributed among the members of the charity but will be given to some other charity having similar main objects to that of the charity and which also prohibits the distribution of its income and property among its members. [paragraph 11.42]

12.93 The Commission recommends that, unless the governing instrument provides otherwise, any proposed dissolution or merger should be subject to a special resolution and require a two-thirds majority of the trustees. [paragraph 11.43]

**APPENDIX LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27

Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboring of a Child (February 1979)	€1.90
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