

REPORT

TRUST LAW: GENERAL PROPOSALS

(LRC 92 – 2008)

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Law Reform Commission

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernize the law. Since it was established, the Commission has published over 130 documents containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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However, full responsibility for this Report lies with the Commission

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INTRODUCTION

A Trust Law Review

1. This Report, which follows the publication in 2005 of a *Consultation Paper on Trust Law - General Proposals*,¹ completes the Commission's review of the law of trusts under its *Second Programme of Law Reform 2000-2007*.² The aim of this review is to make recommendations that would lead to a modern legislative code concerning the duties, responsibilities and powers of trustees. The result would be to replace the *Trustee Act 1893*, the principal legislation concerning the duties and powers of trustees, with a more complete legislative statement of the relevant law. The 1893 Act has been amended in relatively minor respects only since the foundation of the State. Thus, the *Trustee Act 1931* 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* amended the provisions in the 1893 Act on the investment of trust funds.³

2. Since the publication of the Consultation Paper, the Commission has hosted a number of consultative meetings with relevant organisations and interested persons to discuss its provisional recommendations. The Commission is also very grateful to those bodies and individuals who prepared written submissions in response to the Consultation Paper,⁴ and which the Commission considered in formulating the final recommendations in this Report.

3. As the Commission noted in the Consultation Paper, parts of the *Trustee Act 1893* are clearly in need of reform⁵ while other provisions are still as relevant today as when they were enacted but would benefit from suitable textual modernisation. Consequently, this Report includes a combination of three types of recommendations: those involving the retention of existing provisions in the 1893 Act, with suitable updating of the actual wording used;

¹ LRC CP 35-2005, referred to in this Report as "the Consultation Paper."

² Item 20 in the Commission's *Second Programme of Law Reform 2000-2007* (available at www.lawreform.ie) committed the Commission to examine the law of trusts, including the law of charities. On the Commission's work in connection with the law of charities, see paragraph 8, below.

³ The consolidation and reform of the 1893 Act (as amended) was proposed in the Minister for Justice's 1962 *Programme of Law Reform* (Pr.6379), at p.11, but this did not come to fruition so that the current project is the first occasion on which the 1893 Act has been examined in detail with a view to its reform.

⁴ See the Acknowledgements page above.

⁵ See the Consultation Paper at paragraph 1.02.

those involving reform or expansion of provisions in the 1893 Act; and those involving entirely new provisions. As the succeeding chapters of the Report indicate, some of the proposed new provisions may assist in clarifying existing practice based on established case law, but others involve significant changes in the duties and powers of trustees.

4. The publication of this Report has involved, with the exception of one specific area, a complete review of the law concerning trustees. As noted in the Consultation Paper, consideration of, for example, the powers of sale of trustees raises a number of issues in land law as well as trust law.⁶ Since the publication of the Consultation Paper, the Commission published its 2005 *Report on the Reform and Modernisation of Land Law and Conveyancing Law*,⁷ which, among other matters, proposed the replacement of the *Settled Land Acts 1882 to 1890* with a single scheme for trusts of land. This proposal, as well as the other recommendations in the 2005 Report, were incorporated into the *Land Law and Conveyancing Law Reform Bill 2006*, currently before the Oireachtas. The other remaining aspect of the Commission's review of trust law will, therefore, deal with the effect on the relationship between trustees and beneficiaries of the repeal of the *Settled Land Acts* when the *Land Law and Conveyancing Law Reform Bill 2006* is enacted. This will be completed under the Commission's *Third Programme of Law Reform 2008-2014*.⁸ Subject to this proviso, the draft *Trustee Bill* attached to the Report contains the principal elements of what the Commission considers would be a suitable new legislative code on the duties, responsibilities and powers of trustees.

5. Another related matter considered in the Consultation Paper was the absence of a legal basis allowing for the variation of trusts, which the Commission had recommended in its 2000 *Report on Variation of Trusts*.⁹ At the time of writing (November 2008), the Commission understands that the Government proposes to bring forward amendments to the *Land and Conveyancing Law Reform Bill 2006* which will provide for a jurisdiction to allow for the variation of trusts in certain circumstances. Consequently, the Commission has concluded that it is no longer necessary to consider this issue in this Report.

⁶ See the Consultation Paper at paragraph 5.02.

⁷ LRC 74-2005.

⁸ Project 21 in the Commission's *Third Programme of Law Reform 2008-2014* (LRC 86--2007) (available at www.lawreform.ie) commits the Commission to consider the consequences of the repeal of the *Settled Land Acts* when the *Land Law and Conveyancing Law Reform Bill 2006* is enacted.

⁹ LRC 63-2000.

6. Similarly, sections 16 and 17 of the *Land and Conveyancing Law Reform Bill 2006* also propose to abolish the rule against perpetuities, which was also recommended by the Commission in its 2005 *Report on the Reform and Modernisation of Land Law and Conveyancing Law*.¹⁰ For that reason, it is also no longer necessary to deal with that matter in this Report.

B Trusts in general

7. To set the Commission's review of trust law in context, it is useful to consider the role of the trust, which is generally seen as one of the most significant contributions of equity to the law.¹¹ The modern trust has come a long way since its evolution in the medieval concept of uses, by which the owner of land would give it to another to hold on the owner's behalf.¹² Historically, complex trust arrangements were used to protect land-based wealth by preventing imprudent heirs from putting the long term interests of a family at risk. Trusts continue to be used by families in Ireland for the purposes of protecting capital where beneficiaries are young, lack capacity or may be regarded as improvident.¹³ Indeed, as personal wealth has increased dramatically among Irish families, trusts are now regularly used as a temporary shield, giving protection to capital pending the maturity of beneficiaries.¹⁴ They are often viewed as the most flexible and secure instrument that can be used to protect capital while ensuring that appropriate funds, whether of an income or capital nature, are available or can be appointed for the benefit of one or more beneficiaries.¹⁵

¹⁰ LRC 74-2005.

¹¹ The late Prof Maitland observed: "Of all the exploits of Equity the largest and most comprehensive is the invention and the development of the Trust." Maitland *Equity* (2nd ed Cambridge University Press 1936) at 23.

¹² See Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 53.

¹³ The term 'improvident' is of necessity a very general, and possibly subjective, term because some people who have accumulated wealth may have subjective views of the abilities and maturity of family members for whom they have an obligation to make provision.

¹⁴ The Society of Trust and Estate Practitioners (STEP), which made a submission to the Commission, has confirmed this in general terms.

¹⁵ It should be noted that as the use of trusts gives rise to considerable administrative and taxation costs, they are generally only likely to be used where the risks associated with the direct provision of benefits to beneficiaries would lead to a risk of loss of capital through improvident behaviour and the potential for

C Pension trusts and charitable trusts

8. Trusts are not limited to the world of wills and family settlements, however, and they are extremely flexible tools for making dispositions of property for many purposes. Nowadays trusts have considerable and increasing relevance in the commercial context, for example, through their application in financial and investment schemes, such as pension funds. It should be noted that pension trusts, which differ in a number of respects from the traditional trust model and are regulated under the *Pensions Acts 1990 to 2008*, are not in general included within the scope of this Report. Similarly, trust law is also of immense significance to charities. The *Charities Bill 2007*, currently before the Oireachtas, includes the first statutory definition of a charity, proposes to establish a register of charities and to put in place a regulatory framework for registered charities under the auspices of a Charities Regulatory Authority. The 2007 Bill takes into account some recommendations of the Commission in its 2006 *Report on Charitable Trusts and Legal Structures for Charities*.¹⁶ The Commission's recommendations in this present Report are intended to apply to charitable trustees generally, but where relevant they are expressly stated to be without prejudice to the provisions of the *Charities Bill 2007*.

beneficiaries to use freely owned assets in a manner which is not in their best interests.

¹⁶ LRC 80-2006. As mentioned in footnote 2, above, item 20 in the Commission's *Second Programme of Law Reform 2000-2007* included the law of trusts and charities. In 2003, the Department of Community, Rural and Gaeltacht Affairs published a consultation document entitled *Establishing a Modern Statutory Framework for Charities*, which proposed a modern regulatory framework for charities in Ireland. The Commission agreed that, as part of its own review of charity law under the Second Programme, it would conduct specific research on the duties of charitable trustees in co-operation with the Department's general reform proposals. As a result, the Commission published the *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006), which followed from its *Consultation Paper on Charitable Trust Law: General Proposals* (LRC CP 36-2005) and *Consultation Paper on Legal Structures for Charities* (LRC CP 38-2005). The *Charities Bill 2007*, currently before the Oireachtas, represents the Government's legislative proposals arising from the Department's 2003 consultation document and takes into account a number of the Commission's proposals.

D Outline of the Report

9. The Commission's review of trust law concentrates on the powers and duties of trustees, and the Report begins in Chapter 1 by examining the fiduciary nature of the office of trustee and the importance of incorporating that analysis into the modern legislative code being proposed by the Commission.

10. In Chapter 2, the Commission examines 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 applications to court on matters which should be capable of being resolved by the trustees themselves. The Commission also considers the question of trustee remuneration and the policy issues associated with any proposal to introduce a statutory charging clause.

11. In Chapter 3, the Commission considers the standard and duty of care expected of trustees together with the instances in which the duty of care should apply. The question of whether the duty should be of uniform application or take account of the differences between lay and professional trustees is also addressed.

12. In Chapter 4 the Commission considers the liability that may be imposed on a trustee for breach of trust and examines the extent to which trustees may be permitted to exclude or restrict such liability. In this context the issue of regulating trustee exemption clauses is considered.

13. In Chapter 5, the Commission considers the nature and extent of the duty of trustees to provide information to beneficiaries.

14. In Chapter 6, the Commission considers the desirability of permitting trustees to delegate some particular aspects of the administration of the trust to agents, nominees and custodians.

15. In Chapter 7, the Commission considers the need for more expansive powers of insurance and discusses the question of whether the insurance may be paid for out of income or capital.

16. In Chapter 8, the Commission considers the powers of investment available to trustees and the existing statutory scheme of authorised investments. The desirability of obtaining and considering professional advice prior to exercising a power of investment is discussed as is the duty of care to which trustees exercising their powers of investment are subject. The question of adopting an ethical investment policy is considered and the extent to which trustees may allow non-financial considerations to inform their investment decisions.

17. In Chapter 9, the Commission reviews the existing powers of trustees concerning debts, settlements and compounding liabilities and identifies a number of ways in which these may be improved.

18. In Chapter 10, the Commission addresses the duties of trustees concerning the maintenance of beneficiaries and advancement of sums to beneficiaries and the need to reform the existing statutory powers.

19. In Chapter 11, the Commission considers the ability of trustees to deal with trust property by way of purchase or sale and the related power to issue receipts.

20. Chapter 12 provides a summary of the recommendations in the Report.

21. The Appendix to this Report contains a draft *Trustee Bill 2008* to implement the Commission's recommendations for reform, and it also includes existing provisions which, as mentioned in paragraph 3, above, should be retained subject to suitable textual modernisation.

CHAPTER 1 THE NATURE OF THE OFFICE

A Introduction

1.01 The Consultation Paper opened with a brief outline of what it means to be a trustee and stated that “the office of trustee is an onerous one”.¹ As this Report makes recommendations relating to the powers and duties of trustees, this Chapter elaborates on the nature of the office.

1.02 It is well established that a trustee stands in a fiduciary relationship to the beneficiaries of the trust.² Although, as will be seen below, a precise definition is not possible, a ‘fiduciary relationship’ has been described, in broad terms, as:

“one in which a person undertakes to act on behalf of or for the benefit of another, often as an intermediary with a discretion or power which affects the interest of the other who depends on the fiduciary for information and advice.”³

1.03 The relationship between trustees and beneficiaries is generally viewed as the archetype of a fiduciary relationship.⁴ Furthermore, fiduciary duties are the cornerstone of the relationship between trustees and beneficiaries. Not only is a trustee subject to the specific obligations imposed by

¹ See the Consultation Paper at paragraph 1.01.

² *Keech v Sandford* (1726) Sel Cas Ch 61; *Price v Blakemore* (1842) 6 Beav 507; *West Donegal Land League Ltd v Udaras na Gaeltachta* [2006] IESC 29, Supreme Court, 15 May 2006. Although Sealy argues that the term ‘fiduciary’ is “more precisely used, in contrast with trusts proper, in reference to those situations which are in some respects trustlike but are not, strictly speaking, trusts” it appears to be almost universally accepted as appropriate to describe trustees as persons who act in a fiduciary capacity. See Sealy “Fiduciary Relationships” [1962] CLJ 69, at 72.

³ Law Commission *Fiduciary Duties and Regulatory Rules – A Summary* (LCCP124-1992) (Summary) at 1.

⁴ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Maguire v Makaronis* (1997) 188 CLR 449.

the terms of the trust instrument, “the fiduciary position of a trustee subjects him to onerous negative obligations in equity.”⁵

1.04 Part B discusses the nature and scope of fiduciary relations and outlines their key features. Part C outlines some of the main fiduciary obligations of trustees and Part D explains that the Commission considers that these should form part of the new legislative code in this area.

B The Concept of Fiduciary Relations

(1) Introduction

1.05 The concept of ‘fiduciary relationships’ is arguably one of the most important to have arisen from the courts of equity. Although much has been written on the nature and scope of fiduciary relationships, a precise definition of the term ‘fiduciary’ has proved elusive.⁶ Finn has described the term fiduciary as “one of the most ill-defined, if not altogether misleading terms in our law”.⁷ Although there have been attempts at providing a definition⁸, courts and commentators have concluded that the term defies definition⁹ and some have gone even further and argued that “attempts at a definition are unwise or inappropriate.”¹⁰

⁵ Pearce & Stevens *The Law of Trusts and Equitable Obligations* (3rd ed Butterworths 2002) at 738.

⁶ According to Thomas and Hudson, the term is fiduciary is a “little like an elephant, we think we would know one when we saw one but find it difficult to describe in the abstract”. See Thomas & Hudson *The Law of Trusts* (Oxford 2004) at 758.

⁷ Finn *Fiduciary Obligations* (Law Book Co Ltd 1977) at 1.

⁸ Examples of definitions of the term ‘fiduciary’ include: “a person who undertakes to act in the interest of another person.” (Austin Scott “The Fiduciary Principle,” (1949) 37 CLR 539, at 540); “a person in a special relationship of trust to another” (Courtney *The Law of Private Companies* (2nd ed Butterworths 2002) at 503); “a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.” Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18.

⁹ *Breen v Williams* (1996) 186 CLR 71, paragraph 22; Law Commission for England and Wales and the Scottish Law Commission Consultation Paper *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (No 153 1998) at 236.

¹⁰ See Law Commission for England and Wales Consultation Paper *Fiduciary Duties and Regulatory Rules* (No 124 1995), paragraph 2.4.1 which cites Goff

1.06 However some insight can be gained from the etymology of the term 'fiduciary'. 'Fiduciary' has links in Latin with 'to trust: *fidere*' and 'faith: *fide*'¹¹ and is strongly associated with notions of 'faith', 'confidence', 'trust' and 'fairness'.¹² Thus, while it may not be possible to provide a comprehensive definition, the etymology of the term fiduciary indicates that at the heart of a fiduciary relationship are core values such as good faith, loyalty and trust.

1.07 Not only is a single, all-embracing definition unavailable, it is also not possible to provide an exhaustive list of the categories of fiduciary relationships.¹³ However certain categories are well established as being indisputably fiduciary in nature. As mentioned above, the relationship between trustee and beneficiary is considered to be axiomatic of the fiduciary relationship¹⁴ but other examples of recognised fiduciary relationships include company directors and their company¹⁵, principals and their agent¹⁶ and solicitors and their client.¹⁷

(2) Features of Fiduciary Relations

1.08 In his attempt to find a unified concept of fiduciary relationships, Shepherd concluded that a fiduciary relationship "exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilise that power in the best interests of another, and the recipient of the power uses that power."¹⁸ In this concept, Shepherd usefully identified two distinct features which can be observed across all classes of fiduciary relationships.

and Jones *The Law of Restitution* (3rd ed 1986) at 632; *Lloyds Bank Ltd. v Bundy* [1975] QB 326, 347, *per* Sir Eric Sachs; *Re Craig, decd.* [1971] Ch 95, 104, *per* Ungood-Thomas J. See also the comments of Feeney J in *Clements v Meagher* [2008] IEHC 258, High Court, 25 July 2008.

¹¹ *New Oxford Dictionary of English* (Oxford 2001).

¹² Thomas & Hudson *The Law of Trusts* (Oxford 2004) at 758.

¹³ Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 213.

¹⁴ See also Thomas & Hudson *The Law of Trusts* (Oxford 2004) at 759.

¹⁵ *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.

¹⁶ *De Bussche v Alt* [1878] 8 Ch D 286.

¹⁷ *Brown v IRC* [1965] AC 244.

¹⁸ J C Shepherd "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 LQR 51, at 75; see also J C Shepherd *The Law of Fiduciaries* (Carswell, 1981).

(a) Discretion and Power

1.09 The first feature of fiduciary relations is that fiduciaries invariably have discretion or power to act on behalf of or for the benefit of another party.¹⁹ Persons who are considered to be fiduciaries usually employ specialised knowledge or skills in an advisory, representative or managing capacity. Whether the fiduciary is managing property on behalf of another person or representing or advising another person, they must have sufficient scope to act in the interests of that other person. If the relationship does not confer discretion or power on the ‘fiduciary’ then he cannot be considered to be truly in a fiduciary position and will not be subject to the constraints of the fiduciary principle.²⁰

(b) Duties or Obligations

1.10 The second feature of fiduciary relationships is the imposition of duties or obligations. Underlying such relationships is the scope for the fiduciary to exercise their discretion or power in a manner detrimental to the interests of the other party. According to Pearce and Stevens, the essence of fiduciary relationships is that “one person occupies a position in which he has a duty to act on behalf of on another, thereby enjoying the potential to abuse his position by acting for his own interests.”²¹

1.11 As Mason J said in *Hospital Products Ltd v United States Surgical Corporation*²²:

“The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.”

¹⁹ In *Fiduciary Duties and Regulatory Rules* (LCCP No.124) the Law Commission stated that in determining whether a relationship gives rise to fiduciary obligations, “discretion or power” is one of the factors that must be present.

²⁰ DeMott “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1988) Duke LJ 879, at 901.

²¹ Pearce & Stevens *The Law of Trusts and Equitable Obligations* (3rd ed Butterworths 2002) at 740.

²² (1984) 156 CLR 41, 96.

1.12 Consequently, equity imposes fiduciary obligations to protect the interests of the vulnerable.²³ In our modern society, where specialisation of labour gives specialists the opportunity to abuse their superior knowledge or skills, the imposition of fiduciary obligations has become increasingly important.²⁴

(3) Nature and Scope of Fiduciary Relations

1.13 In *Bristol and West Building Society v Mothew*, Millett LJ gave an outline of the defining characteristics of the fiduciary relationship that indicates the nature of fiduciary obligations:

“The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.”²⁵

1.14 While it is possible to indicate the nature of fiduciary obligations as involving the core obligation of exclusive loyalty, their precise scope will vary depending upon the particular fiduciary relationship. In *A.G. v Blake* Lord Woolf MR stated:

“There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligations.”²⁶

²³ Millett “Equity’s Place in the Law of Commerce” (1998) 114 LQR 214, at 219.

²⁴ Frankel “Fiduciary Law” (1983) 71 Calif L Rev 795; Brickman “The continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000’s Revision of Model Rule 1.5” (2003) Ill L Rev 118, at 1185.

²⁵ [1998] Ch 1, 18. The observations of Millett LJ have been relied on by the Irish courts, for example in *McMullen v Clancy (No.2)* [2005] 1 IR 445 and in *Clements v Meagher* [2008] IEHC 258, High Court, 25 July 2008, in which Feeney J quoted this excerpt from Millett LJ’s judgment at paragraph 3.1 and described his approach as “apposite”.

²⁶ [1998] 2 WLR 805, 814.

(4) Elasticity of Fiduciary Concept

1.15 As DeMott has written, the evolution of the fiduciary concept owes much to “the situation-specificity and flexibility that were Equity’s hallmarks.”²⁷ Those hallmarks can still be seen today and the fiduciary concept remains an evolving concept that is “highly complex, poorly delimited, and in a state of flux.”²⁸

1.16 This is an area of law susceptible to flexible and expansive interpretation and which has developed largely by analogy. The roots of the fiduciary principle are evident in trust law and, as previously stated, the trustee can be taken as the classic fiduciary.²⁹ From the paradigm of the express trustee, other categories of persons with analogous characteristics have been defined as fiduciary with the consequence that they also owe trustee-like obligations.³⁰ For example, as a consequence of their trustee-like characteristics, it is well established that directors stand in a fiduciary relationship to their company.³¹ Sealy states that a director’s fiduciary obligations:

“follow wholly from two features of his position: first, as a member of the board, or perhaps a delegate of the board, he may have control over property which in equity belongs to the company; and, secondly,

²⁷ DeMott “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1988) Duke LJ 879, at 881.

²⁸ Law Commission of England and Wales *Consultation Paper on Fiduciary Duties and Regulatory Rules* (No 124 1995), paragraph 2.4.1.

²⁹ According to Johnston, “the fiduciary principle is of great antiquity” and its roots can be traced from primitive law, through Roman concepts such as *mandatum* and *fiducia* to feudal law where the origins of modern trust law can be seen in the concept of ‘fealty’. Johnston “Natural Law and the Fiduciary Duties of Managers” (2005) 8 *Journal of Markets and Morality* 27. Sealy also described the origins of the concept of fiduciary relationships as lying in the law of trusts and noted that the term “fiduciary” was adopted to describe relationships which though “trust-like” fell short of the strict definition of trusts. Sealy “Fiduciary Relationships” (1962) CLJ 69, at 71. See also Brickman “The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000’s Revision of Model Rule 1.5” (2003) III L Rev 118, at 1183.

³⁰ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96.

³¹ *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 426; *Dawson International plc v Coats Paton plc* [1989] BCLC 233.

by the mere fact of accepting office – and a fortiori in carrying out the functions of his office – he holds himself out as undertaking to act in the interests of another, *ie*, the company.”³²

Consequently, like trustees, directors have a wide range of duties, including fiduciary duties.

1.17 However, as Martin stressed, directors and other examples of fiduciaries may be well established but “the boundaries of the category of fiduciary relationships are not clear, and the category is not closed.”³³

1.18 Not only is the category of fiduciaries not closed, neither is the category of persons to whom the duties are owed. For example, while the traditionally accepted rule was that duties are owed by directors to their company, there has been recent expansion of directors’ duties to creditors, employees and members.³⁴

1.19 Furthermore the nature and scope of fiduciary duties is not static. Fiduciary duties are evolving principles which require flexibility in their interpretation and application. A classic example of this is found in the development of the standard of care required of trustees in exercising their powers of investment. Historically caution and conservatism were held as the cardinal principles in determining whether a trustee had displayed the requisite standard of care.³⁵ However the standard required has evolved over time to reflect the realities of modern investment and fiduciary decision-making. Consequently, it will now be generally acceptable for a trustee to take a prudent degree of risk in order to generate a greater profit for the trust.³⁶

C The Fiduciary Obligations of Trustees

(1) Introduction

1.20 According to Pearce and Stevens, “the fiduciary position of a trustee subjects him to onerous negative obligations in equity, which are designed to prevent him from abusing his position by acting in his own interests at the

³² Sealy “The Director as Trustee” (1967) CLJ 83, at 90.

³³ Hanbury & Martin *Modern Equity* (17th ed Thomson Sweet & Maxwell 2005) at 619. See also the comments of Feeney J in *Clements v Meagher* [2008] IEHC 258, High Court, 25 July 2008 at para 3.1.

³⁴ Courtney *The Law of Private Companies* (2nd ed Lexis Nexis Butterworths 2002) at 504.

³⁵ *Learoyd v Whitely* (1887) 12 App Cas 727.

³⁶ *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

expense of the interests of the beneficiary.”³⁷ Although there are a wide range of views on how the fiduciary duties of trustees should be classified, the views of Millett LJ in the English case *Bristol and West Building Society v Mothewe*³⁸ provide a useful outline.

1.21 As it is the paradigm of a fiduciary relationship, Millett LJ’s outline applies strictly to the relationship between trustees and beneficiaries but the core content of the fiduciary obligation is a duty of loyalty. Bogert has stated:

“One of the most fundamental duties of the trustee [of a trust] is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary, and must exclude all selfish interest and all consideration of the interests of third persons.”³⁹

(2) The Fiduciary Duties of Trustees

1.22 As Millett LJ outlined in the *Bristol and West Building Society* case, this duty of exclusive loyalty in turn encompasses a myriad of sub-categories of fiduciary duties. The principal sub-categories enumerated by Millett LJ were the duty to act in good faith, the duty to avoid conflicts of interest and the duty not to make an unauthorised profit. Other sub-categories that are important for our purposes are the general duty of care in administering the trust, the duty to take personal responsibility for the administration of the trust, the duty to treat all beneficiaries fairly and the duty to keep accounts and provide information to the beneficiaries.

(a) Duty of Good Faith⁴⁰

1.23 Given the etymology of the term ‘fiduciary’ as previously discussed, it is unsurprising that the trustee’s core duty of exclusive loyalty would include a duty of good faith.⁴¹ This duty requires that the trustee act honestly and with fidelity in the interests of the beneficiaries. In the English case *Armitage v Nurse*⁴² Millett LJ said that “the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum

³⁷ Pearce & Stevens *The Law of Trusts and Equitable Obligations* (3rd ed Butterworths 2002) at 738.

³⁸ [1998] Ch 1, 18. See paragraph 1.13 above.

³⁹ Bogert *Trusts & Trustees* (2nd ed Rev West Publishing Company 1978) at 217.

⁴⁰ Some commentators argue that this duty is not strictly a fiduciary duty but it would be difficult to see lying or corruption as anything other than a clear breach of fiduciary duty.

⁴¹ *Cowan v Scargill* [1985] Ch 270.

⁴² *Ibid.*

necessary to give substance to the trusts.”⁴³ It is thus fundamental to the very concept of the trust as if a trustee is not obliged to act honestly and with fidelity in the interests of the beneficiaries, there is simply no substance to the trust.⁴⁴

(b) Duty to Avoid Conflicts of Interest

1.24 The fundamental duty of exclusive loyalty operates to reduce the risk of trustees abusing their position by using their powers of management in their own interests. As it could prove very difficult to always determine the true motives of trustees, equity laid down the strict rule that they must not place themselves in a position where their duty and their own interests or the interests of a third party may conflict.⁴⁵ In the words of Lord Herschell in *Bray v Ford*:

“Human nature being what it is there is danger of the person holding a fiduciary position being swayed by interest rather than duty ... It has therefore been deemed expedient to lay down this positive rule.”⁴⁶

(c) Duty not to Make an Unauthorised Profit

1.25 The core duty of exclusive loyalty also operates to reduce the danger of trustees taking advantage of their position in order to make a personal profit. This danger was recognised in the early case of *Keech v Sandford*⁴⁷ where a trustee attempted to obtain in his own name a renewal of a lease held in trust for an infant. Consequently, again with the basic justification of deterrence, equity takes the inflexible position that “a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit...”⁴⁸

(d) Duty to Take Personal Responsibility for the Administration of the Trust

1.26 Trustees are under a duty to take personal responsibility for administrative decisions. As the Consultation Paper stated, the rationale underpinning this duty stems 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

⁴³ *Ibid* at 253.

⁴⁴ The question of excluding liability the principle of good faith is discussed in Chapter 4, below.

⁴⁵ *Huntington Copper and Sulphur Co Ltd v Henderson* (1877) 4 SC (4th Series) 294, 299.

⁴⁶ *Bray v Ford* [1896] AC 44.

⁴⁷ (1726) Sel Cas T King 61.

⁴⁸ *Bray v Ford* [1896] AC 44.

beneficiaries.”⁴⁹ This duty is subject to qualification and, again, is discussed further in the Report.⁵⁰

(e) Duty to treat all Beneficiaries Fairly

1.27 As well as their duties to adhere to the terms of the trust instrument, it is well-established that trustees are also under a duty to be impartial in the exercise of their functions. The general principle is that “trustees are bound to hold an even hand among their beneficiaries and not to favour one as against another.”⁵¹

(f) Duty to Keep Accounts and Provide Information to Beneficiaries

1.28 Trustees are under a duty to keep “clear and accurate accounts of the trust property and a beneficiary is entitled to inspect these accounts.”⁵² Furthermore trustees are under a duty to provide beneficiaries with certain information. The nature and extent of this duty is also considered in greater detail later in the Report.⁵³

(g) Duty of Care

1.29 Though it is arguably inappropriate to describe it as a fiduciary duty, trustees also owe a duty to the beneficiaries to exercise care in carrying out their functions.⁵⁴ The standard and scope of this general duty of care is

⁴⁹ Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 458.

⁵⁰ See Chapter 6, which deals with the issue of permissible delegation.

⁵¹ *Lloyds Bank v Duker* [1987] 1 WLR 1324, 1330.

⁵² Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 448.

⁵³ See Chapter 5, below.

⁵⁴ Although some commentators have described the duty of care as the “backbone of fiduciary obligation” (See Birks “The Content of Fiduciary Obligation” (2000) 34 *Is LR* 3), others argue that it is inappropriate to characterise the duty of care as a fiduciary duty, saying instead that it is a separate duty owed alongside the range of fiduciary obligations. See Pearce & Stevens *The Law of Trusts and Equitable Obligations* (3rd ed Butterworths 2002) at 741. In *Girardet v Crease & Co* (1987) 11 *BCLR* (2d) 361, 362 Southin J made the distinction between a breach of the duty of care by a fiduciary and a breach of a fiduciary duty because “an allegation of breach of fiduciary duty carries with it the stench of dishonesty, if not of deceit, then of constructive fraud.” This was quoted and endorsed by Millet LJ in *Bristol and West Building Society v Mothew* [1998] 1 Ch 1. In *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 *DLR* (4th) 14, La Forrest J said

considered in detail later in this Report but it should be noted that the standard of care applied to trustees is more rigorous than the standard of care generally applied in the tort of negligence, *ie* that of the “reasonable person”.⁵⁵ The demand for the more rigorous standard stems largely from the fact that, traditionally, the trust has been regarded as the highest form of fiduciary relationship.

1.30 It is thus evident from the range of duties outlined that the office of trustee is an onerous one. Not only may trustees be deemed liable for breach of the duties contained in the trust instrument, they may also be found liable for breach of fiduciary duty.

D Conclusion

(1) *Fiduciary Principle Underlying Trust Law Reform*

1.31 As previously stated, this Report makes recommendations in relation to the office of trustee and the powers and duties it entails. Since the fiduciary principle underlines the exercise of these power and duties, the Commission emphasises that it should also form part of the proposed new legislative code in this area. Accordingly, each option for reform in the succeeding chapters has been informed by the understanding that as fiduciaries, high standards of behaviour are required of trustees.⁵⁶ The Commission endorses the statement by Millett LJ in the English case *Armitage v Nurse*⁵⁷ that “the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.”⁵⁸ The Commission has also concluded that the proposed legislation should include an express statement that a trustee, as a fiduciary, must perform the trust honestly and in good faith for the benefit of the beneficiaries.⁵⁹

that “it is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.”

⁵⁵ See Chapter 3, below.

⁵⁶ In *Meinhard v Salmon* (1928) 249 NY 458, 164 NE 545 Cardozo J described it as “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. [The fiduciary’s duty must be kept] at a higher level than that trodden by the crowd.”

⁵⁷ [1998] Ch 241.

⁵⁸ *Ibid* at 253.

⁵⁹ The question of allowing the exclusion of the principle of good faith is discussed, and rejected, in Chapter 4, below.

1.32 *The Commission recommends that the legislation setting out the powers and duties of trustees should include an express statement that a trustee, as a fiduciary, must perform the trust honestly and in good faith for the benefit of the beneficiaries.*

CHAPTER 2 THE OFFICE OF TRUSTEE

A Introduction

2.01 As Chapter 1 outlined, the office of trustee is an onerous and exacting one. Trustees are invariably obliged to carry out numerous duties and obligations and, in so doing, are obliged to observe high standards of honesty and integrity. Failure to appoint suitable trustees can have serious consequences for the successful administration of the trust and for the interests of the beneficiaries. As Porter MR stated in *Bank of Ireland v Cogry Flax Spinning Co*:

“That is why it is so important to select an honourable and upright, as well as an intelligent and capable man for the office of trustee. If the selection is unfortunate, so may be the results.”¹

2.02 Traditionally there are two categories of trustees: on the one hand, non-professional or lay trustees, who usually agree to act out of a sense of duty to the person who settles property on trust (the settlor) and, on the other hand, professional trustees, who are paid for their services. Arguably it may be desirable to appoint trustees who are drawn from both categories in order to ensure that those with a strong sense of personal duty and personal knowledge of the beneficiaries and their needs are afforded adequate support in terms of professional experience and expertise.

2.03 As trusts may endure for extended periods of time, provision must be made for the appointment and removal of trustees. This chapter examines the extent to which the existing provisions governing the capacity, numbers, appointment, retirement and removal of trustees contained in the *Trustee Act 1893* should be modernised and updated. The chapter discusses the current position in relation to each matter before making recommendations with the overall aim of facilitating efficient management and administration of the trust and reducing the need for recourse to the courts in relation to matters which should be capable of being resolved by the trustees themselves.

¹ [1900] 1 IR 219, 236.

2.04 Part B considers capacity and suitability to act as a trustee and Part C considers regulation in relation to the numbers of trustees. Part D concerns appointment of trustees. Part E deals with disclaimer of office by trustees, Part F deals with retirement of trustees and Part G the removal of trustees. In Part H the Commission considers the question of trustee disqualification and in Part I the question of their suspension. In Part J the Commission discusses trustee remuneration and the policy issues associated with any proposal to introduce a statutory charging clause.

B Capacity/Suitability to Act as a Trustee

(1) Current Position

2.05 Currently anyone may act as a trustee in Ireland. The *Trustee Act 1893* provides no restrictions and anyone, including minors or companies permitted by their constitutions, may be appointed. A beneficiary or a relative of a beneficiary² may be appointed although it may be preferable to avoid the potential conflict of interest which may be caused by such an appointment. However, in practice it may not always be possible to find a suitable alternative and in some circumstances it may be possible to argue that, provided beneficiaries do not act as the sole trustee, they may be in the best position to strive for the efficient and profitable administration of the trust. Similarly, although it would be preferable to avoid appointing trustees who reside outside the jurisdiction, it is not always possible to do so and residence outside the jurisdiction should not act as an automatic bar to appointment.³

2.06 Because the *Trustee Act 1893* provides no pre-conditions to appointment, the type and expertise of trustees will vary from non-professional or lay trustees to professional trustees who specialise in providing trust services.

(2) Discussion

2.07 In considering the options for reform, the Commission recognises the value of settlor autonomy but is of the view that some limitation would be appropriate in order to protect the interests of the trust and its beneficiaries. Furthermore, while the settlor may be involved in the initial appointment of trustees, subsequent appointments may be necessary to fill vacancies created by the retirement, removal or death of trustees. At this stage, the settlor may no longer be involved in the trust or may be deceased. Consequently, in the interests of the trust and its beneficiaries, it is appropriate to set some limitation regarding the selection of trustees.

² *Re Jackson's Trusts* (1874) 8 ILTR 174.

³ *Crofton v Crofton* (1913) 47 ILTR 24.

(a) Minors

2.08 In the Consultation Paper the Commission made the provisional recommendation that a minor, that is, a person under 18 years, should be prohibited from acting as a trustee.⁴ As well as considering the approach taken in other common law jurisdictions, the Commission considered the contractual powers of minors under the general law in Ireland and concluded that it would be inadvisable for a minor to be appointed as trustee.

2.09 As outlined in Chapter 1, the trustee stands in a fiduciary relationship to the beneficiaries of the trust. Consequently, not only will the position involve the duties expressly included in the trust instrument, onerous duties and responsibilities will also stem from the fiduciary nature of the position. Although some minors may be capable of performing the requirements of the position, the Commission is of the view that, in order to protect the interests of the trust, the beneficiaries, and potential minor trustees, a trustee should not be permitted to act unless they have reached the age of eighteen.

2.10 The Commission accepts, however, that in keeping with the *Age of Majority Act 1985* it is appropriate to deviate from this position where the minor trustee has attained the age of majority through marriage.⁵

2.11 In the Consultation Paper the Commission noted the position under the *Succession Act 1965*, by which a minor who is appointed as executor can apply for a grant of probate on attaining majority.⁶ The Commission expressed the provisional view that it was not necessary to allow specifically for the appointment of a minor as trustee on attaining majority and stated that upon the attainment of majority, the person or persons with the power of appointment can consider appointing the minor as a replacement or additional trustee if necessary. In preparing this Report, the Commission has concluded that it would be preferable to state that a minor appointed as a trustee may become an additional trustee when he or she attains the age of majority. The Commission sees such an approach as having greater compatibility with the fundamental principle of settlor autonomy. The Commission has therefore concluded that that where a minor is named in the original trust instrument and appointed in writing, he or she should be permitted to act as an additional trustee when they reach the age of majority at 18 years of age (or by marriage).

⁴ See the Consultation Paper at paragraph 1.28.

⁵ 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”. Under section 1 of the *Marriages Act 1972* the current minimum age for marriage is 16 years.

⁶ See the Consultation Paper at paragraph 1.29.

2.12 *The Commission recommends that a minor (within the meaning of the Age of Majority Act 1985) 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. The Commission recommends however that where a minor is named in the original trust instrument and appointed in writing, he or she should be permitted to act as an additional trustee when they reach the age of majority at 18 years of age (or by marriage).*

(b) Mental Capacity

2.13 In their Report *Charity Law: The Case for Reform*, the Law Society of Ireland recommended that to “be of sound mind” should be a statutory qualification for charity trustees.⁷ The Commission has examined the question of legal capacity in detail in its 2006 *Report on Vulnerable Adults and the Law*⁸ and has recommended a “functional approach” to the assessment of capacity. This approach is issue-specific and asks whether the individual has the capacity to carry out a particular function at a specific time. Because of the complexities involved in establishing mental capacity, the Commission is of the view that it would be inappropriate to set any qualifying criteria in relation to mental capacity for trustees. Instead the general functional approach recommended in relation to legal capacity should apply.⁹

2.14 *The Commission recommends that qualifying criteria in relation to mental capacity for trustees should not be introduced. The Commission recommends that the general functional approach recommended in its 2006 Report on Vulnerable Adults and the Law in relation to legal capacity should instead apply.*

⁷ *Charity Law: The Case for Reform* (The Law Society of Ireland July 2002) at 220.

⁸ LRC 83-2006.

⁹ The Scheme of the *Mental Capacity Bill 2008*, published by the Government in September 2008, proposes to implement the functional test in the Commission’s Report. Note that, under current law, where an individual is made a ward of the court, the Committee of the ward may make an application to act as trustee to the President of the High Court under section 87 of the *Lunacy Regulation (Ireland) Act 1871*. However it appears such applications are quite rare in practice. Also, where a power of attorney comes into effect under the *Powers of Attorney Act 1996*, section 16(2) of the 1996 Act provides that the donee of the power does not assume any functions which the donor might have as trustee.

C Number of Trustees

(1) Minimum Number of Trustees

(a) Current Position

2.15 There is currently no minimum number of trustees required in Ireland.

(b) Discussion

2.16 Although there is currently no minimum number of trustees required, as noted above, it is arguably preferable to ensure a mix of lay and professional trustees and, for practical reasons, it is both desirable and usual to have two or more trustees.¹⁰ This is particularly the case where the trust includes land as, unless the settlement provides otherwise, section 39(1) of the *Settled Land Act 1882* requires two trustees to give a receipt for capital money on a sale by a tenant for life.¹¹

2.17 Martin takes the general view that “a sole trustee is most unsatisfactory because of the opportunities for maladministration and fraud which then arise.”¹²

2.18 While it may be usual and desirable to have two trustees, situations do arise where only one is appointed, eg where a parent wishes to settle property on a child and the trust deed provides for the other parent to be appointed as sole trustee.¹³

2.19 In the Consultation Paper the Commission took the view that a sole trustee does not offer adequate protection of beneficiaries’ interests and provisionally recommended that in the case of all non-charitable trusts a minimum of two trustees or a sole corporate trustee should be required.

¹⁰ See paragraph 2.02.

¹¹ It should also be noted that the requirement for two trustees currently contained in section 39 of the *Settled Land Act 1882* is to be retained under the *Land and Conveyancing Law Reform Bill 2006*. Section 21 of the 2006 Bill provides that, in order for a conveyance of the legal estate or interest in any land subject to the *Settled Land Acts 1882-1890* to overreach any equitable interests in the land and give the purchaser clear legal title, it must be made by at least two trustees or a trust corporation.

¹² Hanbury & Martin *Modern Equity* (16th Ed Butterworths 2001) at 515.

¹³ It should be noted that Part 31, Chapter 2, of the *Taxes Consolidation Act 1997* contains anti-avoidance provisions in relation to settlements on children. Settlements on children are generally ineffective for tax purposes unless made on foot of an irrevocable instrument.

2.20 The *Trustee Act 1893* did not embrace the concept of a sole trust corporation but the concept was included in the *Succession Act 1965*¹⁴ in the context of allowing a trust corporation to act as a suitable alternative to the two trustees otherwise required to act in relation to an infant's property. Section 57(1) of the *Succession Act 1965* provides that where an infant 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 infant.

2.21 This provision indicates a preference for two trustees, or alternatively a trust corporation, where the beneficiary is a minor. The Commission agrees with the protectionist approach to minors that this provision makes and takes the view that the proper administration of trusts in general would benefit from having more than one trustee in place.

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

¹⁴ Section 30(4) of the *Succession Act 1965* provides that a trust corporation 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 Companies Act 1963 or within the meaning of the corresponding 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 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. Section 3 of the *Land and Conveyancing Law Reform Bill 2006* has adopted this definition of 'trust corporation'.

(2) Maximum Number of Trustees

(a) Current Position

2.23 There is currently no restriction on the number of trustees who may be appointed.¹⁵

(b) Discussion

2.24 The rationale for imposing a restriction is that a multiplicity of trustees may give rise to difficulty in obtaining the unanimity in decision-making that is required where the trust instrument does not provide otherwise. Consequently, as set out in the Consultation Paper, a statutory cap on the number of trustees has been considered, and in some cases implemented, in a number of jurisdictions.¹⁶ For example, section 34(2) of the English *Trustee Act 1925* restricts the number of trustees of trusts of land to four. However, as expressed in the Consultation Paper, the Commission is of the view that there is no reason to restrict the number of trustees in this jurisdiction. There is no indication that Irish trusts have been experiencing problems due to excessive numbers of trustees and indeed some trusts may benefit from large boards of trustees.

2.25 *The Commission recommends that no restriction on the number of trustees should be imposed.*

D Appointment

2.26 The question of appointment arises both in the context of the initial trustees and the additional or replacement trustees that may be required throughout the lifetime of the trust.¹⁷ Currently, trustees may be appointed in one of three ways, by the trust instrument, by the beneficiaries or in accordance with statute.

¹⁵ 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 2.44 below.

¹⁶ See the Consultation Paper at paragraphs 1.53 to 1.79.

¹⁷ It should be noted that additional or replacement trustees are generally not liable for breaches of trust committed before they were appointed though they are obliged to take reasonable steps to ensure the trust affairs are in order on appointment. See *Harvey v Oliver* (1887) 57 LT 239; *Re Lucking's Will Trusts* [1968] 1 WLR 866. Liability of trustees for breaches of trust is discussed in Chapter 4.

(1) Trust Instrument

(a) Current Position

2.27 When a new trust is created the trust instrument will ordinarily make provision for the appointment of the original trustees. Where this is a will and no trustees have been appointed, the court has jurisdiction to appoint trustees.¹⁸ However, as Mee notes, in the case of an *inter vivos* trust, where the equitable ownership in the property is transferred to trustees who are not named or are already dead, the trust will fail as it has not been properly constituted.¹⁹ If however the *inter vivos* conveyance is valid but the trusteeship is disclaimed²⁰, the legal ownership will revert to the settlor (or the personal representative if the settlor is now deceased) to be held on a resulting trust.²¹

2.28 Where a new trust is created the trust instrument may also make provision for any additional or replacement trustees that may be required.²² The trust instrument will usually set out the formalities required.²³

2.29 The trust instrument may also nominate the persons to be provided with an express power of appointment in relation to new or additional trustees.²⁴ Where there is an express power of appointment, it must be strictly construed.²⁵

¹⁸ *Pollock v Ennis* [1921] 1 IR 181. See paragraphs 2.104 to 2.106 for further discussion on the judicial power of appointment.

¹⁹ See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 188.

²⁰ See paragraphs 2.112 to 2.122 below which consider disclaimer of trusteeship.

²¹ *Ibid* at 45. See also section 19 of the *Land and Conveyancing Law Reform Bill 2006* which sets out the persons who will constitute trustees of trusts of land where there is no trustee nominated in the trust instrument.

²² As noted in paragraph 1.105 of the Consultation Paper, “[u]nless the trust instrument so specifies the settlor does not have the power to appoint new trustees or to appoint himself/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.” However, as also noted in paragraph 1.105 of the Consultation Paper, “the power to appoint new trustees by the settlor may be important when dealing with incapacitated beneficiaries.”

²³ If no provision is made to appoint additional or replacement trustees then the statutory provisions in relation to appointment will apply. See paragraph 2.40 to 2.103 below.

²⁴ Difficulties may arise however where a trustee resigns as trust instruments are often silent in relation to the issue of resignation.

²⁵ *Re Wheeler* [1896] 1 Ch 315.

(b) Discussion

2.30 The Commission is of the view that where the trust instrument makes provision in relation to the appointment of trustees or in relation to powers of appointment of new or additional trustees, these provisions must be strictly construed. In keeping with the principle of “freedom of settlement”, the law should interfere as little as possible with the ability of the settlor to shape the trust as he or she sees fit and any statutory provisions should apply only in circumstances where the trust instrument may be silent or deficient.

(2) By the Beneficiaries

(a) Current Position

2.31 Under the rule in *Saunders v Vautier*²⁶ where the beneficiaries are all *sui juris* (ie of full age and capacity) and together absolutely entitled to the entire beneficial interest of the trust, they may bring the trust to an end and appoint new trustees.

(b) Discussion

2.32 In the English case of *Re Brockbank, Ward v Bates*²⁷ the view was taken that beneficiaries cannot appoint new trustees unless they rely on the rule in *Saunders v Vautier* and first bring the trust to an end. Vaisey J set out the rationale for this view as follows:

“If the court, as a matter of practice and principle, refuses to interfere with the legal power of appointment of new trustees, it is, in my judgment, a fortiori not open to the beneficiaries to do so. As I have said, they can put an end to the trust if they like; nobody doubts that; but they are not entitled, in my judgment, to arrogate to themselves a power which the court itself disclaims possessing, and to change trustees whenever they think fit at their whim or fancy...”²⁸

2.33 In the Consultation Paper the Commission noted the potentially disadvantageous nature of relying on the rule in *Saunders v Vautier*.²⁹ The obligation to terminate the trust and create a new trust before trustees may be

²⁶ (1841) Cr & Ph 240.

²⁷ [1948] Ch 206.

²⁸ *Ibid* at 210.

²⁹ See Consultation Paper at paragraph 1.192.

appointed creates a laborious process and “the price in fiscal terms [of taking such a course] is likely to be considerable”.³⁰

2.34 Following a recommendation by the Law Commission for England and Wales, the English *Trusts of Land and Appointment of Trustees Act 1996* introduced a new statutory mechanism which partially reversed the effect of *Re Brockbank*.³¹ Section 19 of the 1996 Act provides that where there is no person nominated by the trust instrument to appoint new trustees and the beneficiaries are able to put an end to the trust under the rule in *Saunders v Vautier*, those beneficiaries can in writing direct that certain trustee(s) retire and direct the remaining trustee(s) to appoint new trustees in their place. Section 19 will not apply if the trust instrument either expressly nominates a person with the power to appoint new trustees or expressly excludes the operation of the section.

2.35 Section 20 of the *Trusts of Land and Appointment of Trustees Act 1996* contains a similar power in relation to the appointment of a substitute for incapable trustees. It gives to beneficiaries placed in the same circumstances as stipulated under section 19 the right to appoint a substitute trustee for a trustee who is incapacitated for reasons of mental ill-health. Section 20 will not apply where there is a person who is willing and able to appoint a replacement under section 36(1) of the *Trustee Act 1925*.

2.36 Unfortunately, there is no case law in this jurisdiction to indicate whether a similar approach to that taken in *Re Brockbank* would be taken by an Irish court. However, given the line of authority that has followed *Re Brockbank* and that the English legislature deemed it necessary to expressly confer powers of appointment on beneficiaries, it is possible that an Irish court would also tend to the view that the rules of equity do not confer such powers.³² In any event, it appears that there is a degree of uncertainty which is undesirable and should be clarified.

2.37 In the Consultation Paper the Commission espoused the overall aim of facilitating non-judicial appointments and took the view that terminating the trust is not the answer in a situation where the beneficiaries have the capacity

³⁰ See Whitehouse and Hassall *Trusts of Land, Trustee Delegation and the Trustee Act 2000* (2nd ed Butterworths 2001) at 97 where the financial and tax consequences of winding up one trust and replacing it with another are highlighted.

³¹ Law Commission for England and Wales *Report on Trusts of Land* (No 181 1989).

³² See *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 and *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313.

and wish to appoint a new trustee. Instead the Commission provisionally recommended that a clear statutory power of appointment should be introduced along similar lines to the mechanism contained in the English legislation.

2.38 *The Commission recommends where (a) there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, and (b) the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust, they should be entitled to direct the appointment of a new trustee or trustees.*³³

(3) Statutory Provisions

2.39 The *Trustee Act 1893* contains statutory provisions in relation to both non-judicial and judicial appointment of trustees. The purpose of the statutory provisions is to facilitate the administration of the trust in circumstances where the trust instrument may be silent or deficient. In providing for both non-judicial and judicial mechanisms for appointment, it was evidently recognised that whereas some situations may not require a perhaps costly and time consuming application to court, others may demand a judicial direction for a resolution. In practice, the provisions in relation to judicial appointment of trustees are rarely utilised in this jurisdiction.

(a) Non-Judicial Appointment

2.40 In the Consultation Paper, the Commission considered reform of the existing statutory provisions in relation to non-judicial appointment under the following headings:

- (i) When can the powers of appointment be exercised;
- (ii) Who may exercise the powers;
- (iii) How should the powers be exercised.

(i) When can the powers of appointment be exercised

(I) Current Position

2.41 Section 10(1) of the *Trustee Act 1893* provides a statutory power of appointment which is exercisable subject to any contrary indication expressed in the trust instrument.³⁴ The intervention of the court is not required in relation to appointments made under section 10.

2.42 The power of appointment under section 10 may be used to appoint a new trustee for the whole or any part of trust property. Section 10(2)(b) provides that when a new trustee is appointed for the whole or any part of the

³³ See also paragraph 2.137 below.

³⁴ Section 10(5) of the *Trustee Act 1893*.

trust property “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...”.

2.43 The power to appoint new trustees may only be exercised where a trustee:

- (i) is dead, or
- (ii) remains out of the jurisdiction for more than 12 months, or
- (iii) desires to be discharged from his/her duties, or
- (iv) refuses to act, or
- (v) is unfit to act, or incapable of acting.

2.44 The power is therefore limited to the appointment of replacement trustees although where a trustee is being replaced, the number of trustees may be increased.³⁵ It should be noted that replacement is not always necessary and section 10(2)(c) provides that it is not obligatory to fill up the original number of trustees where more than two trustees were originally appointed.³⁶ However the subsection does stipulate 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.

(II) *Discussion*

2.45 The Commission firstly considers that, in keeping with the principle of settlor autonomy and the facilitative nature of the statutory powers of appointment, the power of the settlor to oust the application of the provisions should be maintained.

2.46 *The Commission recommends that the statutory powers of appointment of trustees should remain subject to any contrary intention that is expressed in the trust instrument.*

2.47 Many jurisdictions provide for the non-judicial appointment of additional trustees. For example, in England, a power to appoint additional trustees has been provided by section 36(6) of the *Trustee Act 1925* with the proviso that the number of trustees shall not be increased beyond four by virtue of an appointment under the section.

2.48 However, under the existing statutory provisions in this jurisdiction, the non-judicial power of appointment is limited to the appointment of replacement trustees following the death, retirement or removal of an existing trustee. Where an additional trustee is required, due to an increased workload

³⁵ Section 10(2)(a) of the *Trustee Act 1893*.

³⁶ See paragraph 2.128 in relation to the conditions for retirement without replacement imposed by section 11 of the *Trustee Act 1893*.

or a need for specialist expertise for example, an application to court is currently required. This may be seen as a safeguard against the flooding of the trust with surplus trustees however, in view of the absence of a statutory cap on the number of trustees and the benefits of introducing additional trustees in many situations, recourse to the courts should not be necessary.

2.49 *The Commission recommends that a statutory power to appoint additional trustees without recourse to the courts be introduced. As the Commission has already recommended that there be no limit on the maximum number of trustees, the Commission recommends that it should not be provided that the number of trustees may not be increased beyond four by virtue of an appointment under the statutory power.*

2.50 The Commission has considered the existing circumstances in which the non-judicial power of appointment may be exercised under section 10(1) of the 1893 Act and makes a number of observations and recommendations on the current law.³⁷

(aa) *Where a trustee is dead*

2.51 Difficulties in the exercise of the existing non-judicial power of appointment are unlikely to arise in circumstances where a trustee dies and it is clear that this ground should be retained.

(bb) *Where a trustee remains out of the jurisdiction for more than 12 months*

2.52 In the Consultation Paper the Commission distinguished the situation where a trustee has left the jurisdiction and abandoned his or her duties from the situation where the trustee is participating fully from outside the jurisdiction. While the former situation clearly requires the replacement of the trustee, the latter may be entirely acceptable in our modern technological world. The Commission is therefore of the view that this is no longer an appropriate ground for the replacement of a trustee under the non-judicial power of appointment.

2.53 If a settlor or testator does wish the trustees to reside within the jurisdiction, this may be expressly specified in the trust instrument. However, if no such provision is made and a trustee is absent from the jurisdiction in circumstances suggesting a dereliction of duty, an application to court can be made. Whether such absence amounts to an abandonment of duties warranting replacement will then be a question of interpretation for the court to determine.

³⁷ See paragraph 2.43 for a summary of the existing circumstances in which the powers of appointment of replacement trustees may be exercised.

2.54 *The Commission recommends that the statutory provision regarding the removal of a trustee on the ground of absence from the jurisdiction for 12 months or more should be deleted.*

(cc) *Where a trustee desires to be discharged*

2.55 Again, difficulties in the exercise of the existing non-judicial power of appointment are unlikely to arise in circumstances where a trustee wishes to be discharged and it is clear that this ground should be retained.

(dd) *Where a trustee refuses to act*

2.56 Where a person disclaims the position of trustee, they are in effect refusing to act and the power of appointment under section 10(1) will be exercisable.³⁸ The Commission is of the view that this ground should be retained.

2.57 However the category of 'refusing trustees' would also include the situation where a person who has initially accepted the trusteeship but subsequently refuses to act and also refuses to resign. The Commission is of the view that the statutory power of appointment should not apply to situations where trustees refuse to act subsequent to accepting trusteeship. Consequently, in this situation, an application to court will be required.

2.58 *The Commission recommends that the statutory power of appointment should not apply to situations where trustees refuse to act subsequent to accepting trusteeship.*

(ee) *Where a trustee is unfit to act, or incapable of acting*

2.59 The terms "unfit to act" and "incapable of acting" may pose difficulties due to their openness to subjective interpretation. Although they have been judicially considered on many occasions,³⁹ a determination on fitness or capacity will usually be dependent on the circumstances of the particular trustee. Although in practice a trustee who is to be challenged on the grounds of unfitness is likely to retire thereby facilitating replacement, the Commission is of the view that the non-judicial removal of a trustee under statutory authority

³⁸ Disclaimer is discussed in greater detail at paragraphs 2.112 to 2.122 below.

³⁹ For example, a trustee has been deemed "unfit to act" on the grounds of a conviction for a crime of dishonesty (see *Turner v Maule* (1850) 15 Jur 761) or because the trustee was in liquidation or bankrupt (see *Re Barker's Trusts* (1875) 1 Ch D 43 and *Re Adams' Trust* (1879) 12 Ch D 634). Similarly trustees have been deemed "incapable of acting" by reason of some defect such as physical or mental capacity or infancy (see *Re East* (1873) 8 Ch App 735). See also paragraph 2.13 above.

should only be permissible in clear and objectively definable circumstances.⁴⁰ The Commission therefore considers that a clear and exhaustive list of the circumstances in which the non-judicial power of appointment may be exercised should be set out by statute. If issues of fitness or capacity arise outside these objectively ascertainable circumstances and the trustee in question is unwilling to retire, the Commission considers it appropriate that an application to court is made.

2.60 *The Commission recommends that the statutory provision regarding the removal of a trustee on the ground that he or she is “unfit” to act or “incapable” of acting should be deleted and replaced with a number of additional clear and objectively definable grounds.*

2.61 The Commission has considered the following as additional grounds for the non-judicial power of appointment:

(ff) *Where a trustee is a minor*

2.62 As a corollary of the Commission’s earlier recommendation that a minor should be prohibited from acting as a trustee, the Commission is of the view that the non-judicial power of appointment should be exercisable where a replacement trustee is required because a minor has been invalidly appointed.

2.63 *The Commission recommends that the non-judicial power of appointment should be exercisable where a replacement trustee is required because a minor has been invalidly appointed.*

(gg) *Where a trustee is a ward of court⁴¹ or where an enduring power of attorney has come into effect*

2.64 The issue of mental capacity was discussed earlier and the Commission took the view that it would be inappropriate to set any qualifying criteria in relation to mental capacity for trustees.⁴² Again, as a consequence of the subjectivity of the question of mental capacity, the Commission does not consider the inclusion of mental capacity as a ground for the non-judicial

⁴⁰ The list of clear and objectively definable circumstances now proposed as grounds for removal is set out at paragraph 2.71 below.

⁴¹ At present, where a person is considered incapable of managing his or her affairs, an application to court can be made to make that person a ward of court under the *Lunacy Regulation (Ireland) Act 1871*. In its *2006 Report on Vulnerable Adults and the Law* the Commission recommended the replacement of the wardship system in the 1871 Act with a guardianship regime. In September 2008, the Government published the draft Scheme of a *Mental Capacity Bill 2008*, which would largely implement the Commission’s recommendations.

⁴² See paragraph 2.13 above.

appointment of new trustees to be appropriate. However the question of capacity becomes less of a quagmire where the trustee has been made a ward of court or where an enduring power of attorney has been registered and come into effect. 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 ward⁴³ and when an enduring power of attorney is registered and comes into effect, the donee or donees of the power do not take over any functions which the donor has as a trustee.⁴⁴

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

(hh) *Where a trustee is bankrupt or makes a composition or arrangement with creditors*

2.66 In the Consultation Paper the Commission provisionally recommended that instances where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors should be specifically included as grounds for the exercise of the non-judicial power of appointment. The Commission has reconsidered the appropriateness of such a provision however.

2.67 Although bankruptcy is well established as a basis for deeming a trustee “unfit to act”⁴⁵ and is also specifically mentioned in section 25(1) of the *Trustee Act 1893* as a ground for exercising the judicial power of appointment, there is currently no provision under Irish law precluding a bankrupt from acting as a trustee simply by virtue of his status as a bankrupt. Where the

⁴³ 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.

⁴⁴ 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.”

⁴⁵ 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.”

Commission is not recommending that bankrupt persons should be disqualified from acting as trustees, it does not consider it appropriate that the non-judicial power of appointment should be exercisable in circumstances where one of the trustees has been declared bankrupt. The Commission is of the view that where a question as to the fitness or suitability of a trustee arises by virtue of bankruptcy, it is more appropriate that an application be made to court.⁴⁶

2.68 *The Commission recommends that the non-judicial power of appointment should not be exercisable in circumstances where one of the trustees has been declared bankrupt.*

(ii) Where the trustee is a corporate trustee which is in liquidation or has been wound up

2.69 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.”⁴⁷ The *Trustee Act 1893* makes no express provision however for replacing a corporate trustee which has had its legal existence cut short. As noted in the Consultation Paper, section 36(3) of 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.⁴⁸

2.70 *The Commission recommends that where a corporate trustee is in liquidation or has been wound-up, an application to court should not be*

⁴⁶ The bankruptcy of a settlor may also have consequences for the trust. It is therefore important to note the provisions of section 59 of the *Bankruptcy Act 1988* which provides that:

“Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall—

- (a) if the settlor is adjudicated bankrupt within two years after the date of the settlement, be void as against the Official Assignee, and
- (b) if the settlor is adjudicated bankrupt at any subsequent time within five years after the date of the settlement, be void as against the Official Assignee unless the parties claiming under the settlement prove that the settlor was, at the time of making the settlement, able to pay all his debt without the aid of the property comprised in the settlement and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof...”

⁴⁷ Keane *Company Law* (3rd ed Butterworths 2000) at 493.

⁴⁸ Section 35(3) of the *Trustee Act (Northern Ireland) Act 1958* contains a similar provision.

necessary. *The Commission recommends that instances where a corporate trustee is in liquidation or has been wound up should be specifically included as grounds for the exercise of the non-judicial power of appointment.*⁴⁹

2.71 The circumstances in which the non-judicial power of appointment may be exercised under statutory authority would therefore be where a trustee:

- a. is a minor;
- b. is a ward of court⁵⁰ or a donor of an enduring power of attorney;
- c. is dead;
- d. desires to be discharged from his/her duties;
- e. refuses to act,
- f. is a corporate trustee which is in liquidation or has been wound up.

2.72 In the Consultation Paper the Commission noted that the *Trustee Act 1893* fails to cover the situation which can arise where a trustee is removed pursuant to an express power in the trust instrument but the trust instrument is silent with regard to the issue of the trustee's replacement. The Commission is of the view that the necessity of a court application in these circumstances could be avoided by the implementation of a provision along the lines of section 36(2) of the English *Trustee Act 1925*. Section 36(2) provides that where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust.

2.73 *The Commission recommends 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.*

⁴⁹ The question of whether the liquidator of the company should be involved in appointing a replacement is discussed at paragraphs 2.92 to 2.94 below.

⁵⁰ At present, where a person is considered incapable of managing his or her affairs, an application to court can be made to make that person a ward of court under the *Lunacy Regulation (Ireland) Act 1871*. In its 2006 *Report on Vulnerable Adults and the Law* the Commission recommended the replacement of the wardship system in the 1871 Act with a guardianship regime. In September 2008, the Government published the draft Scheme of a *Mental Capacity Bill 2008*, which would largely implement the Commission's recommendations.

(ii) Who may exercise the powers

(I) Current Position

2.74 Section 10(1) of the *Trustee Act 1893* provides three distinct categories of persons entitled to exercise the statutory power of appointment. Priority is first given to any express nomination by the settlor⁵¹ in the trust instrument.⁵² In the absence of any nomination, or where the person nominated is not ‘able or willing to act’, the continuing trustees are the second category of persons who may exercise the power of appointment. Finally, where there are no trustees remaining because of death, the third category, the personal representatives of the last surviving or continuing trustee, will be allowed to exercise the power.⁵³

2.75 As section 10(1) of the *Trustee Act 1893* refers to the power as being a power to appoint “another person or other persons to be a trustee or trustees”, the persons exercising the power cannot appoint themselves.⁵⁴

(II) Discussion

2.76 The Commission has considered whether any changes or extension should be made to the existing categories of persons entitled to appoint new trustees under the existing statutory powers.

(aa) Persons nominated in the trust instrument

2.77 As mentioned above, priority is first given to any express nomination by the settlor in the trust instrument. Where there is no such nomination, the power moves without difficulty to the next category, the trustees. However the power also moves where the person nominated is unable or unwilling to act. Inability to act may arise due to incapacity or where multiple nominated persons fail to agree on the person to be appointed. In relation to unwillingness to act, the Commission has noted the distinction between the situation where the person appointed refuses to exercise the power to act and the situation where

⁵¹ In relation to a will, priority will be given to any express nomination by the testator.

⁵² Section 10(1) of the *Trustee Act 1893*. Note that if the settlor wishes to retain the power to appoint new trustees, this must be expressly provided for in the trust instrument.

⁵³ Where no such person is available to exercise the power of appointment the court will make the appointment – see paragraphs 2.104 to 2.106 below.

⁵⁴ *Re Power’s Settlement* [1951] Ch 1074. By contrast it is specifically provided in section 36(1) of the English *Trustee Act 1925* that a person exercising the power of a substitute appointment may appoint themselves if they wish. The Commission does not propose to follow this aspect of the 1925 Act.

the person appointed considers the issue of appointment but decides that it is unnecessary or inappropriate.⁵⁵

2.78 *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.*

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

2.79 Section 10(1) of the *Trustee Act 1893* provides that in the absence of any express nomination in the trust instrument, or where the person nominated is not 'able or willing to act', the surviving or continuing trustees for the time being are the second category of persons who may exercise the power of appointment. A "continuing trustee" is one who is to continue to act in the trust after the completion of the appointment and it has also been held that the last surviving or continuing trustee includes a sole trustee.⁵⁶

2.80 Under section 10(4) of the 1893 Act a "continuing trustee" will include a refusing or a retiring trustee if they are willing to act in the execution of the provisions of the section. This provision therefore facilitates retirement where all of the trustees, or the last remaining trustee, wish to retire and obviates the need for recourse to the courts in such circumstances. The Commission considers that this facilitative provision should be maintained as it is appropriate that trustees who are handing over their trusteeship and who wish to obtain a sufficient discharge are satisfied as to the suitability of their replacement.

2.81 *The Commission recommends that where the trust instrument makes no express nomination or where the person nominated is not able or willing to act, the continuing trustees should be maintained as the next category of persons with the capacity to exercise the non-judicial power of appointment. The Commission recommends that continuing trustees should continue to include refusing or retiring trustees.*

2.82 As a trustee who is being compulsorily removed is not a "refusing or retiring trustee"⁵⁷ such a trustee will not be considered a "continuing trustee" for the purposes of section 10(4) of the 1893 Act and will therefore not fall within

⁵⁵ See the Consultation Paper at paragraph 1.179.

⁵⁶ *Re Shafto's Trusts* (1885) 29 Ch D 247.

⁵⁷ See *Re Stoneham Settlement Trusts* [1953] Ch 59 where Dankwerts J stated "[i]t 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 ... I come to the conclusion quite plainly that a person who is removed against his will is not a refusing or retiring trustee..."

the second category of persons who may exercise the non-judicial power of appointment.

2.83 *The Commission recommends that a trustee who is being compulsorily removed should not be permitted to exercise the non-judicial power of appointment.*

2.84 As discussed earlier, a trustee who disclaims the trust is also considered to be a 'refusing' trustee. The Commission takes the view that is unlikely that the legislature would have intended to provide an individual who had never acted as trustee and in whom the trust property had never actually vested, with the power to appoint new trustees. 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 and will fall within the scope of section 10(4) of the 1893 Act.

2.85 *The Commission recommends that any new legislative provision governing the appointment of trustees should make clear that a person who has disclaimed the position of trustee is excluded from exercising the power to appoint new trustees.*

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

2.86 Section 10(1) of the *Trustee Act 1893* provides that the final category of persons with a power of appointment is the personal representatives of the last surviving or continuing trustee.⁵⁸ The English *Trustee Act 1925* added two supplementary provisions in relation to the final existing category of persons with the power to appoint new trustees.

2.87 First, section 36(4) of the 1925 Act provides that the power of appointment given to the personal representative of a surviving or continuing trustee is deemed to be exercisable by the executors for the time being of such trustee, without the concurrence of an executor who has not renounced or has not proved. This subsection operates to ensure that an executor who has renounced or has not proved the will of the last surviving or continuing trustee need not be involved in the appointment of a new trustee.⁵⁹ There is no equivalent statutory provision in this jurisdiction.

⁵⁸ Under section 10(5) of the *Succession Act 1965* when the death of the last surviving trustee of a trust occurs, the property vested in the trust will devolve on his or her personal representatives.

⁵⁹ It appears that this subsection was inserted as a result of the decision in *Re Pawley and London and Provincial Bank* [1900] 1 Ch 58 which had held that the term "personal representatives" as it appeared in the *Land Transfer Act 1897* included those who had not obtained a grant of probate.

2.88 *The Commission recommends that the power of appointment given to the personal representative or personal representatives of a surviving or continuing trustee shall be deemed to be exercisable by the executor or executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by the administrator or administrators for the time being of such trustee, without the concurrence of any executor or executors who has renounced or has not proved.*⁶⁰

2.89 Secondly, section 36(5) of the *Trustee Act 1925* qualifies the position outlined in section 36(4) by allowing a sole or last surviving executor intending to renounce the office of executor but willing to act for the purpose of appointing new trustees to do so without accepting the office of executor.

2.90 The Commission considers that this situation is analogous to the situation regarding disclaiming trustees and is of the view that it is not appropriate to allow a sole or last surviving executor who intends to renounce the office of executor to be involved in the appointment of new trustees. Similarly the Commission does not consider that where all of the executors intend to renounce they should be in a position to exercise the power of appointment of a trustee.⁶¹

2.91 The Commission has considered extending the non-judicial power of appointment to include two further categories of persons.

(dd) Liquidator of a corporate trustee

2.92 As discussed earlier, the Commission recommends that the circumstances in which the non-judicial power of appointment may be exercised under statutory authority should be extended to include a corporate trustee that is in liquidation or has been wound-up. It is therefore appropriate to consider the role of the liquidator of such corporate trustee in relation to the appointment of a replacement trustee.

2.93 The Commission believes this situation to be comparable to the role that the personal representatives of the last surviving or continuing trustee may

⁶⁰ 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 cease and that the proving executors may exercise all the powers conferred on the personal representatives.

⁶¹ 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. See also paragraph 2.114 below where the presumption of acceptance of trusteeship that operates on the proving of the will is discussed.

have in the appointment of new trustees. Accordingly, 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 join in the exercise of a power of appointment if there is no person nominated for that purpose in the trust instrument. Thus, if there is no express power of appointment in the trust instrument, the liquidator should join in the appointment where there are other remaining trustees and exercise the power of appointment solely where the corporate trustee was a sole trustee.

2.94 *The Commission recommends that, where a corporate trustee is in liquidation or has been wound-up, the liquidator should be allowed to join in the exercise of a power of appointment if there is no person nominated for that purpose in the trust instrument.*

(ee) *The beneficiaries*

2.95 As discussed earlier, the rule in *Saunders v Vautier*⁶² provides that where the beneficiaries are all *sui juris* and together absolutely entitled to the entire beneficial interest of the trust, they may bring the trust to an end and appoint new trustees.⁶³ For the reasons set out above, the Commission is of the view that terminating the trust is not the answer in a situation where the beneficiaries who are all *sui juris* and together absolutely entitled to the beneficial interest in the trust wish to appoint a new trustee.⁶⁴

2.96 Instead the Commission recommends that 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 the mechanism contained in the English *Trusts of Land and Appointment of Trustees Act 1996*.⁶⁵

2.97 The categories of persons who may exercise the non-judicial power of appointment under statutory authority would therefore be:

- the persons nominated in the trust instrument;
- the surviving or continuing trustees or trustee for the time being;
- the personal representative or personal representatives of the last surviving or continuing trustee;
- the liquidator of a corporate trustee which is in liquidation or wound-up; and

⁶² (1841) Cr & Ph 240.

⁶³ See paragraph 2.31 above.

⁶⁴ See paragraphs 2.32 to 2.38 above.

⁶⁵ See sections 19 and 20 of the English *Trusts of Land and Appointment of Trustees Act 1996* which have been set out at paragraphs 2.34 and 2.35 above.

- the beneficiaries where *sui juris* and together absolutely entitled to the entire beneficial interest in the trust.

2.98 *The Commission recommends that the categories of persons who may exercise the non-judicial power of appointment under statutory authority should be:*

- *the persons nominated in the trust instrument;*
- *the surviving or continuing trustees or trustee for the time being;*
- *the personal representative or personal representatives of the last surviving or continuing trustee;*
- *the liquidator of a corporate trustee which is in liquidation or wound-up; and*
- *the beneficiaries where sui juris and together absolutely entitled to the entire beneficial interest in the trust.*

(iii) How are the powers to be exercised

(I) Current position

2.99 While section 11 of the *Trustee Act 1893* requires the retirement of trustees to be “by deed”, section 10(1) of the 1893 Act only requires the appointment of new trustees to be made “in writing”.

2.100 However, if the appointment is made by way of deed, a vesting declaration in the trust instrument will be sufficient so as to vest the trust property in the new trustee without the need for any conveyance or assignment.

⁶⁶

(II) Discussion

2.101 It should be noted that in its *Report on Reform and Modernisation of Land Law and Conveyancing Law*,⁶⁷ the Commission made a number of recommendations in relation to the formalities required for deeds. These proposals have been included in the *Land and Conveyancing Law Reform Bill 2006*, which is currently before the Oireachtas.⁶⁸ Section 62(2)(b) of the 2006 Bill provides that an instrument is a deed if it is executed in the following manner:

⁶⁶ See section 12(1) of the *Trustee Act 1893*. However certain types of property are expressly excluded from the automatic vesting provisions 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. See section 12(3) of the 1893 Act.

⁶⁷ LRC 74-2005.

⁶⁸ See Part 8 Chapter 3 of the 2006 Bill.

(i) if made by an individual-

(I) it is signed by the individual in the presence of a witness who attests the signature, or

(II) it is signed by a person at the individual's direction given in the presence of a witness who attests the signature, or

(III) the individual's signature is acknowledged by him or her in the presence of a witness who attests the signature, and

(IV) if the instrument would not be enforceable unless it is made under seal, it is sealed by the individual;

(ii) if made by a company registered in the State, it is executed under the seal of the company in accordance with its Articles of Association;

(iii) if made by a body corporate registered in the State other than a company, it is executed in accordance with the legal requirements governing execution of deeds by such a body corporate;

(iv) if made by a foreign body corporate, it is executed in accordance with the legal requirements governing execution of the instrument in question by such a body corporate in the jurisdiction where it is incorporated.

2.102 Any proposals introduced will apply similarly to any formal documents required in relation to the appointment and retirement of trustees.

2.103 *The Commission recommends that the provisions in the Land and Conveyancing Law Reform Bill 2006 in relation to the formalities required for deeds should apply similarly to any formal documents required in relation to the appointment and retirement of trustees.*

(b) Judicial Appointment

(i) Current Position

2.104 It is well established that the court has an inherent power of appointment where no trustees have been appointed or where those nominated predecease the testator or refuse to act.⁶⁹ The power is most frequently invoked when it is sought to replace trustees on grounds of dishonesty or incompetence.⁷⁰ It is well established that the court will not interfere where there

⁶⁹ *Pollock v Ennis* [1921] 1 IR 181.

⁷⁰ See paragraphs 2.146 to 2.148 below.

is a donee ready and willing to exercise a legal power of appointment of new trustees.⁷¹

2.105 In addition to its inherent jurisdiction, the court also has a statutory power to appoint a new trustee or 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'.⁷² Thus the court will not invoke the statutory power if an express or statutory non-judicial power could be utilised and there is a person willing and able to use it.

2.106 Section 36(1) of the *Trustee Act 1893* provides that an order for the appointment of a new trustee may be made on the application of a trustee or beneficiary. The appointment under section 25 can be of a new trustee or new trustees either in substitution or in addition to any existing trustee or trustees or where there is no existing trustee. As the statutory power can be used whenever it is expedient to appoint a new trustee, appointments under the section could be envisaged in a wide variety of circumstances. However the section specifically puts forwards the replacement of a bankrupt or convicted trustee as possible grounds for the statutory power of appointment being exercised.

(ii) Discussion

2.107 As stated earlier, section 25 of the *Trustee Act 1893* provides two examples of where the court will be prepared to exercise its statutory power, where a trustee is convicted of a felony and where a trustee is declared bankrupt. The Commission has considered whether, given the court's existing discretion under its inherent jurisdiction, it is necessary to enumerate any additional grounds for the exercise of the statutory power of appointment. The Commission is of the view that the inclusion of enumerated grounds would provide some guidance for the public as to the situations where the court may be prepared to exercise its power of appointment.

2.108 *The Commission recommends that bankruptcy of a trustee,⁷³ 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 be included as possible grounds for the removal of a trustee and the appointment of a replacement by the court.*

⁷¹ *Re Sutton* (1885) WN 122; *Re Gibbon's Trusts* (1882) 30 WR 287 and *Re Higginbottom* (1892) 3 Ch 132.

⁷² Section 25 of the *Trustee Act 1893*.

⁷³ Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

2.109 The Commission has also considered whether it is appropriate to limit the statutory power of judicial appointment to situations in which it is 'inexpedient, difficult, or impractical' to appoint a trustee 'without the assistance of the court'. Although acknowledging that the court's inherent jurisdiction is not limited in this manner, the Commission takes the view that these phrases should be retained in order to encourage non-judicial appointments.

2.110 The Commission has also considered whether it is appropriate to limit the categories of persons who are entitled to apply to the court for an order for the appointment of a new trustee. Section 36(1) of the *Trustee Act 1893* currently provides that applications may be made by beneficiaries or appointed trustees. In the Consultation Paper the Commission provisionally recommended that section 36(1) of the *Trustee Act 1893* should be expanded to allow for applications to court by persons nominated in the trust instrument for the purposes of appointing new trustees. However the Commission has reconsidered this recommendation and is of the view that the section should be widened further to allow for applications by any person with an interest in the trust.

2.111 *The Commission recommends that section 36(1) of the Trustee Act 1893 should be expanded to allow for applications to court for the appointment of a new trustee by any person with an interest in the trust.*

E Disclaimer

2.112 It has been noted that:

"[a] person may accept the office of trustee expressly, or he may do so constructively by doing such acts as are only referable to the character of trustee or executor, or he may do so by long acquiescence. In the absence of evidence to the contrary, acceptance will be presumed."⁷⁴

However no one can be compelled to accept the office of trustee and the position may be disclaimed before acceptance.⁷⁵

2.113 Disclaimer should be made as soon as possible and preferably in writing as this will provide unambiguous evidence of the prospective trustee's

⁷⁴ Underhill & Hayton *Law of Trusts and Trustees* (17th ed Butterworths 2006) at paragraph 39.1.

⁷⁵ It is at least arguable, however, that a person can be deemed to be a constructive or resulting trustee against their will.

intentions.⁷⁶ A prudent person will do so by deed as the onus of proving disclaimer is on those who assert it and a deed will be required to obtain a sufficient discharge thereby precluding liability for breach of trust.⁷⁷ Disclaimer may however be implied where there is consistent apathy or inaction on the part of a trustee who has not yet accepted the position.⁷⁸

2.114 It should be noted however that a deed of retirement will be required where an executor is also nominated as a trustee and has proved the will. In *Re Sharman's Will Trusts*⁷⁹ Bennett J held that where the office of executor is clothed with certain trusts, or the executor is also nominated as trustee under the will, he will be construed to have accepted the trusteeship if he takes out probate to the will.⁸⁰ The corollary to this presumption of trusteeship is that where the will has not been proved, the position of trustee may be disclaimed.

2.115 As discussed earlier in the context of appointing new trustees, section 10(1) of the *Trustee Act 1893*, which contains provisions for the appointment of new trustees where, a trustee, *inter alia*, "refuses to act therein" also applies in the case of a disclaimer. Therefore where a person nominated refuses to act before assenting to trusteeship this amounts to disclaimer and section 10(1) can therefore be utilised.

2.116 As stated in the Consultation Paper the Commission is of the view that it would not be appropriate to introduce a statutory requirement for the disclaimer to be in writing. To do so may give rise to difficulties where disclaimer arises by implication or because a trustee cannot be located.⁸¹

2.117 The effect of disclaimer is to avoid the title *ab initio*. If one trustee disclaims, the trust is administered by the remaining trustees.

2.118 In the Consultation Paper, the Commission considered a difficulty that may arise where a sole trustee disclaims.⁸² In the case of a trust in a will,

⁷⁶ Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 415.

⁷⁷ Underhill & Hayton *Law of Trusts and Trustees* (17th ed Butterworths 2006) at paragraph 38.3.

⁷⁸ *Re Clout & Frewer's Contract* [1924] 2 Ch 230.

⁷⁹ [1942] 2 All ER 74.

⁸⁰ See also *In Re Brown* [1997] JLR 137 where it was held that the respondent's acceptance of the position of executor also constituted acceptance of the position of trustee.

⁸¹ See the Consultation Paper at paragraph 1.103.

⁸² See the Consultation Paper at paragraph 1.100.

the personal representatives of the deceased will normally appoint the assets to the trustees. 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.⁸³ However, for the purposes of the *Settled Land Acts 1882 to 1890* a sole personal representative shall not be deemed to be a trustee until at least one other trustee is appointed. In the Consultation Paper the Commission noted that it is not entirely clear whether a sole personal representative has the power to appoint trustees or whether a court application is required.⁸⁴ The Commission accordingly recommended that section 50(3) 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 section.

2.119 It should be noted that it is provided by section 19(1)(b)(iv) of the *Land and Conveyancing Law Reform Bill 2006* that it is possible for a sole personal representative to be a trustee of land. Section 19 deals with the trustees of land and, in relation to trusts of land created expressly, sets out in priority the persons who may become the trustees if none are specified by the trust instrument. The final category of persons who may become the trustees if none are specified by the trust instrument is “the settlor or, in the case of a trust created by will, the testator’s *personal representative* or personal representatives”.⁸⁵ However, section 21(2) clarifies that where there is an express trust any conveyance must be by at least two trustees or a trust corporation, that is, a corporation authorised to act as a trustee.⁸⁶ The Commission therefore remains of the view that section 50(3) 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 section.

2.120 Also in the context of the *Succession Act 1965*, section 57 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 infant and may execute

⁸³ Section 50(3) of the *Succession Act 1965*.

⁸⁴ 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.

⁸⁵ See section 19(1)(b)(iv) of the 2006 Bill.

⁸⁶ As the explanatory notes to the 2006 Bill make clear, this is designed to minimise the risk of an inappropriate disposal of the land.

such assurance or take such other action as may be necessary for vesting the share in the trustee so appointed. In default of appointment the personal representatives shall be trustees for the purposes of section 57. Again it is not entirely clear whether a sole personal representative has the power to appoint trustees or whether a court application is required. While section 57 refers to “personal representatives” in the plural, according to Spierin, “the generally accepted view is that a sole personal representative can appoint trustees under this section.”⁸⁷

2.121 Again, the Commission is of the view that specific statutory provision should be made for a sole personal representative to appoint other trustees in circumstances where there is no other person nominated in relation to appointment by the trust instrument. Under section 10(1) of the *Trustee Act 1893* a sole continuing trustee may exercise the statutory power of appointment and to obviate the necessity for an application to court, it would seem appropriate that a sole personal representative should have a similar power in relation to the appointment of trustees. The Commission now turns to set out its recommendations on disclaimer and on the position of a sole personal representative.

2.122 *The Commission recommends that a person who is appointed an executor of a will and nominated as a trustee and who proves the will shall be presumed to have accepted the office of trustee, but that person may be discharged of his or her duties. The Commission also recommends that a person who is appointed an executor of a will and nominated as a trustee but who does not prove the will shall be presumed not to have accepted the office of trustee, and shall be deemed to have disclaimed the office of trustee, unless there is evidence to the contrary. The Commission also recommends that sections 50 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.*

F Retirement

(1) Current Position

2.123 As discussed above, the position of trustee may be disclaimed before acceptance.⁸⁸ However once the office has been accepted, the trustee may only retire in one of four ways⁸⁹:

⁸⁷ Spierin *The Succession Act 1965 and Related Legislation* (3rd ed Butterworths 2003) at 171.

⁸⁸ See paragraph 2.112 above.

- (a) In accordance with the trust instrument;
- (b) With the consent of all the beneficiaries⁹⁰;
- (c) In accordance with statute; or
- (d) In accordance with a court order.

(a) In accordance with the trust instrument

2.124 A trustee is always able to retire where there is an express clause in the trust instrument permitting to do so. Although the terms of the trust instrument may not require the use of a deed, it is prudent to retire by deed in order to obtain a sufficient discharge and preclude continuing liability for breach of trust.

(b) With the consent of all the beneficiaries⁹¹

2.125 A trustee may also be able to retire where all the beneficiaries consent, provided that they are all *sui juris* and collectively entitled to the entire beneficial interest in the trust property. As discussed earlier in the context of appointment of trustees, this may require the winding up of the trust.⁹² However, as Mee notes:

“[i]f all of the beneficiaries (being *sui juris* etc) consent to the retirement of a trustee. Then none of them will be able to hold that trustee responsible in respect of his or her conduct thereafter (on the basis of the principle that a beneficiary who has concurred in a breach of trust has no right of action in respect of that breach). Thus, it would seem that the beneficiaries can, in this indirect manner, effectively allow a trustee to retire.”⁹³

⁸⁹ It should be noted that a retired trustee will be liable where the breach of trust occurred while he was a trustee, where he retired to facilitate a breach of trust and where he was fully aware of, and connived, in the subsequent breach of trust. See *Head v Gould* [1898] 2 Ch 250, 273. The liability of trustees for breaches of trust is discussed in greater detail in Chapter 4.

⁹⁰ Provided that all the beneficiaries are *sui juris* and together collectively entitled to the entire beneficial interest in the trust property.

⁹¹ *Ibid.*

⁹² See paragraphs 2.33 to 2.38 above.

⁹³ See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 193 and also at 265 for a discussion of the principle in *Walker v Symonds* (1818) 3 Swan 1 that a beneficiary who has concurred or acquiesced in a breach of trust cannot complain of such breach.

(c) In accordance with statute

2.126 Both sections 10 and 11 of the *Trustee Act 1893* make provision for the retirement of trustees.

2.127 Section 10 of the 1893 Act allows a trustee who “desires to be discharged” to retire as consequence of the exercise of the statutory power of appointment of new trustees in the place of existing trustees.⁹⁴

2.128 Section 11 of the 1893 Act allows a trustee to retire by deed, without the necessity of a new appointment, where there are more than two trustees and the other trustees and any other person, if any, empowered to appoint trustees consent by way of deed.

2.129 Section 42 of the 1893 Act provides trustees to pay monies or securities belonging to the trust into court, the receipt for which shall be a sufficient discharge. As Mee notes, this is a power that could be invoked to retire in an exceptional case, such as where the beneficiaries cannot be ascertained.⁹⁵

(d) In accordance with a court order

2.130 As a final option, a trustee may retire by seeking a court order under section 25 of the 1893 Act which empowers the court to appoint new trustees in substitution for existing trustees whenever it is expedient or wherever it is inexpedient, difficult or impracticable to do so without the court’s assistance.⁹⁶

(2) Discussion

2.131 In considering the options for statutory reform in relation to retirement, the Commission has endeavoured to facilitate retirement where trustees no longer wish to remain in office but in a manner which should not put the administration of the trust at risk.

2.132 Section 11(3) of the 1893 Act provides that the section applies only if and as far as a contrary intention is not expressed in the trust instrument. If the trust instrument expressly excludes the possibility of retirement, a court application will be necessary and will invariably be granted.

⁹⁴ See paragraphs 2.40 to 2.102 above.

⁹⁵ See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 194. As Mee notes, the “trustees cannot pay the money into court simply to escape responsibility for executing the trust and, if they pay the funds into court inappropriately, will be liable for costs”.

⁹⁶ See paragraphs 2.104 to 2.105 above.

2.133 *The Commission recommends that nothing in the trust instrument should be capable of restricting the right of a trustee to retire.*

2.134 The Commission is of the view however that retirement should not be too straightforward to achieve. In the interests of the effective administration of the trust, the issue of retirement should be properly discussed and recorded, in particular, so that the trust property is vested appropriately in the continuing trustees. As mentioned previously, retirement should preferably be by deed in order to obtain a sufficient discharge and preclude continuing liability for breach of trust.

2.135 *The Commission recommends that the requirement for the consent of the co-trustees and any person empowered by the trust instrument to appoint trustees should be retained. If such consent is not obtained, a court application will be necessary.*

2.136 As discussed above at paragraphs 2.31 to 2.36, the Commission has taken the view that terminating the trust is not the answer in a situation where the beneficiaries wish to appoint a new trustee.

2.137 *The Commission recommends that beneficiaries who are sui juris and collectively entitled to the whole beneficial interest under the trust should have a statutory power to direct an existing trustee to retire.⁹⁷*

2.138 In the Consultation Paper, the Commission noted the lack of clarity which exists in relation to the power of a trustee to retire from part only of the trust.⁹⁸ Section 11 of the *Trustee Act 1893* provides for retirement from “the trust” which may be construed as precluding retirement from part of the trust. However, in circumstances where a trustee may be appointed over part only of a trust and section 10 of the Act makes specific provision for 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” there would seem to be inconsistency within the existing provisions.

2.139 *The Commission recommends that the retirement provisions should make it clear that a trustee may 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.⁹⁹*

2.140 As noted above, section 11 of the 1893 Act provides that retirement can only be effected under the section where there are at least two trustees left

⁹⁷ See sections 19 to 21 of the *Trusts of Land and Appointment of Trustees Act 1996*.

⁹⁸ See paragraphs 1.224 to 1.225 of the Consultation Paper.

⁹⁹ That is, where there is a clearly defined sub-trust or sub-fund.

to administer the trust. This issue is inextricably tied to the Commission's earlier views on the introduction of a statutory minimum number of trustees.¹⁰⁰

2.141 *In keeping with the Commission's earlier recommendation that, in the case of non-charitable trusts, two trustees or a corporate trustee should be required, the Commission recommends that a trustee should not be permitted to retire unless at least two trustees or a corporate trustee remains.*

G Removal

(1) Current Position

2.142 Currently a trustee may only be removed from office in one of four ways:

- (a) In accordance with the trust instrument;
- (b) By the beneficiaries;¹⁰¹
- (c) In accordance with statute; or
- (d) In accordance with a court order.

(a) In accordance with the trust instrument

2.143 A trustee may be removed from his office under specified circumstances expressly stipulated in the trust instrument.

(b) By the beneficiaries¹⁰²

2.144 A trustee may also be removed from office by the beneficiaries, provided that they are all *sui juris* and collectively entitled to the entire beneficial interest in the trust property. As discussed earlier in the context of appointment of trustees, this may require the winding up of the trust.¹⁰³

(c) In accordance with statute

2.145 The statutory power of appointment contained in section 10 of the *Trustee Act 1893* effectively allows for the removal of a trustee by way of replacement.¹⁰⁴ Section 10 provides for replacement where a trustee is unfit, incapable or refusing to act as trustee.

¹⁰⁰ See paragraphs 2.16 to 2.22 above.

¹⁰¹ Provided they are all *sui juris* and together absolutely entitled to the entire beneficial interest in the trust property.

¹⁰² *Ibid.*

¹⁰³ See paragraphs 2.32 to 2.38 above.

¹⁰⁴ See paragraphs 2.41 to 2.44 above for a fuller discussion of the statutory power of appointment in section 10.

(d) In accordance with a court order

2.146 A trustee may also be removed where the court exercises either its statutory power under section 25 of the *Trustee Act 1893* or its inherent jurisdiction.

2.147 Section 25 of the 1893 Act effectively permits removal by allowing the court to appoint a new trustee in substitution for an existing trustee whenever it deems such substitution appropriate. Examples of where such substitution may be appropriate are provided by the section, namely “where a trustee is convicted of a felony, or is a bankrupt.”

2.148 Where the court exercises its inherent jurisdiction to remove a trustee, the appointment of a replacement trustee is not essential. However where two trustees have been acting and the trust includes land, replacement will be required as, unless the settlement provides otherwise, section 9(1) of the *Settled Land Act 1882* requires two trustees to give a receipt for capital money on a sale by a tenant for life.¹⁰⁵ The court may exercise its inherent jurisdiction where a trustee acts dishonestly or incompetently or is seen to be wilfully obstructing the administration of the trust.¹⁰⁶ The court may also exercise its inherent jurisdiction where there is a clear conflict of interest between the trustee’s personal interests and the interests of the trust.¹⁰⁷ In exercising its jurisdiction, the court’s primary consideration will always be the welfare of the beneficiaries.¹⁰⁸

¹⁰⁵ It should also be noted that the requirement for two trustees currently contained in section 39 of the *Settled Land Act 1882* is to be retained under the *Land and Conveyancing Law Reform Bill 2006*, subject to the amendment that a trust corporation will also suffice. Section 21 of the 2006 Bill provides that, in order for a conveyance of the legal estate or interest in any land subject to the *Settled Land Acts 1882 to 1890* to overreach any equitable interests in the land and give the purchaser clear legal title, such conveyance must be made by at least two trustees or a trust corporation.

¹⁰⁶ *Arnott v Arnott* (1924) 58 ILTR 145.

¹⁰⁷ *Moore v McGlynn* [1894] 1 IR 74; *Kirby v Barden* High Court (Carroll J) 12 March 1999.

¹⁰⁸ *Spencer v Kinsella* [1996] 2 ILRM 401.

(2) Discussion

2.149 As the removal of a trustee under the statutory power of appointing new trustees, or by the court, is so bound up with the appointment of new trustees, the matters discussed earlier in the context of appointment are again relevant.¹⁰⁹

2.150 As discussed above at paragraphs 2.32 to 2.38, the Commission has taken the view that terminating the trust is not the answer in a situation where the beneficiaries wish to appoint a new trustee.

*2.151 The Commission recommends that beneficiaries who are sui juris and collectively entitled to the whole beneficial interest under the trust should have a statutory power to remove an existing trustee.*¹¹⁰

2.152 The existing statutory powers of removal contained in section 10 (non-judicial) and section 25 (judicial) of the *Trustee Act 1893* are powers of removal by way of replacement and thus may only be exercised where a replacement trustee is being appointed. The Commission has considered whether a statutory power of removal without replacement should be introduced. In view of the Commission's earlier views in relation to the introduction of a statutory minimum number of trustees¹¹¹, the Commission believes that removal without replacement should not be permitted by statute unless at least two trustees or a corporate trustee remains.

2.153 The Commission recommends that removal without replacement should not be permitted by statute unless at least two trustees or a corporate trustee remains.

2.154 In view of the court's inherent jurisdiction to remove a trustee without the need to appoint a replacement, the Commission does not consider it necessary to expand the statutory power to include judicial removal without replacement.

2.155 As noted above, section 25 of the *Trustee Act 1893* provides two examples of where a court order for removal may be appropriate, where a trustee is convicted of a felony and where a trustee is declared bankrupt. The Commission has considered whether, given the court's existing discretion under its inherent jurisdiction, it is necessary to enumerate any additional grounds for the exercise of the statutory power of removal. The Commission is of the view that the inclusion of enumerated grounds would provide some guidance for the

¹⁰⁹ See paragraphs 2.40 to 2.102 above.

¹¹⁰ See sections 19 to 21 of the English *Trusts of Land and Appointment of Trustees Act 1996*.

¹¹¹ See paragraphs 2.16 to 2.22 above.

public as to the situations where the court will be prepared to exercise its power of removal.

2.156 *The Commission recommends that bankruptcy of a trustee,¹¹² 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.*

H Disqualification

(1) Current Position

2.157 Irish legislation currently does not provide for the disqualification of trustees.¹¹³

2.158 Section 48 of the *Charities Bill 2007* does provide that several categories of persons are disqualified from acting as trustees of a charitable organisation but this will have no application to non-charitable trusts, which are the focus of this Report.

(2) Discussion

2.159 As noted in the Consultation Paper, “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.”¹¹⁴ In relation to non-charitable trusts, statutory interference with a settlor’s power of appointment may be less desirable. However, it must be noted that trustees may be subsequently appointed by persons other than the settlor and that beneficiaries of non-charitable trusts are equally deserving of adequate protection. However, although the Commission accepts that the protection of trust interests should be the overriding concern, it is of the view that policing disqualification in relation to general trusts would not be feasible.

2.160 *The Commission makes no recommendations in relation to the disqualification of trustees of non-charitable trusts.*

¹¹² Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

¹¹³ There are no provisions in the *Trustee Act 1893* or the *Charities Acts 1961* and *1973* in relation to the disqualification of trustees.

¹¹⁴ See the Consultation Paper at paragraph 1.283.

I Suspension

(1) Current Position

2.161 Irish legislation currently does not provide for the suspension of trustees.

(2) Discussion

2.162 The issues mentioned in paragraph 2.159 in relation to disqualification apply equally in relation to suspension.

2.163 *The Commission makes no recommendations in relation to the suspension of trustees of non-charitable trusts.*

J Remuneration

(1) Current Position

2.164 Historically, the office of trustee was performed gratuitously.¹¹⁵ As Manson wrote at the turn of the century:

“For centuries trustees and executors have gone on discharging the onerous duties incident to their respective offices, administering property, which is not their own, for the benefit of others, exposed to temptation from within, to risks from the fraud or negligence of trustees, to the solicitation of beneficiaries to breaches of trust, called strictly to account as often as they have yielded to such solicitation or deviated a hair’s breadth from the letter of their trust, and all this unrecompensed, unthanked – a striking example of altruistic virtue and disinterested devotion to duty.”¹¹⁶

2.165 Thus, although trustees are entitled to be reimbursed for any expenses properly incurred in the performance of their duties¹¹⁷, as a general principle, trustees are not entitled to remuneration for the work they carry out in the capacity of trustee. However, despite this general principle, which operates as an extension of the trustee’s fiduciary duty to prevent the conflict of his

¹¹⁵ *Re Duke of Norfolk’s Settlement Trusts* [1982] Ch 61; *Guinness plc v Saunders* [1990] 2 AC 663.

¹¹⁶ Manson “Remuneration of Trustees and Executors” (1903) *Journal of the Society of Comparative Legislation* New Ser Vol 5 No. 1 185-190.

¹¹⁷ 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”.

personal interests with those of the trust, it will almost invariably be the case that trustees can claim remuneration for their services.

(2) Current Mechanisms for Remuneration

2.166 The bar on remuneration is not absolute and there are currently several mechanisms by which trustees may be entitled to claim remuneration for their services.

(a) Express charging clause

2.167 Where there is an express charging clause in the trust instrument, the trustee will be entitled to remuneration. There is a long-standing practice of including express remuneration provisions in trust instruments and such provisions are essential where a professional trustee is to be appointed.

2.168 The extent to which the trustee is permitted to charge will be determined in accordance with the terms of the express charging clause, which will be strictly construed.¹¹⁸

2.169 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. Thus such a trustee will not be able to charge for services which could have been undertaken by a lay trustee.¹¹⁹

(b) Inherent jurisdiction of the court

2.170 The court also has an inherent jurisdiction to authorise a trustee to receive remuneration, both in respect of past and future services.¹²⁰ It is however a jurisdiction that will be exercised sparingly and in exceptional cases so as not to interfere with the arrangements of the settlor and not to burden the trust fund unduly. Examples of where the jurisdiction may be exercised include where the trustees have undertaken exceptionally burdensome work which was outside their contemplation when appointed¹²¹ or which have brought unexpected benefits to the beneficiaries.¹²²

2.171 The court also has an inherent jurisdiction to increase the level of remuneration to which a trustee was entitled under the trust instrument. An

¹¹⁸ *Re Chalinder & Herington* [1907] 1 Ch 58; *Re Gee* [1948] Ch 284.

¹¹⁹ *Re Chapple* (1884) 27 Ch D 584; *Clarkson v Robson* (1900) 2 Ch 722.

¹²⁰ *Boardman v Phipps* [1967] 2 AC 46; *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

¹²¹ *Foster v Spencer* [1996] 2 All ER 672.

¹²² *Boardman v Phipps* [1967] 2 AC 46.

increase may be appropriate where the original provision for remuneration has been seriously undermined by inflation¹²³ or where “it is in the best interests of the beneficiaries to increase the remuneration.”¹²⁴

(c) Contract with the beneficiaries

2.172 A trustee may make an arrangement for remuneration with the agreement of all the beneficiaries where they are *sui juris* and between them absolutely entitled to the trust property. Where they are not all of full age and capacity, such as where some of the beneficiaries are minors or as yet unborn, application must be made to the court to authorise any payment. Agreements for remuneration with beneficiaries will be carefully scrutinised and are not to be encouraged.¹²⁵

(d) Solicitor-trustees

2.173 Under the rule in *Cradock v Piper*¹²⁶ a solicitor-trustee who acts in legal proceedings on behalf of himself and his co-trustees, or himself and his beneficiaries, is entitled to receive the costs which would have been incurred had he acted for his co-trustees or his beneficiaries only. In *Re Worthington*, Upjohn J. said that this rule was “exceptional, anomalous and not to be extended.”¹²⁷

(3) The Case for and against a Statutory Charging Clause

2.174 In the Consultation Paper the Commission considered whether the introduction of a statutory charging clause would be appropriate.

2.175 The arguments in favour of a default charging clause can be summarised as follows:

- Although it is objectionable for trustees to derive secret or unauthorised remuneration, there is nothing inherently wrong with rewarding trustees for their services.¹²⁸

¹²³ *Re Barbour's Settlement* [1974] 1 All ER 1188.

¹²⁴ *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61, 79.

¹²⁵ *Ayliffe v Murray* (1740) 2 Atk 58.

¹²⁶ (1850) 1 Mac & G 664; *Re Smith's Estate* [1894] 1 IR 60.

¹²⁷ [1954] 1 All ER 677 at 678.

¹²⁸ Law Commission for England and Wales *Report on Trustees' Powers and Duties* (No 260 1999) at 73.

- A statutory power to remunerate trustees under properly controlled conditions may be advantageous in that it may facilitate the employment of skilled professional trustees.¹²⁹
- As charging clauses are almost invariably included in professionally prepared trust instruments, it would bring the law into line with current practice.¹³⁰
- As express professional charging clauses commonly include provision that any charges shall be reasonable and not exceed the normal professional fees that the trustee would charge, there is a yardstick by which professional charges can be measured.¹³¹
- A statutory charging clause would dispense with the existing requirement for a court order where an express charging clause has been excluded due to an oversight or where the trust has arisen by operation of law.¹³²
- Some jurisdictions are already permitting the delegation of administrative or ministerial functions to professional agents who will be remunerated.
- A statutory charging clause would shorten trust deeds as it would meet the needs and expectations of the parties to most trusts.¹³³

2.176 The arguments against a default charging clause can be summarised as follows:

- A statutory charging clause would encroach too far upon the general principle that a trustee should not profit from the trust.¹³⁴

¹²⁹ *Ibid.*

¹³⁰ Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 4.24.

¹³¹ Law Commission for England and Wales *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at paragraph 10.11.

¹³² See Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 4.24 and New Zealand Law Commission *Some Problems in the Law of Trusts* (PP48 2002) at paragraph 14.

¹³³ Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 4.24.

¹³⁴ Law Reform Committee *The Powers and Duties of Trustees* (Cmnd 8733 1982) at paragraph 3.47.

- A default power to charge for services rendered may be open to abuse.¹³⁵
- Trustees could abuse their entitlement to remuneration and enrich themselves at the expense of the beneficiaries by creating remunerative work or charging excessive fees.¹³⁶
- Facilitating the remuneration of trustees for services to the trust could lead to a conflict of interest in that trustees are vested with the duty of supervising and monitoring paid agents.¹³⁷
- In some trusts, particularly private family trusts involving vulnerable beneficiaries, there may be an expectation that the trustees will act without remuneration.
- A default charging clause would not guarantee that settlors would be aware of the fact of remuneration and the terms of remuneration.¹³⁸

(4) Discussion

(a) All trustees

2.177 Some jurisdictions, such as South Africa, have ensured that all trustees are statutorily entitled to remuneration for their services.¹³⁹ The Commission is of the view that it is not appropriate to consider introducing a statutory charging provision which would be applicable to lay trustees. Not only would such a provision encroach too far upon the fiduciary nature of the trusteeship, it would be tantamount to turning the position of trustee into a paid office.

2.178 Instead, the Commission considers it appropriate that settlors should always direct their minds to the issue of remuneration and should be made specifically aware of the effect that remuneration may have on the funds of the trust. Where it is then deemed appropriate, the settlor will be free to make express provision for remuneration. The Commission takes the view that

¹³⁵ *Ibid.*

¹³⁶ Scottish Law Commission *Discussion Paper on Breach of Trust* (No 123 2003) at paragraph 4.25.

¹³⁷ *Ibid* at paragraph 4.24.

¹³⁸ See Law Reform Committee *The Powers and Duties of Trustees* (Cmnd 8733 1982) at paragraph 3.47 and Scottish Law Commission *Discussion Paper on Breach of Trust* (No. 123 2003) at paragraph 4.25.

¹³⁹ Section 22 of the *Trust Property Control Act 1988*.

providing for default remuneration for all trustees would interfere unnecessarily with the freedom and autonomy of the settlor.

(b) Professional trustees only

2.179 Some jurisdictions, such as England and Wales, have introduced statutory charging provisions in respect of professional trustees only.¹⁴⁰

2.180 The Commission is of the view that, even where it is to be limited to professional trustees, the arguments in favour of a statutory charging clause are not compelling. In practice, where it is appropriate to reward the trustees for their services, there is almost invariably an adequate provision for remuneration in the trust instrument. In situations where the trust has become too complex or inappropriate for a lay trustee to manage, the administration of the trust may be delegated to a paid agent or, alternatively, the court's inherent jurisdiction to order remuneration may be invoked. Similarly, on the rare occasion that the inclusion of a charging provision is appropriate but has been overlooked in error, the court's inherent jurisdiction may be invoked.

2.181 The Commission is of the view that the arguments against the introduction of a statutory charging clause are more persuasive. Again, the Commission considers it appropriate that settlors should specifically consider the issue of remuneration and where it is deemed appropriate, the settlor will be free to make express provision for remuneration. The Commission takes the view that even limiting provision for default remuneration to professional trustees would interfere unnecessarily with the freedom and autonomy of the settlor.

2.182 Furthermore the Commission believes that, even where limited to professional trustees, a default power of remuneration may be open to abuse. For example, although a settlor may have opted for a lay trustee because a professional was not required, the lay trustee could retire and appoint a professional trustee to act in substitution.

2.183 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 and where it is necessary, the court's inherent jurisdiction may be invoked.

2.184 *The Commission recommends that a statutory default provision in relation to trustee remuneration should not be introduced.*

¹⁴⁰ Part V of the English *Trustee Act 2000* provides for remuneration for trust corporations and professional trustees only.

CHAPTER 3 DUTY OF CARE

A Introduction

3.01 In addition to their fiduciary duties, trustees also owe a duty to the beneficiaries to exercise care in carrying out their functions.¹ This is commonly referred to as the general duty of care but, as this may have connotations derived from tort law, it should be noted that the duty of trustees to take care does not derive from tort or contract law. In addition, as discussed later, the standard of care applied to trustees is more rigorous than the tortious standard of care, that of the “reasonable person”. The demand for the more rigorous standard for trustees is because the trust has been regarded as the highest form of fiduciary relationship.

3.02 In the Consultation Paper, the Commission noted that in Ireland there is currently no statutory regulation of a trustee’s duty or standard of care.² In this Chapter, the Commission considers whether such statutory regulation is now appropriate. Part B considers the existing duty of care owed by trustees under the common law and Part C discusses the formulation and application of a new statutory duty of care. The Commission notes that it has already recommended in Chapter 1 that a statutory formulation of the duty of a trustee, as fiduciary, to act in good faith, should be included in the new legislative scheme being proposed in this Report.

B Current Position

3.03 As the *Trustee Act 1893* makes no reference to the concept of a duty of care, the standard of care that must be employed by a trustee in discharging his duties is governed in Ireland by the common law.

3.04 The traditional formulation of the standard of care is set out in *Speight v Gaunt*³ where Lord Blackburn stated that the general duty of trustees

¹ On the fiduciary duty generally, see Chapter 1, above.

² See Chapter 3 of the Consultation Paper.

³ (1883) 9 App Cas 1.

was to act honestly and fairly and to take “all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own.”⁴ Thus a trustee was not found liable when it was discovered a broker he had employed had embezzled the trust funds.

3.05 In *Learoyd v Whitely*⁵, Lindley LJ refined the dictum of Lord Blackburn as it applies to the exercise of a trustee’s powers of investment. He stated:

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

3.06 Consequently, trustees have been required to exercise their powers as a prudent person of business acting on behalf of someone for whom they felt morally bound to provide. Though this is effectively the standard of care required of trustees, the courts have indicated on a number of occasions that a higher standard may be expected of paid trustees.⁷

3.07 In the Consultation Paper, the Commission referred to the Law Commission’s analysis of the general duty of care as a useful summary of the common law position. In its *Report on Trustees’ Powers and Duties*, the Law Commission stated:

“[i]n essence, trustees were required to exercise reasonable prudence in choosing an agent and in negotiating the terms 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*].”⁸

3.08 Another useful summary is provided by Snell:

“In exercising his discretions, a trustee must act honestly and must use as much diligence as prudent man of business would in dealing with

⁴ *Ibid* at 19.

⁵ (1886) 33 Ch D 347.

⁶ *Ibid* at 355.

⁷ *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515; *Re Waterman’s Will Trusts* [1952] 2 All ER 1054.

⁸ Law Commission *Report on Trustees’ Powers and Duties* (No 260 1999) at 34 to 35.

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 ... If he takes the same care of the trust property as a man of ordinary prudence would take of his own, he will not be liable for accidental loss, such as theft of the property whilst in his possession or in the possession of others to whom it has been entrusted in the ordinary course of business, or a depreciation in the value of securities upon which the trust funds have been rightfully invested.”⁹

3.09 The Commission is of the view that these summaries represent the duty of care to be met by trustees under current Irish law.

C Discussion

3.10 The Commission has considered reform of the duty and standard of care under the following headings:

- (1) what standard of care should be required of trustees?
- (2) should the duty of care be of uniform application?
- (3) when should the statutory duty apply?

(1) *What standard of care should be required of trustees?*

3.11 In considering the formulation of a statutory duty and standard of care, the Commission has drawn on the experience of other jurisdictions. In particular, in 1995 the Law Commission of England and Wales embarked on a comprehensive review of the powers and duties of trustees and its recommendations were largely implemented in the English *Trustee Act 2000*.

3.12 In the Consultation Paper, the Commission considered the five options for the standard of care outlined by the Law Commission.¹⁰ These options variously required trustees to:-

- (a) act in good faith;
- (b) be vicariously liable for all the acts and defaults of their agents;

⁹ McGhee *Snell's Equity* (30th ed Sweet & Maxwell 2000) at 246.

¹⁰ Law Commission for England and Wales *Consultation Paper on Trustees' Powers and Duties* (No 146 1997) at para 6.46ff.

- (c) satisfy a series of specified criteria, compliance with which would be a defence to any proceedings;
- (d) act with the care of the ordinary prudent person of business; or
- (e) act with the care and diligence that may reasonably be expected having regard to the nature, composition and purposes of the particular trust, the skills which the trustees actually have, or if they are employed as professional trustees, those which they either ought to have or hold themselves out as having.

3.13 Like the Law Commission of England and Wales, the Commission is of the view that option (e) is the appropriate standard of care that should be required of trustees. This hybrid objective and subjective approach represents a refinement of the common law “prudent and reasonable man” test and allows the court to distinguish between professional and non-professional trustees according to their skills and knowledge. It is a high but flexible standard which allows the court to take into consideration:

- (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.¹¹

3.14 Following the recommendation of the Law Commission, section 1 of the English *Trustee Act 2000* formulated the new uniform statutory duty of care applicable to trustees in the following terms:

“(1) 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.”

¹¹ *Ibid* at paragraph 6.53.

3.15 *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 recommends that trustees should have to exercise such care and skill as is reasonable in the circumstances, having regard in particular-*

- (a) to any special knowledge or experience that they have or hold themselves out as having, and*
- (b) if they act 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.*

(2) *Should the duty of care be of uniform application?*

3.16 In the Consultation Paper, the Commission considered whether the new statutory duty of care should allow a distinction to be drawn between professional and lay trustees or, alternatively, whether a single uniform standard should apply to all trustees.

3.17 Although the traditional formulation of the common law standard of care did not expressly distinguish between professional and non-professional trustees,¹² the courts have long held that it is appropriate to draw such a distinction. In *Bartlett v Barclays Bank Trust Co Ltd*¹³ Brightman J pointed to the inequity which would be caused by the application of one uniform standard and confirmed that a higher standard of care is expected of professional trustees.¹⁴

3.18 The argument in favour of differentiating between the two types of trustees rests mainly on the issue of qualifications. The Commission is of the view that it is appropriate to construct a statutory duty of care that requires a more exacting standard of care of those who are qualified and of whom it is reasonable to expect a greater degree of skill and expertise.

3.19 However the corollary of demanding a higher standard of care from professional trustees is accepting a lesser standard from those who do not fall into the professional category. In this respect, two competing principles come into play, the need to protect and compensate beneficiaries who have suffered loss through the actions or omissions of non-professional trustees and the need to protect honest and well-meaning lay trustees from the imposition of liability where they have acted conscientiously and in good faith.

¹² See for example *Speight v Gaunt* (1883) 9 App Cas 1.

¹³ [1980] 2 WLR 430, 443.

¹⁴ This point had previously been made, *obiter*, by Harman J in *Re Waterman's Will Trusts* [1952] 2 All ER 1054, 1055.

3.20 The Commission is of the view that the hybrid objective and subjective test is the appropriate formula for the standard of care as its flexibility will allow the court to balance these competing principles and take into consideration the particular characteristics of the trust and the individual skills of the trustee.

3.21 In the Consultation Paper the Commission referred to sections 297 and 297A of the *Companies Act 1963* (as amended by section 138 of the *Companies Act 1990*) as providing a legislative precedent for imposing a hybrid objective and subjective test. The Commission takes the view that sections 297 and 297A, which introduced a hybrid test for dealing with the liability of company directors for fraudulent and reckless trading, show a legislative willingness to acknowledge varying degrees of skill and expertise when adjudicating on a person's conduct. Section 297A(2)(a) of the Act as amended provides that the standard of such directors is to be judged by 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”.

3.22 The Commission is of the view that the statutory duty of care should allow for a distinction to be drawn between professional and non-professional trustees by demanding a higher standard of care from trustees who are qualified professionals. The Commission considers that the proposed statutory duty of care would allow such distinction to be drawn as although it involves a requirement to act with objective 'reasonable care and skill', it also takes into account a subjective element which has regard to any special knowledge or experience the trustee may have.

3.23 *The Commission recommends that the statutory duty of care should allow for a distinction to be drawn between professional and non-professional trustees by demanding a higher standard of care from trustees who are qualified professionals.*

(3) When should the statutory duty of care apply?

(a) A limited or general statutory duty of care

3.24 As noted in the Consultation Paper,¹⁵ the English *Trustee Act 2000* has limited the situations in which the statutory duty of care is to apply. The situations are set out in schedule 1 of the 2000 Act as follows:

- when exercising powers in relation to investment;
- when acquiring land;

¹⁵ See paragraph 3.18 of the Consultation Paper.

- when employing an agent, custodian or nominee;
- when exercising the power to insure;
- when compounding liabilities;
- when exercising powers in relation to reversionary interests, valuations and audits.

3.25 The Commission is of the view however that it is not appropriate to limit the situations in which the new statutory duty of care would apply in Ireland. Instead, the Commission prefers an approach which would provide a statutory duty of care of general application that may only be excluded only insofar as ensures the irreducible core obligations of trusteeship will still apply.

3.26 *The Commission recommends that the statutory duty of care should be of general application.*

(b) Relationship with common law duty

3.27 The English *Trustee Act 2000* provides that the statutory duty of care it introduced takes effect in addition to the existing fundamental duties of trustees (for example, to act in the best interests of the beneficiaries and to comply with the terms of the trust). Consequently, it would seem that in England the statutory duty of care will take the place of the common law duty where it applies. Schedule 1, paragraph 7 of the 2000 Act also states: “The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply.” Thus, it appears that the common law duty will apply where the statutory duty does not apply or is expressly excluded in the trust instrument.

3.28 As the Commission has already recommended that the proposed new statutory duty of care is to be of general application, the Commission considers that it should not be possible to entirely exclude the statutory duty of care in the trust instrument. As discussed above, it is proposed that it should only be possible to exclude the statutory duty of care insofar as the irreducible core obligations of trusteeship will still apply.¹⁶ Accordingly, the Commission also considers it is important, to avoid any doubt, that the existing common law duty of care will be replaced by the proposed statutory duty of care. However, the Commission is of the view that, in applying the statutory duty of care, the courts may be guided by the case law which has moulded and clarified the common law duty of care.

¹⁶ The issue of trustee exemption clauses or provisions limiting the duty of care, diligence and skill required from trustees will be addressed in Chapter 5. The irreducible core obligations of trusteeship will also be discussed.

3.29 *The Commission recommends that the statutory duty of care should replace the common law duty of care.*

CHAPTER 4 LIABILITY OF TRUSTEES

A Introduction

4.01 In this chapter, the Commission considers the liability that may be imposed on a trustee for breach of trust and examines the extent to which trustees may be permitted to exclude or restrict such liability.

4.02 Part B examines the extent of trustees' liability for breach of trust and Part C sets out the current position in relation to clauses that seek to exempt trustees from such liability. Part D considers the case for and against the regulation of trustee exemption clauses and Part E makes various recommendations for reform.

B Liability of Trustees for Breach of Trust

(1) Breach of Trust

4.03 A trustee will be found to be acting in breach of trust if he breaches any obligation imposed expressly by the trust instrument or impliedly by law. Failure to comply with an express duty imposed by the trust instrument, a fiduciary duty imposed by equity¹ or the duty of care imposed by common law or statute law² will therefore amount to a breach of trust. Furthermore, a trustee who exceeds his powers will be in breach of trust. Consequently, a breach of trust may occur in a wide variety of circumstances. As Millet LJ explained in *Armitage v Nurse*³:

“Breaches of trust are of many different kinds. A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers; it may consist of a failure to carry out a positive obligation of the trustees or merely of a want of skill and care on their part in the

¹ See Chapter 1 above.

² See Chapter 4 above.

³ [1998] Ch 241.

management of the trust property; it may be injurious to the interests of the beneficiaries or be actually to their benefit.”⁴

(2) Extent of Liability

4.04 A trustee will be liable for breach of trust where he acts in a manner inconsistent with the terms of the trust or where a trustee fails to fulfil his duties to the trust through neglect or omission. The remedy for breach of trust may be compensatory or restitutionary. When a breach has been committed the trustee responsible will be liable to compensate the trust for all the loss flowing directly or indirectly from the breach to make good the loss to the trust or, where he receives an unauthorised profit in breach of his fiduciary duty, he will be liable to make restitution of the profit received. It would appear that where the trustee’s conduct constitutes both a breach of trust and a breach of fiduciary duty, the remedies are alternative and the beneficiaries must elect between compensation and restitution.⁵

4.05 It is well established that a trustee will be personally liable for his own breach of trust only and not for the breaches of his co-trustees.⁶ However, where several trustees are liable for a breach of trust they are jointly and severally liable.⁷

4.06 Section 24 of the *Trustee Act 1893* confirmed this principle of personal liability by providing that a trustee “shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustees...” However this indemnity will not apply where his conduct amounts to ‘wilful default’ or where there should have been intervention on the part of the trustee.⁸ Since the introduction of the 1893 Act, the interpretation of the phrase “wilful default” has been the subject of some controversy.⁹ Notwithstanding the literal definition of the phrase which would

⁴ [1998] Ch 241 at 251.

⁵ *Tang Min Sit v Capacious Investments* [1996] AC 514.

⁶ *Townley v Sherborne* (1634) J Bridge 35, 37.

⁷ See sections 11 and 12 of the *Civil Liability Act 1961*. Where a co-trustee has committed a breach of trust, the question of whether an innocent trustee could be regarded as a “wrongdoer” under the 1961 Act has not been considered by the courts.

⁸ See section 24 of the *Trustee Act 1893*. See also Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) at 429.

⁹ See Jones ‘Delegation by Trustees: A Reappraisal’ (1959) 22 MLR 381; Stannard ‘Wilful Default’ [1979] Conv 345; Dal Pont ‘Wilful Default Revisited – Liability for a Co-Trustee’s Defaults’ [2001] Conv 376. See also paragraph 6.13 below.

seem to require some element of deliberate misconduct, it was traditionally interpreted by the Courts of Equity as encompassing a degree of neglect or a lack of reasonable care.¹⁰ Thus any breach of duty caused by the voluntary act of the trustee could be treated as wilful default.¹¹ However, in the context of the subsequently enacted English *Trustee Act 1925* “wilful default” has been interpreted as implying “either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty.”¹² Therefore it would seem, in that jurisdiction at least, that a trustee who has acted honestly and prudently will not be fixed with liability. However “wilful default” remains without interpretation by an Irish court and, as has been noted, “it seems the more strict approach, which requires the trustees to exercise reasonable care, would fit more harmoniously with the equitable principles which have been developed in this area”.¹³ It would also fit more harmoniously with the new statutory duty of care that the Commission is recommending and which is proposed to be of general application.¹⁴

4.07 Similarly, trustees are generally not liable for breaches of trust committed before they were appointed though they are obliged to take reasonable steps to ensure the trust affairs are in order on appointment.¹⁵ A retired trustee will be liable where the breach of trust occurred while he was a trustee, where he retired to facilitate a breach of trust and where he was fully aware of, and connived, in the subsequent breach of trust.¹⁶ Unless a retired trustee has obtained a sufficient discharge, he will also be liable for breaches of trust that have occurred since his purported retirement.

4.08 Liability is to be assessed at the date of judgment¹⁷ and where a trustee is under an obligation to replace trust funds, he will also be liable for interest.

¹⁰ See *Anon.* (1682) 1 Vern. 45; *Speight v Gaunt* (1883) 22 Ch D 727; (1883) 9 A.C. 1.

¹¹ See Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997) at paragraphs 4.12 to 4.16.

¹² *Re Vickery* [1931] 1 Ch 572, 584 per Maugham J.

¹³ Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 204.

¹⁴ See paragraphs 3.11 to 3.28 above.

¹⁵ *Harvey v Oliver* (1887) 57 LT 239; *Re Lucking’s Will Trusts* [1968] 1 WLR 866.

¹⁶ *Head v Gould* [1898] 2 Ch 250, 273.

¹⁷ *Target Holdings Ltd. v Redfems* [1996] AC 421, 437.

C Exclusion of Liability from Breach of Trust

(1) Trustee Exemption Clauses

4.09 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”.¹⁸ An example of a standard exemption clause might read:

“no trustee shall be liable for any loss or damage which may happen to the trust fund at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud.”¹⁹

4.10 In addition to this standard form of exemption clause, there are various other types of clause which purport to exclude the liability of trustees. These consist of clauses which limit the scope of the trustees’ duties (“duty modification clauses” or “duty exclusion clauses”), clauses which extend the trustees’ powers (“extended powers clauses” or “authorisation clauses”) and clauses which entitle the trustee to indemnity from the trust fund (“indemnity clauses”).

(2) Current Position

4.11 In the English case of *Armitage v Nurse*²⁰, the Court of Appeal held that exemption clauses were valid and effective to exclude liability for all conduct, excluding actual fraud.²¹ As there has not been any statutory restriction of trustee exemption clauses or judicial consideration of the issue in this jurisdiction, it is generally considered that it is similarly the current position under Irish law that a properly worded exemption clause can, in principle, exclude liability for anything but fraud or dishonesty. Support for this belief can be drawn from the comments of Murphy J in *Stacey v Branch*²² where he

¹⁸ British Columbia Law Institute *Report on Exculpation Clauses in Trust Instruments* (No 17 2002) at Foreword.

¹⁹ These are the terms of the trustee exemption clause which was at issue in the leading English case of *Armitage v Nurse* [1998] Ch 241, which was taken from *Hallett’s Conveyancing Precedents* (1965).

²⁰ [1998] Ch 241.

²¹ However, it should be noted that a degree of uncertainty lingers in England as in *Walker v Stones* [2001] QB 902, Sir Christopher Slade held at 937 that “[an exemption] clause in my judgment would not exempt the trustees from liability for breaches of trust, even if committed in the genuine belief that the course taken by them was in the interests of the beneficiaries, if such belief was so unreasonable that no reasonable solicitor-trustee could have held that belief.”

²² [1995] 2 ILRM 136.

accepted that “an absolute owner of property can settle his affairs... on such terms as would relieve his trustees from the responsibility to exercise the degrees of care and prudence which would otherwise be inferred.”²³

D Regulation of Trustee Exemption Clauses

(1) The Case for and against Regulation

4.12 In the Consultation Paper, the Commission noted that the issue of exemption clauses has recently attracted “considerable judicial and academic attention” in many common law jurisdictions and embarked on a detailed study of the approach that these jurisdictions have taken to the issue of exemption clauses.²⁴ This comparative study facilitated a summary of the case for and against regulation of trustee exemption clauses.

(a) The Case against Regulation

4.13 The arguments against regulation of trustee exemption clauses were summarised in the Consultation Paper 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;
- (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.²⁵

(b) The Case for Regulation

4.14 The contrary arguments, in favour of regulation of trustee exemption clauses, were summarised in the Consultation Paper as follows:

²³ *Ibid* at 143. Note however that the trust instrument in question did not contain a “trustee exemption clause”. See also *Roberts v Kenny* [2000] 1 IR 33 where trustee exemption clauses were considered but Geoghegan J was unwilling to decide the issue where a breach of trust was not being alleged.

²⁴ See Chapter 7 of the Consultation Paper.

²⁵ See the Consultation Paper at paragraph 7.57.

- (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;
- (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 on the beneficiaries;
- (c) There are a number of jurisdictions which have introduced legislation restricting the effectiveness of immunity clauses, 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 exemption clauses, particularly in light of the fact that it may not be possible for beneficiaries to obtain such insurance.²⁶

(2) Consultation Paper Recommendation

4.15 In the Consultation Paper, the Commission provisionally proposed the introduction of legislative regulation of trustee exemption clauses in Ireland. While the Commission was of the view that there is no reason in principle why a settlor should not have freedom to exempt his trustees from liability for most conduct amounting to a breach of trust, it would be contrary to public policy and incompatible with the fiduciary nature of the office of trustee if trustee exemption clauses were permitted to negate the irreducible core content of the trust. Consequently, the Commission provisionally recommended regulation of trustee exemption clauses, such that liability for breach of the irreducible core obligations of trustees may not be excluded.

E Report Recommendations

(1) Status of Trustee Exemption Clauses

4.16 As noted in the Consultation Paper, the tension in respect of trustee exemption clauses lies 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, the "irreducible core of trustee obligations" and

²⁶ See the Consultation Paper at paragraph 7.58.

public policy on the other. Since the Consultation Paper, the Commission has given further consideration to the issue of trustee exemption clauses, particularly in light of the Law Commission's recent *Report on Trustee Exemption Clauses*.²⁷

4.17 In its earlier Consultation Paper,²⁸ the Law Commission had made a number of proposals, the most significant of which was the proposal that a professional trustee should no longer be able to rely on any provision in a trust instrument excluding liability for breach of trust where that breach of trust arose from negligence. However, after a wide-scale consultation process, the Law Commission became concerned about the potential adverse consequences of such radical legislative intervention. Among the dangers of "over-regulation" put forward by the Law Commission's consultees were:

- The administration of trusts would become more bureaucratic, and probably more expensive, as indemnity insurance premiums would be likely to increase;
- Trustees would become more defensive in their policies, being disinclined to act expeditiously without first obtaining legal advice;
- The management of trust property would become correspondingly less flexible;
- There would be an increase in trust litigation by disappointed beneficiaries;
- There would be no clear alternative protection to trustee exemption clauses available to trustees. *Ex post facto* judicial relief was uncertain in its scope, and it was apparent that trustee indemnity insurance was not capable of filling the role;
- Some trustees would even become reluctant to act at all.

4.18 The Law Commission also acknowledged in the Report that any statutory prohibition of reliance on trustee exemption clauses would restrict the autonomy of settlors to determine the terms on which they settle assets on trust. The Law Commission was concerned that this would limit the flexibility of the trust and thereby detract from one of its greatest attributes.²⁹

²⁷ Law Commission for England and Wales *Report on Trustee Exemption Clauses* (No 301 2006).

²⁸ Law Commission for England and Wales *Consultation Paper on Exemption Clauses* (No 171 2002).

²⁹ Law Commission for England and Wales *Report on Trustee Exemption Clauses* (No 301 2006) at paragraph 1.17.

4.19 As a consequence, the Law Commission decided not to proceed with the provisional proposals outlined in the Consultation Paper and decided against a statutory prohibition of trustee exemption clauses.

4.20 The response of the Law Commission's consultees has simply reinforced the Commission's provisional view that it would not be justifiable or necessary to introduce an absolute prohibition of trustee exemption clauses in this jurisdiction. The Commission sees no public policy or other legal ground to find such clauses wholly unenforceable. There is nothing wrong in principle with affording settlors the option of modifying or restricting the extent of the obligations and liabilities of trustees and denying settlors all power to do so would have a very significant impact on the trust relationship.

4.21 In view of the lack of judicial consideration of trustee exemption clauses in this jurisdiction and the fact "it seems inevitable that given their proliferation an issue may arise as to their effectiveness"³⁰, the Commission is of the view that the issue should be dealt with by statute.

4.22 *The Commission recommends that a legislative statement concerning the status and enforceability of trustee exemption clauses should be made.*

(2) *Legislative Constraint on Trustee Exemption Clauses*

4.23 However, the Commission is also of the view that some legislative constraint is necessary and it should not be permissible for an exemption clause to clear the office of trustee of all obligations.

4.24 In many jurisdictions the debate as where the limits on the validity of trustee exemption clauses should lie has tended to focus on the dividing lines between gross negligence and ordinary negligence.³¹ The Commission considers that approaches based on the distinction between negligence and gross negligence 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.

4.25 As Millett LJ stated in *Armitage v Nurse*³², there is an "irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by

³⁰ Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 477.

³¹ See the Consultation Paper at paragraphs 7.75 to 7.80.

³² [1998] Ch 241.

them which is fundamental to the concept of a trust”³³. The Commission agrees that certain enforceable obligations are fundamental to the trust concept and that if the "irreducible" core of obligations is absent or unenforceable, there is no validity to the trust. Consequently, the Commission is of the view that regulation is necessary to ensure that trustee exemption clauses purporting to exclude liability for the obligations at the core of the trust concept are not valid or enforceable.

4.26 *The Commission recommends regulation of trustee exemption clauses, such that liability for breach of the irreducible core obligations of trustee may not be excluded.*

4.27 It is therefore necessary to consider which obligations or duties form the irreducible core content of trusteeship.

(a) *The duty to act in good faith*

4.28 In *Armitage v Nurse*³⁴ Millett LJ said that “the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.”³⁵ It is fundamental to the very concept of the trust as if a trustee is not obliged to act honestly and with fidelity in the interests of the beneficiaries, there is simply no substance to the trust.³⁶ As noted by Hayton:

“The duty to act in good faith (*ie* honestly and consciously) in respect of any trust matter cannot, of course, be excluded. To do so would make a nonsense of the trust relationship as an obligation of confidence.”³⁷

Consequently, as Hayton states, “an exemption from liability for breach of the duty to act in good faith cannot have effect, because that would empty the area of obligation so as to leave no room for any obligation.”³⁸

4.29 *The Commission recommends that it should not be possible to absolve a trustee from the duty to perform the trusts honestly and in good faith.*

³³ *Ibid* at 253.

³⁴ *Ibid*.

³⁵ *Ibid* at 253.

³⁶ See above at paragraph 1.23.

³⁷ Hayton “The Irreducible Core Content of Trusteeship” in Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press 1996) at 57.

³⁸ *Ibid* at 58.

4.30 The honesty or dishonesty of the trustee's conduct will be a matter to be assessed by the court considering all the circumstances including:

- the role of the trustee;
- the trustee's experience;
- the nature of the trustee's conduct; and
- the role of any other trustees.

(b) The duty to account

4.31 As discussed earlier, the trustee is accountable to his or her beneficiaries for the manner in which he or she has discharged the duties imposed.³⁹ As the beneficiaries are the equitable owners of the trust property, they have standing to call for the enforcement of the trust or to bring a suit for breach of trust. This accountability is of paramount importance as the ability of the beneficiaries to require recalcitrant trustees to act in accordance with their rights is a prerequisite of an effective trust. Consequently, as Hayton has written, "the fundamental interrelated core duties to disclose information and trust documents and to account to the beneficiaries for the trustees' stewardship of the trust property, so as to be liable for losses or profits in relation thereto cannot be excluded."⁴⁰

4.32 *The Commission recommends that it should not be possible to absolve a trustee from the duty to account to the beneficiaries of the trust.*

(3) Best Practice regarding Exemption Clauses

4.33 The Commission is therefore of the view that trustee exemption clauses may in principle exclude all liability except liability for breach of the irreducible core obligations of the trust. However, in view of the fiduciary nature of trusteeship, it is of fundamental importance that trustees always endeavour to maintain the highest standards of behaviour and that best practice is followed in relation to the drafting of trustee exemption clauses and the promotion of settlor awareness.

(a) Specificity in drafting

4.34 Although the Commission is not opposed to trustee exemption clauses in principle, it remains concerned to guard against any risk of abuse of the practice. In any case where an exemption clause is purporting to exclude liability for breach of trust, the court will ultimately have to construe the words of

³⁹ See paragraph 1.28 above.

⁴⁰ Hayton "The Irreducible Core Content of Trusteeship" in Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press 1996) at 57.

the particular exemption clause in light of the conduct complained of and decide whether liability has been excluded by the terms of the clause.

4.35 The Commission is of the view that trustee exemption clauses should be worded with sufficient clarity and specificity to ensure that they are reasonable and unambiguous in terms of the extent of protection they purport to afford. As a matter of policy, trustee exemption clauses should only be effective to exclude liability if clear, unequivocal and unambiguous terms are used. Clarity and specificity will also assist in ensuring that trustee exemption clauses can be understood by settlors.

4.36 *The Commission recommends that trustee exemption clauses should be worded in clear, unequivocal and unambiguous terms.*

(b) Settlor awareness

4.37 The Commission is also of the view that “best practice” dictates that settlors should be made aware of any trustee exemption clause in the trust instrument. In its *Report on Trustee Exemption Clauses*,⁴¹ the Law Commission reported that many settlors appear to be unaware of either the existence or the effect of trustee exemption clauses.⁴² As the Law Commission observed, this is an unacceptable state of affairs as:

“It undermines the argument that settlors may autonomously decide to grant their trustees the protection of exemption. It also challenges the view that exemption clauses operate in a properly functioning market; the asymmetry of information between the trustee and the settlor has the effect of conferring on the former the benefit of a protection not appreciated by the latter.

4.38 Consequently, instead of opting for the provisionally recommended statutory regulation of trustee exemption clauses, the Law Commission recommended a rule of practice which would require trustees to ensure that, before the trust is executed, the settlor is made aware of any trustee exemption clauses contained within the trust instrument. The Law Commission set out a statement of this rule of practice as follows:

“Any paid trustee who causes a settlor to include a clause in a trust instrument which has the effect of excluding or limiting liability for negligence must before the creation of the trust take such steps as

⁴¹ Law Commission for England and Wales *Report on Trustee Exemption Clauses* (No 301 2006).

⁴² *Ibid* at paragraph 1.19.

are reasonable to ensure that the settlor is aware of the meaning and effect of the clause.”⁴³

4.39 Where a regulated trustee breaches this rule of practice, liability in damages will not be incurred but the trustee will be open to disciplinary sanctions by the regulating governing body.

4.40 The Commission agrees that best practice dictates that there is proper disclosure of trustee exemption clauses to the settlor. As Hayton notes:

“Where a trustee benefits from reduction of the ordinary duties of trustees to lesser duties there needs to be full frank disclosure to the settlor, so that a fully informed consent can be given, because a fiduciary relationship exists even before the trust instrument is finally executed.⁴⁴ The greater the reduction in the trusteeship duties (eg to the bare core of duties) the greater the need to make full and frank disclosure ...”⁴⁵

4.41 The Commission is optimistic that such transparency would also encourage trustees to shy away from including the widest type of trustee exemption clauses, with which the Commission has already expressed dissatisfaction.⁴⁶

4.42 *The Commission recommends that the existence and effect of trustee exemption clauses should be made clear to the settlor prior to the execution of the trust.*

(4) Discretionary Power of the Court to relieve Trustees from Liability for Breach of Trust

4.43 In the Consultation Paper, the Commission provisionally recommended that the courts should be conferred with the discretion to relieve trustees from breach of trust in certain circumstances. The Commission further

⁴³ *Ibid* at paragraph 6.65.

⁴⁴ *Galmerrow Securities Ltd v National Westminster Bank plc* (Chancery Division, unreported, December 20, 1990) where Harmon J accepted ‘as a correct statement of the law’ Stephenson LJ’s observations in *Swain v Law Society* [1982] 1 WLR 17, 26 ‘as establishing that fiduciary duties can exist before any trust has been created’. Also see *Jothann v Irving Trust Company* (1934) 270 NYS 721, affd 22 NYS 955.

⁴⁵ Hayton “The Irreducible Core Content of Trusteeship” in Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press 1996) at 61.

⁴⁶ See above at paragraphs 4.23 to 4.26.

recommended that the formulation of such a statutory power should be similar to the provisions of section 61 of the English *Trustee Act 1925* which provides:

“if it appears to the court that a trustee, whether appointed by the court or otherwise, 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 breach, then the court may relieve him either wholly or partly from personal liability for the same.”

4.44 The Commission remains of the view that a provision conferring the courts with a discretionary power to relieve trustees from liability for breach of trusts where they have acted reasonably and honestly would be a fair and useful provision. The Commission considers it inappropriate to constrain the courts by formulating fixed rules in relation to the operation of this discretionary power. However, some guidance may be drawn from the English case law which has established that the onus is on the trustee to establish the honesty and reasonableness of his actions⁴⁷ and that in exercising the discretion, three factors must be considered: “the trustee’s honesty, reasonableness and the question whether he ought fairly be excused”.⁴⁸

4.45 *The Commission recommends the introduction of a provision which would confer upon the courts a discretion to relieve trustees from liability for breach of trust in circumstances where they have acted honestly and reasonably and ought fairly to be excused for the breach of trust.*

4.46 The Commission is of the view that there is no need to distinguish between professional and lay trustees in the context of relieving liability for breach of trust. It is proposed that the courts’ discretion should not be constrained by fixed rules and, in the exercise of this discretion, the professional trustee may simply be judged by a higher standard where it is considered appropriate.

4.47 *The Commission recommends that the proposed statutory provision providing for the relieving of liability for breach of trust should not distinguish between professional and lay trustees.*

⁴⁷ *Re Stuart, Smith v Stuart* [1897] 2 Ch 583, 590, 66 LJ Ch 780.

⁴⁸ Hanbury & Martin *Modern Equity* (16th ed Sweet & Maxwell 2001) at 668, referring to *Marsden v Regan* [1954] 1 WLR 423.

(5) Scope of Application of Proposed Reforms

4.48 In the Consultation Paper, the Commission considered the scope of application of any proposed reform of the law on trustee exemption clauses under two headings:

- (a) Geographical scope of application
- (b) Temporal scope of application

(a) Geographical scope of application

4.49 In the Consultation Paper, the Commission took the provisional view that it would not be necessary to introduce a provision to prevent settlors circumventing Irish regulation by exercising freedom of choice under the *Hague Convention on the Law Applicable to Trusts and on their Recognition 1985*.

4.50 The Commission remains of the view that in light of the limited nature of the proposed regulation and the existing provisions of Irish tax law⁴⁹, there is no need to introduce further provisions dealing with the relocation of trusts outside the jurisdiction.

4.51 *The Commission recommends that further provisions dealing with the relocation of trusts outside the jurisdiction should not be introduced.*

(b) Temporal scope of application

4.52 In the Consultation Paper, the Commission provisionally recommended that any legislative reform should be prospective in approach, applying to breaches of trust which occur after the date of any legislation coming into force.⁵⁰

4.53 The Commission provisionally recommended however 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.⁵¹ The Commission was of the view that to provide otherwise would be to legislate for a “two tier” trust system.

4.54 The Commission remains of the view that, as a matter of principle, trustees should not be exposed to retrospective liability for any breach of trust which they believed would be governed by a trustee exemption clause.

⁴⁹ In accordance with section 579 of the *Taxes Consolidation Act 1997*, all trusts that 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.

⁵⁰ See the Consultation Paper at paragraph 7.104.

⁵¹ See the Consultation paper at paragraph 7.105.

4.55 *The Commission recommends that the proposed legislative regulation of trustee exemption clauses should be prospective in approach, applying to breaches of trust which occur after the date of any legislation coming into force*

4.56 *The Commission recommends that the proposed legislative regulation of trustee exemption clauses should apply to all trust instruments, whenever executed and should operate from the date of commencement.*

CHAPTER 5 DUTY TO PROVIDE INFORMATION

A Introduction

5.01 As discussed in previous Chapters, “there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust.”¹ It is generally accepted that one of these core obligations is the duty of a trustee to account to the beneficiaries for the manner in which he or she has discharged the duties imposed.² Consequently, as Hayton has stated, at the very core of the trust concept are “the fundamental interrelated core duties to disclose information and trust documents and to account to the beneficiaries for the trustees’ stewardship of the trust property, so as to be liable for losses or profits in relation thereto....”³

5.02 In preparing this Report, therefore, the Commission considered that it was appropriate to consider the issue in detail. Part B contains an analysis of the origins and nature of the right to information. Part C deals with historical limitations on the right to information and Part D with limitations on access. Part E contains a comparative analysis of developments in this area, and Part F contains the Commission’s recommendations for reform.

B The Origin and Nature of the Right to Information

(1) Introduction

5.03 The provisions of the *Trustee Act 1893* made no reference to any duties on trustees, or correlative rights of beneficiaries, with regard to accountability or disclosure of information. However, it is well established at common law that trustees are obliged to keep accounts of the trust property⁴

¹ *Armitage v Nurse* [1998] Ch 241, 253.

² Hayton “The Irreducible Core Content of Trusteeship” in Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press 1996) at 47.

³ *Ibid* at 57.

⁴ *Moore v McGlynn* [1894] 1 IR 74. See also *Cahill (Inspector of Taxes) v O’Driscoll* [2005] IEHC 179, [2005] 4 IR 100 where Hanna J confirmed at 106 that “the duty to account is a hallmark of trusteeship”.

and beneficiaries have a right to information and production and inspection of certain trust documents.⁵

5.04 In *Chaine-Nickson v Bank of Ireland*⁶ Kenny J confirmed the beneficiary's entitlement to information, quoting with approval *The Law Relating to Trusts and Trustees*⁷:

“When a beneficiary has a vested interest in a trust fund so that he has a right to payment of the income, the trustees must at all reasonable times at his request give him full and accurate information as to the amount and state of the trust property and permit him or his solicitor, to inspect the accounts and vouchers and other documents relating to the trust.”

(2) Discretionary beneficiaries

5.05 Although there was some doubt about whether beneficiaries under a discretionary trust were similarly entitled to information regarding the trust fund, this was resolved by Kenny J in *Chaine-Nickson v Bank of Ireland*⁸. It was argued on behalf of the trustees that discretionary beneficiaries were not entitled to information but, as this would mean that trustees of a discretionary trust would be effectively unaccountable, Kenny J concluded that:

“Legal principle and the one relevant authority [*Moore v McGlynn*]⁹ establish that a potential beneficiary under a discretionary trust is entitled to copies of the trust accounts and to details of the investments representing the trust funds.”¹⁰

5.06 In the subsequent English case of *Murphy v Murphy*¹¹ Neuberger J usefully clarified that the extent of the trustee's obligation will depend on the nature of the discretionary trust and the number of beneficiaries involved. Thus a specific potential beneficiary will have the right to ask the trustees for “information as to the nature and value of the trust property, the trust income,

⁵ See *Low v Bouverie* [1891] 3 Ch 82 and *O'Rourke v Darbishire* [1920] AC 581.

⁶ [1976] IR 393, 396.

⁷ Underhill *The Law Relating to Trusts and Trustees* (11th ed Butterworths 1959) at 401. (Now see Underhill & Hayton *Law of Trusts and Trustees* (17th ed Butterworths 2006).

⁸ [1976] IR 393.

⁹ [1894] 1 IR 74.

¹⁰ [1976] IR 393, 399.

¹¹ [1999] 1 WLR 282.

and as to how the trustees have been investing and distributing it”¹² but the court will not make orders “which would be likely to result in trustees of discretionary private trusts being badgered with claims for trust moneys, or for accounts as to how trust moneys have been spent.”¹³

(3) Objects of a power of appointment

5.07 Until the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*¹⁴ it might have been argued, unless specifically conferred, that the objects of a fiduciary power have no accounting rights on the basis that, while the presence of beneficiaries was a core characteristic of a trust, the presence of objects of powers of appointment was merely an optional extra. However, since *Schmidt v Rosewood Trust Ltd*, it is accepted that the object of a power is also entitled to seek disclosure. This is a consequence of a shift in approach to the issue of disclosure.

(4) Shift in approach

5.08 Traditionally, the basis of the beneficiaries’ right to inspect documents was regarded as deriving from their proprietary interest in the trust assets. This approach can be seen in the words of Lord Wrenbury in *O’Rourke v Darbishire*¹⁵:

“If the Plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all the trust documents because they are trust documents and because he is beneficiary. They are in a sense his own. Action or no action, he is entitled to access them.”

5.09 The proprietary approach was utilised more recently in *Re Londonderry’s Settlement*¹⁶. In essence the position was that the basis of the right to inspect trust documents derived from the fact of ownership of those trust documents by the beneficiary and, consequently, as mere objects of powers have no formal beneficial interest in the trust property unless and until the

¹² *Ibid* at 290.

¹³ *Ibid* at 293.

¹⁴ [2003] UKPC 26, [2003] 2 AC 709.

¹⁵ [1920] AC 581.

¹⁶ [1965] Ch 918.

power in question is exercised in their favour, it was arguable that they had no right of inspection.

5.10 In *Schmidt v Rosewood Trust Ltd*¹⁷ the proprietary rationale was rejected however and the Privy Council stated that:

“The more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court’s intervention does not depend on entitlement to a fixed and transmissible beneficial interest.”¹⁸

5.11 After extensive analysis of other common law jurisprudence (including, *inter alia*, from Ireland¹⁹ and Australia²⁰), the Privy Council concluded that the artificial distinction between beneficiaries and mere objects of powers was unnecessary and fairness could be best achieved by leaving the decision in the hands of the courts derived from its inherent supervisory jurisdiction for it to determine such cases on a case by case basis. Consequently, “the object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court’s discretion.”²¹

5.12 *Schmidt v Rosewood Trust Ltd* has been followed in this jurisdiction in *O’Mahony v McNamara*²² in terms confirming that a beneficiary’s right to seek disclosure of trust documents is simply an aspect or incident of the court’s inherent and fundamental jurisdiction to supervise and intervene in the administration of a trust. The plaintiffs, who were members of a staff retirement benefit scheme, sought an order for disclosure of all trust documents relating to the staff retirement benefit scheme. Carroll J held that the High Court, as part of its inherent jurisdiction to supervise and, if appropriate, intervene in the administration of a trust, could order the disclosure of trust documents.

¹⁷ [2003] 2 AC 709.

¹⁸ *Ibid* at 729.

¹⁹ *Chaine-Nickson v Bank of Ireland* [1976] IR 393.

²⁰ *Spellson v George* [1987] 11 NSWLR 300.

²¹ [2003] 2 AC 709.

²² [2005] 1 IR 519.

5.13 It should also be noted that the shift in approach has recently been accepted in England. In *Breakspear v Ackland*²³ it was accepted by Briggs J that there is now “virtual unanimity” in the common law jurisdictions that:

“the basis upon which trustees and the court should approach a request for disclosure of a wish letter (or of any other document in the possession of trustees in their capacity as such) is one calling for the exercise of discretion rather the adjudication upon a proprietary right.”²⁴

C Limitations on the Right to Information

5.14 In view of this discussion, it is therefore well established that, as a general principle, beneficiaries have the right to information about a trust in which they are beneficiaries. However, this right to information is not unqualified and has been historically subject to two important limitations.

(1) Documents disclosing reasons for exercise of discretion

5.15 The first historical limitation on the right to information derives from the basic principle that trustees are not obliged to explain their reasons for exercising or not exercising a discretionary power. The rationale for this principle has been stated as follows:

“First, the disclosure of reasons for a decision is inconsistent with the proposition that the trustee's exercise of a discretionary power cannot be challenged in the absence of *mala fides*. Secondly, on a practical level a requirement to give reasons would add to trustees' already onerous obligations. Thirdly, the beneficiaries' knowledge of the reasons for the trustees' discretion may embitter the relationship between trustees and beneficiaries, and that between beneficiaries *inter se*, particularly in the case of family settlements.”²⁵

²³ [2008] WLR (D) 52.

²⁴ However, it should also be noted that Briggs J went on to determine that, at least in England, the Londonderry principle that the exercise of discretionary dispositive powers by trustees is inherently confidential remains good law.

²⁵ Dal Pont and Chalmers *Equity and Trusts in Australia and New Zealand* (2nd ed LBC Information Services 2000) at 622. See also *Re Londonderry's Settlement* [1965] Ch 918. It was further indicated in that case however that if trustees do provide reasons for their decisions “their soundness can be considered by the court.”

(2) Documents disclosing confidential information

5.16 The second historical limitation on the right to information is that beneficiaries do not have a right to information that is confidential, especially where that information may relate to the exercise of a discretion. The confidentiality of certain information may be expressly regulated by a secrecy clause in the trust instrument or implied by being expressed in a letter of wishes.²⁶

5.17 In the recent English decision *Breakspear v Ackland*, Briggs J described the essential characteristic of a letter of wishes as being “a mechanism for the communication by a settlor to trustees of the settlement of non-binding requests by him to take stated matters into account when exercising their discretionary powers”.²⁷ Though they are only one example of a document disclosing confidential information, letters of wishes are perhaps the prime example of where the competing considerations of accountability and confidentiality clash.

5.18 In the Australian case *Hartigan Nominees Pty Ltd v Rydge*²⁸ Mahoney JA explained the significance of confidentiality, particularly in the context of discretionary trusts:

“In deciding questions of disclosure, it is important in my opinion to have regard to the essential nature of such discretionary trust. Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner in which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy are respected. In a discretionary trust of this kind, the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the

²⁶ See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 where Sheller JA stated at 446 that the fact that a separate memorandum was delivered and the wishes were not disclosed in the trust instrument or a document attached to it lead to the conclusion that the memorandum was given to the trustees in circumstances of confidence.

²⁷ [2008] WLR (D) 52, para 5.

²⁸ (1992) 29 NSWLR 405. However, in the more recent decision of *Re Rabaiotti's Settlement* [2000] JLR 953 although the Jersey Royal Court affirmed the general principle that a trustee does not have to disclose the reasons for the exercise of a discretion, it also held that, as part of its general supervisory jurisdiction, it retained a discretion to order disclosure of documents disclosing reasons where it was satisfied that it was essential to do so.

law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In cases of this kind, if a settlor's wishes cannot be dealt with in confidence, the purpose of the trust may be defeated."²⁹

Similarly in *Breakspear v Ackland*, Briggs J noted that the settlor's desire for confidentiality has both a subjective and objective connotation:

"Confidentiality may serve a purely selfish desire of the settlor to keep his wishes, beliefs and the communication of certain facts secret from the family. Objectively speaking, that secrecy may in many cases be thoroughly beneficial, since it may tend to preserve family harmony and mutual respect, while enabling trustees to be briefed as to matters relevant to the exercise of their discretionary powers, rather than kept in ignorance of them."³⁰

5.19 As discussed earlier, one of the core fiduciary obligations is the duty of a trustee to account to his beneficiaries for the manner in which he has discharged the duties imposed on him. In *Breakspear v Ackland* Briggs J also explained the value of letters of wishes in relation to the accountability of trustees:

"Since few would argue that clearly and rationally expressed wishes and relevant information included by settlers in wish letters could be treated by trustees as wholly irrelevant to the exercise of their discretionary powers, it is inescapable that their content will potentially be relevant, both to beneficiaries in monitoring the performance by trustees of their fiduciary obligations, and to the court in enforcing that performance where necessary and appropriate."³¹

5.20 It is clear therefore that there is an inevitable clash between the competing considerations of accountability and confidentiality. However, traditionally, primacy was given to the value of confidentiality and therefore where the confidentiality of certain information is expressly regulated by a secrecy clause in the trust instrument or implied by being expressed in a letter

²⁹ *Ibid* at 436.

³⁰ [2008] WLR (D) 52, para 6.

³¹ *Ibid*, para 8.

of wishes,³² such information has traditionally not been available to beneficiaries.

D Obtaining Information

5.21 As discussed earlier, trustees are obliged to keep accounts of the trust property and beneficiaries have a right to information and production and inspection of trust documents.³³ Consequently, upon request, a trustee must permit a beneficiary or his or her solicitor to inspect the accounts and documents relating to the trust.³⁴ Theoretically however, if a beneficiary wishes to take a copy of the documents, he or she must bear the expense of copying.³⁵

5.22 A beneficiary will have far greater difficulty, however, where the information he or she seeks relates to the grounds upon which a trustee's discretion has been exercised or has been made expressly confidential or impliedly so through being expressed in a letter of wishes. The current position is that, where the information sought is not forthcoming from the trustees, the beneficiary's only option is to institute proceedings challenging the *bona fides* of the trustees' decision.³⁶

5.23 As Carroll J confirmed in *O'Mahony v McNamara*, the issue of whether access to trust documents should be granted will lie at the discretion of the court and in exercising that discretion the "court may have to balance the competing interests of beneficiaries, the trustees themselves and third parties".³⁷

³² See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 where Sheller JA stated at 446 that the fact that a separate memorandum was delivered and the wishes were not disclosed in the trust instrument or a document attached to it lead to the conclusion that the memorandum was given to the trustees in circumstances of confidence.

³³ See above at paragraph 5.03.

³⁴ *Chaine –Nickson v Bank of Ireland* [1976] IR 393, 396.

³⁵ *Ibid.*

³⁶ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705. See also the comments of Megarry (1965) 81 LQR 192.

³⁷ [2005] 1 IR 519, 527.

E Comparative Analysis of Judicial Approaches to Discretion

5.24 As Briggs J stated in *Breakspear v Ackland*³⁸, there is now “virtual unanimity” in the common law jurisdictions that:

“the basis upon which trustees and the court should approach a request for disclosure of a wish letter (or of any other document in the possession of trustees in their capacity as such) is one calling for the exercise of discretion rather than the adjudication upon a proprietary right.”³⁹

However, the decisions of the courts in those jurisdictions have shown some differences in the approach the courts will take to the exercise of the judicial discretion. In this section the Commission proposes to consider the leading cases in the common law jurisdictions and, as each jurisdiction has been informed by preceding cases in other jurisdictions, the cases will be considered chronologically.

(1) Australia

5.25 In *Hartigan Nominees Pty Ltd v Rydge*⁴⁰ the Court of Appeal of New South Wales considered whether a letter of wishes should be disclosed to beneficiaries. The court considered the English case of *Re Londonderry’s Settlement* in which the Court of Appeal held that, notwithstanding the *prima facie* right of beneficiaries to trust documents, certain documents may be protected for the special reason which protects trustees’ deliberations on a discretionary matter from disclosure.⁴¹ The majority, comprising Mahoney JA and Sheller JA, went on to hold that, as the letter of wishes was confidential in nature, the need to protect and preserve this confidentiality precluded disclosure. Mahoney JA accepted the proprietary approach of *Re Londonderry’s Settlement* and based his decision on the need to preserve confidentiality in the trustees’ exercise of dispositive discretionary powers. Shelley JA expressed dissatisfaction with the proprietary approach however but accepted the need to preserve confidentiality regarding the exercise of the trustees’ discretion. Although he took the view that the letter of wishes did not reveal the reasons for the exercise of the trustees’ discretion, he refused

³⁸ [2008] WLR (D) 52.

³⁹ However, it should also be noted that Briggs J went on to determine that, at least in England, the Londonderry principle that the exercise of discretionary dispositive powers by trustees is inherently confidential remains good law.

⁴⁰ (1992) 29 NSWLR 405.

⁴¹ [1965] Ch 918.

disclosure simply on the ground that the settlor had implicitly imposed an obligation on the trustees to keep the letter of wishes confidential from the beneficiaries and the trustees were bound by this obligation in the absence of sufficient countervailing circumstances. Therefore, while Sheller JA appeared to accept that disclosure could be ordered on a discretionary basis, in balancing the competing considerations of accountability and confidentiality, he took the view that confidentiality should be given primacy.

5.26 It should be noted that Kirby P dissented strenuously. He agreed with Sheller JA that the proprietary approach was unsatisfactory. His view however was that preceding cases, such as *Re Londonderry's Settlement*, were “the product of an outdated benevolent paternalism”⁴² and that disclosure to beneficiaries of confidential letters of wishes and trustees’ deliberations should not be regarded as immune from disclosure where disclosure is necessary to enable beneficiaries monitor performance of the trustees’ duties and ensure that they are fully and properly informed.

(2) Jersey

5.27 In *Re Rabaiotti's Settlement*⁴³ the trustees of a number of settlements applied for directions to the Jersey Royal Court as to whether they should disclose documentation, including letters of wishes, to a beneficiary who had been ordered to disclose such documentation in separate matrimonial proceedings. While affirming the general principle that a trustee does not have to disclose the reasons for the exercise of a discretion or documentation that is confidential in nature, the Jersey Royal Court held that, as part of its general supervisory jurisdiction, it retained a discretion to order disclosure of documents disclosing reasons where it was satisfied that it was essential to do so.

5.28 The Deputy Bailiff stated that the general principle is that:

“a beneficiary is entitled to see trust documents which show the financial position of the trust, what assets are in the trust, how the trustee has dealt with those assets, etc. This is an essential part of the mechanism whereby the trustee can be held accountable for his trusteeship to a beneficiary”.

5.29 The Deputy Bailiff then elaborated on the approach the court will take in exercising its discretion and identified two presumptions, one which operates where the documents are documents of the nature described and one which operates where the documents are confidential in nature or disclose reasons for

⁴² Per Briggs J in *Breakspear v Ackland* [2008] WLR (D) 52 at paragraph 30.

⁴³ [2000] JLR 953.

the trustees' exercise of their discretion. In relation to trust documents of the nature described, the Deputy Bailiff stated:

“[o]ne starts with a strong presumption that a beneficiary is entitled to see trust documents of the nature described. There would have to be good reason to refuse disclosure of such documents. But the court is satisfied that, as a matter of general equitable principle, the court has an overriding discretion to withhold documents where it is satisfied that this is in the best interests of the beneficiaries as a whole.”

5.30 The Deputy Bailiff then explained that where documents are confidential in nature or disclose reasons for the trustees' exercise of their discretion, the position is the reverse:

“One starts with a strong presumption that a letter of wishes or other document [that may be confidential or disclose reasons for the trustees' exercise of their discretion], does not have to be disclosed to a beneficiary. The burden lies on the beneficiary who requests the court to order the disclosure of such a document against the wishes of the trustees. Nevertheless, there is power in the Court to do so if the Court is satisfied that there are good grounds for ordering disclosure in a particular case.”

5.31 The court then concluded that, on the particular facts of the case, the letter of wishes should be disclosed.

(3) *Isle of Man*

5.32 As discussed above, the proprietary approach to the issue of disclosure of information was conclusively rejected in *Schmidt v Rosewood Trust Ltd*⁴⁴. The Privy Council stated:

“The more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest.”⁴⁵

5.33 The Privy Council then identified three areas that the court may have to consider in exercising its discretion: first, whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; secondly, what classes of documents should be disclosed, either completely or in a redacted form; and, thirdly, what safeguards

⁴⁴ [2003] 2 AC 709. See also paragraphs 5.10 to 5.13 above.

⁴⁵ *Ibid* 729.

should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court.

5.34 The Privy Council then elaborated on the approach that courts will take in exercising its discretion:

“Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.”⁴⁶

(4) New Zealand

5.35 In New Zealand the *Schmidt v Rosewood* discretionary approach was accepted and followed by Potter J in *Foreman v Kingstone and Cave*⁴⁷. She elaborated on the weight that would be given to the competing considerations of accountability and confidentiality when the court exercises its discretion when she stated:

“But when a trust is established, obligations and correlative obligations are created. Otherwise there is no trust. The fundamental duty of the trustees is to be accountable to all the beneficiaries. That cannot be compromised by a settlor’s desire for confidentiality in relation to his and the trust’s personal affairs unless there exist exceptional circumstances that outweigh the rights of the beneficiaries to be informed.”

5.36 In considering what information beneficiaries should be entitled to obtain, Potter J then identified three categories of documents. The first category was documents which go to the very essence or core of the trust and its operation. Into this category will fall trust deeds, deeds of appointment, resettlement and removal and financial statements containing information about matters such as assets, liabilities and financial transactions. Potter J took the view that in relation to this category of documents, arguments based on avoiding potential acrimony would need to be extremely strong if the information

⁴⁶ *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 734.

⁴⁷ [2005] WTLR 823.

was being sought by a beneficiary with a realistic expectation. However, if the information was being sought by a beneficiary whose claim was weaker by reason of being more remote, then he or she may have to make a case before disclosure is ordered.

5.37 Potter J's second category was documents which were less clear cut and in relation to which the court would have to decide whether full or partial disclosure should be ordered and whether additional safeguards were required. In this category Potter J dealt with the issue of letters or memoranda of wishes and legal opinions obtained by the trustees and took the view that such documents could fall within the meaning of being trust documents and, so long as they did not contain confidential information, should be disclosed.

5.38 The last category was documents giving reasons for trustees' decisions or any other like matters which Potter J stated need not be disclosed.

(5) England

5.39 In the recent case *Breakspear v Ackland*⁴⁸, three beneficiaries under a settlement sought disclosure of a letter of wishes written by the settlor. After undertaking a detailed analysis of the existing jurisprudence, Briggs J came to a number of conclusions.

5.40 Firstly, as discussed earlier, Briggs J confirmed that the basis upon which trustees and the court should approach a request for trust documentation is one calling for the exercise of a discretion rather than the adjudication upon a proprietary right.

5.41 Secondly, despite rejecting the proprietary approach set out in *Re Londonderry's Settlement*⁴⁹, Briggs J concluded that the Londonderry principle, at the heart of which is the unanimous conclusion that "it is in the interests of beneficiaries of family discretionary trusts, and advantageous to the due administration of such trusts, that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as an essentially confidential process", remains good law.⁵⁰

5.42 Briggs J then set out the approach that is to be taken in relation to letters of wishes. First, trustees are to regard a letter of wishes as "invested with a confidentiality designed to be maintained, relaxed, or if necessary abandoned, as they judge best serves the interests of the beneficiaries and the due administration of the trust".⁵¹ Briggs J took the view that a request for

⁴⁸ [2008] WLR (D) 52.

⁴⁹ [1965] Ch 918.

⁵⁰ [2008] WLR (D) 52, at paragraph 53.

⁵¹ *Ibid*, at paragraph 66.

disclosure by a beneficiary simply triggers the need to exercise this discretion, which arises regardless of any request for disclosure, and that in exercising the discretion the trustees are not obliged to give any reasons for their decision.

5.43 Secondly, where an application is made to court, the court will have to exercise its discretion. Briggs J identified four scenarios in which such an application might arise and consequences that will follow in relation to each scenario. First, an application may be made by the trustees in which they seek to surrender their discretion to the court and in this scenario the court will have to exercise its own discretion afresh. Secondly, trustees may seek to have their refusal to disclose approved and in this scenario, Briggs J saw it as inevitable that the trustees would have to disclose their reasons to the court. Thirdly, an application may be made by a beneficiary seeking to challenge the trustees' negative exercise of their discretion to disclose and in this scenario Briggs J took the view that the trustees would be entitled to decline to give reasons and defend the challenge on the basis that the beneficiary had failed to impugn the *fides* of the decision. Finally, a beneficiary may seek to invoke an original discretion in the court as part of its inherent jurisdiction and in this scenario Briggs J stated that the beneficiary would ordinarily have to put forward some evidence of *mala fides* or unfairness to demonstrate that the court's intervention is necessary.⁵²

5.44 Briggs J then usefully set out the approach that should be taken to the exercise of the discretion in relation to disclosure, whether by the trustees or by the court:

"I emphasise that the application of the Londonderry principle to wish letters in the way in which I have sought to explain them is not to be taken as something akin to a statutory code. The question begins and ends, both for the trustees and for the court, a question of discretion, or of the review of the exercise of discretion. There are no fixed rules, and the trustees need not approach the question with any pre-disposition towards disclosure or non-disclosure. All relevant circumstances must be taken into account, and in all cases other than those limited to a strict review of the negative exercise of a discretion, both the trustees and the court have a range of alternative

⁵² It should be noted that Briggs J also pointed out that the issue may also arise where disclosure is sought from the court to facilitate the determination of an issue to which the letter of wishes is relevant. However he stated that this will give rise to different considerations, governed by the law and practice relating to disclosure in civil proceedings and as the issue was not put before him in this context, he declined to consider how the issue should be determined in this context.

responses, not limited to black and white question of disclosure or non-disclosure.”⁵³

5.45 It should be noted that Briggs J did indicate that “the question whether disclosure should be refused, either by trustees or by the court should be addressed primarily upon an assessment of the objective consequences, rather than by reference to the subjective purpose for which disclosure is alleged to be sought”.⁵⁴ However, given his subsequent rejection of the existence of any fixed rules regarding the exercise of discretion, it is clear that the significance and weight to be attached to the subjective purpose for which disclosure is alleged to be sought will vary from case to case.

5.46 In exercising his discretion in relation to the particular facts of the case, Briggs J concluded that disclosure should be ordered.

F Options for Reform

5.47 In considering reform of the obligation of trustees to provide information, the Commission has considered the following options⁵⁵:

(a) Comprehensive provisions on the rights to information

5.48 As discussed earlier, the *Trustee Act 1893* does not provide for any duties on trustees, or correlative rights of beneficiaries, with regard to accountability or disclosure of information. The first option for consideration is therefore the introduction of a clear and comprehensive statutory provision setting out exactly what is required of trustees and available to beneficiaries. Such a provision might also set out precisely the minimum level of accountability that is required for the trust to be valid and enforceable.

5.49 The Commission considers this an overly prescriptive and restrictive approach to the issue of accountability and one that is not in keeping with the fundamental principle of settlor autonomy. As it would involve cementing the rights of beneficiaries in statute, it would also require extreme precision and highly skilled draftsmanship.

⁵³ *Ibid*, para 73.

⁵⁴ *Ibid*, para 51.

⁵⁵ In considering various options for reform the Commission draws on the review of the Jersey Law Commission in its Consultation Paper *The Rights of Beneficiaries to Information Regarding a Trust* (CP 1 February 1998).

(b) *Permit settlors to restrict rights to information but lay down detailed statutory limits*

5.50 A less prescriptive option for reform would be the introduction of a statutory provision which would set out default rights of beneficiaries in relation to trust documentation which would be subject to the terms of the trust instrument. It might also be provided that such default rights could be subject to any order of the court. With the introduction of such a provision, it would remain possible to define the minimum level of accountability required but would be also acceptable to leave the task to the courts if and when it arose.

5.51 The Commission is of the view however, while this is a less prescriptive option for reform, it is still a very restrictive approach which would again require extreme precision and highly skilled draftsmanship.

(c) *Permit settlors to restrict rights to information but give the court power (on application) to invalidate excessive restrictions.*

5.52 The third option the Commission has considered is a converse statutory provision which would permit settlors to delimit the rights of beneficiaries to trust information but would also make provision for a judicial power to invalidate excessive restrictions. In its Consultation Paper *The Rights of Beneficiaries to Information regarding a Trust* the Jersey Law Commission considered this the most flexible approach to reform in this area and stated that:

“Such a provision would enable the court either to strike down terms of the trust which offend this essential principle, whilst preserving the basic validity of the trust, or in an extreme case to declare the trust as a whole invalid. This would result in a more sophisticated approach, specifically directed to the mischief requiring remedy and tailor-made to the circumstances of the particular trust under consideration. Such a provision could also act as a warning to settlors who might be minded to proscribe beneficiary access very closely, and as confirmation of the intent of the Jersey legislature to preserve the all-important principle of trustee accountability.”⁵⁶

5.53 The Commission is of the view however that, while the principle of settlor autonomy is to be greatly respected, this approach is not appropriate. The Commission is of the view that such an approach may in fact perpetuate the view that anything that is not restricted must be disclosed and consequently may encourage settlors to be overly proscriptive and trustees to err on the side of disclosure. Alternatively, where the settlor fails to restrict rights to information, trustees may be affected in the exercise of their discretion and the value of confidentiality may be compromised.

⁵⁶ *Ibid* at 7.3.1

(d) Statutory presumptions

5.54 A further option considered by the Commission is the introduction of a statutory presumption that a beneficiary is entitled to see documents which go to the financial state of the trust and a statutory presumption that a beneficiary is not entitled to see documents which go to why a trustee has exercised his discretion or are otherwise confidential.

5.55 As this option, which draws heavily on the approach of the Jersey Royal Court in *Re Rabaiotti's Settlement*⁵⁷, would provide guidance to settlors, trustees and beneficiaries as to the approach that might be taken by the trustees and the courts in relation to disclosure of trust documentation, the necessity for applications to court may be reduced.

5.56 However, the Commission considers that the decision of *Breakspear v Ackland*⁵⁸, represents persuasive authority in this jurisdiction and finds the approach enunciated by Briggs J compelling. As already noted, the Commission considers that Briggs J has put forward strong arguments against stymieing the discretion of the trustees and of the court and agrees that neither the trustees, nor the court, should approach the question of disclosure of particular trust documents with any pre-disposition towards disclosure or non-disclosure. Consequently, the Commission does not consider that any presumptions towards disclosure or non-disclosure should be cemented in statute.

(e) No statutory reform

5.57 The final option is to maintain the *status quo* by deciding against statutory reform and allowing any remaining uncertainty to be resolved on a case by case basis by the judiciary.

5.58 In considering reform of the area, the Commission is of the view that this is the appropriate approach to take. In its Consultation Paper, the Jersey Law Commission decided against this approach as:

“The judiciary cannot answer hypothetical questions, and can therefore only act to clarify or mould legal principles if and when an appropriate legal dispute comes before the courts, which may or may not happen for many years.”⁵⁹

⁵⁷ [2000] JLR 953. See also paragraphs 5.27 to 5.31 above.

⁵⁸ [2008] WLR (D) 52.

⁵⁹ Jersey Law Commission Consultation Paper *The Rights of Beneficiaries to Information Regarding a Trust* (CP 1 February 1998) at 7.4.1.

5.59 As the law has not been clear in this area, the Commission understands the drive to introduce clarity through legislative amendment. However, since the Jersey Law Commission undertook its review of the area, an English court has had to consider the question of the provision of information to beneficiaries and, as stated earlier, the Commission finds the approach set out by Briggs J in *Breakspear v Ackland*⁶⁰ extremely compelling. The Commission is of the view that this decision represents persuasive authority for an Irish court considering the question of provision of information to beneficiaries and that the approach set out by Briggs J should provide guidance for beneficiaries and trustees regarding their rights and correlative duties. The Commission is of the view that Briggs J has put forward very cogent arguments against stymieing the discretion of the trustees and of the court in any manner and, consequently, save for one exception, the Commission does not consider that fixed rules regarding the rights of beneficiaries to information should be cemented in statute. The Commission is of the view however that, as people are entitled to know if they have an interest in a trust, it is appropriate that beneficiaries be provided with a statutory right to be provided with the deed of settlement, which should be defined to include any will as proved.

5.60 The Commission recommends that beneficiaries should be provided with a statutory right to be provided with the deed of settlement, which should be defined to include any will as proved. The Commission recommends that disclosure of documents other than the deed of settlement should be a matter for the discretion of the trustees and/or the courts.

⁶⁰ *Ibid.*

CHAPTER 6 POWER TO DELEGATE

A Introduction

6.01 This Chapter revisits provisional recommendations made by the Commission with regard to the power of trustees to delegate their duties or powers.

6.02 In Part B of this Chapter, the Commission discusses the current state of Irish law, the general common law principles governing the power of delegation and the limited statutory intervention which has taken place in the context of this power.

6.03 Part C discusses particular issues which arise in the context of powers of delegation and makes various proposals for reform.

B Current Position

(1) Agents

6.04 In keeping with the traditionally personal nature of the trust, the general principle is that a trustee is not entitled to delegate his trust powers.¹ This general rule is encapsulated in the equitable maxim *delegatus non potest delegare*.²

¹ See *Turner v Corney* (1841) 5 Beav 515 where Lord Langdale MR observed at 517 that “trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to responsibility towards their cestuis que trust, for whom they have undertaken the duty.” See also Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 458; Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997) at para 3.5.

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).

6.05 However, it has long been recognised that it would be very difficult, if not practically impossible, for trustees to personally carry out every task connected with the performance of the trust. Furthermore, as was stated in the Consultation Paper, delegation to professional agents with requisite levels of specialised expertise can be vital to the effective administration of the modern trust³ and in certain circumstances a failure to delegate might even amount to a breach of trust.⁴ Consequently, there are a number of limited exceptions to the general principle against delegation.

(a) Exceptions to the general principle

(i) Express authorisation in the trust instrument

6.06 The strict rule against the employment of agents by trustees could always be expressly excluded or modified by the trust instrument and consequently very wide powers of delegation are commonly found in trust instruments.

(ii) Common law exceptions to the general principle

6.07 It has long been established that a trustee can delegate in cases of “legal” or “moral” necessity. In the 18th century case of *Ex parte Belchier*⁵ Lord Hardwicke LC held that “where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.”

6.08 Eventually the rule developed that an agent may be employed and remunerated by trustees where it is prudent and in accordance with ordinary business practice.⁶ However, this power to delegate in cases of necessity is subject to a number of important limitations. Firstly, the selection of agents is not a task that may be delegated and trustees must exercise reasonable care in making their selection.⁷ Secondly, agents may not be employed to carry out tasks outside their competence.⁸ Thirdly, trustees must exercise “the ordinary prudence which a man uses in his own affairs” in the subsequent supervision of appointed agents.⁹ Finally, only ministerial or administrative functions may be

³ See the Consultation Paper at paragraph 6.02ff.

⁴ Wylie *Irish Land Law* (3rd ed 1997) at 610.

⁵ *Ex parte Belchier* (1754) Amb 218.

⁶ *Speight v Gaunt* (1883) 22 Ch D 727.

⁷ *Re Weall* (1889) Ch D 674.

⁸ *Fry v Tapson* (1884) 28 Ch D 268.

⁹ *Mendes v Guedella* (1862) 2 J & H 259 at 277, per Page Wood VC.

delegated and functions which are dispositive in nature or which involve a personal discretion must be personally exercised by the trustees.¹⁰

(iii) Statutory exceptions to the general principle

6.09 In the context of delegation of powers by trustees statutory intervention in Ireland is currently limited to two provisions of the *Trustee Act 1893*.¹¹ Section 17 of the 1893 Act provides a statutory exemption to the general principle against delegation by permitting trustees to authorise receipt of moneys by a banker or solicitor while section 24 provides a limited statutory indemnity for trustees.¹²

6.10 Section 17(1) provides that a trustee may appoint a solicitor to receive purchase money derived from the sale of trust money 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 by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee.

(b) Liability of trustees

6.11 It is well established that where trustees delegate without authority, they will be held vicariously liable for any loss which occurs.¹³

6.12 Furthermore, even where delegation is permissible, trustees are still bound to exercise reasonable prudence in their supervision of the appointed

¹⁰ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) at paragraphs 3.3 to 3.5 and 3.10 to 3.11.

¹¹ As the Consultation Paper noted at paragraph 6.06, section 16 of the *Powers of Attorney Act 1996* 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." It may also be noted that the *Land and Conveyancing Law Reform Bill 2006* (as passed by Seanad Éireann) proposes to amend section 16 of the *Powers of Attorney Act 1996* by deleting "or as a tenant for life within the meaning of the *Settled Land Act 1882*, or as a trustee or other person exercising the power of a tenant for life under section 60 of that Act."

¹² Section 24 of the 1893 Act is considered at paragraph 6.12, below.

¹³ *Speight v Gaunt* (1883) 22 Ch D 727; *Target Holdings v Redfern* [1995] 3 WLR 352.

agent's activities.¹⁴ As discussed earlier however section 24 of the *Trustee Act 1893* provides a limited statutory indemnity for trustees. It states:

“A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults and not for those of any other trustee, nor for any banker, broker or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities nor for any other loss, unless the same happens through his own wilful default...”¹⁵

6.13 However, as discussed earlier, in the context of the subsequently enacted English *Trustee Act 1925* “wilful default” has been interpreted as implying “either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty.”¹⁶ Therefore it would seem, in that jurisdiction at least, that a trustee who has acted honestly and prudently will not be fixed with liability. However “wilful default” remains without interpretation by an Irish court and, as Mee notes, “it seems the more strict approach, which requires the trustees to exercise reasonable care, would fit more harmoniously with the equitable principles which have been developed in this area”.¹⁷ It would also fit more harmoniously with the new statutory duty of care that has been recommended and which is proposed to be of general application.¹⁸

(2) *Nominees and Custodians*

6.14 The *Trustee Act 1893* makes no provision for the appointment of nominees or custodians and at common law a number of principles operate to preclude such appointment in the absence of an express power in the trust instrument¹⁹:

¹⁴ See paragraph 6.08 above.

¹⁵ See paragraph 4.06 for consideration of the phrase “wilful default”.

¹⁶ *Re Vickery* [1931] 1 Ch 572, 584 per Maugham J.

¹⁷ Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 204.

¹⁸ See paragraphs 3.11 to 3.28 above.

¹⁹ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at 160.

- The trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it.²⁰
- Where there are two or more trustees, it is their duty to ensure that the title to the trust property is vested in their joint names, so that it can be transferred only with the consent of all.²¹
- It is permissible for the documents relating to the trust property to be in the custody of just one of the trustees.²²

6.15 Thus, it would seem the current position is that, where appointment of a nominee or custodian is not permitted by the terms of the trust instrument, the vesting of trust property in a nominee or the placing of trust property in the custody of a custodian would amount to a breach of a trust.²³

C Discussion

(1) Agents

6.16 It is generally accepted that the current statutory provisions governing the powers of trustees to delegate are neither adequate nor in keeping with the requirements of modern day trusts.²⁴ Trusteeship is “an increasingly specialised task that often requires professional skills ... that trustees may not have”²⁵ and, in most cases, it would not be practicable or desirable to expect trustees to perform every task associated with the performance of the trust. Not only has Irish legislation failed to keep abreast of developments in other jurisdictions, the current statutory provisions are at odds with the trend of inserting wide powers of delegation into trust instruments to enable trustees to act in a way that the general law does not permit. Consequently, as Delany has commented, “the present position in relation to

²⁰ See *Wyman v Paterson* [1900] AC 271, 288 where Lord Davey described it as being “the first duty of the trustees ... to preserve the trust fund under their own control”.

²¹ See *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592.

²² See *Cottam v Eastern Counties Railway Co* (1860) 1 J&H 243; 70 ER 737.

²³ See *Browne v Butter* (1857) 24 Beav 159, 161.

²⁴ Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 461; Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 202.

²⁵ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997) at paragraph 1.1.

delegation by trustees in this jurisdiction is far from satisfactory and clearly it needs to be addressed as a matter of urgency”.²⁶

6.17 In the Consultation Paper the Commission considered the legislative developments in England in some detail. Since the enactment of the *Trustee Act 1925*, English trustees have had the benefit of wider powers of delegation but these powers have been further extended and modernised by the *Trustee Act 2000*. In the Consultation Paper, the Commission provisionally commended the 2000 Act as a suitable legislative model for reform of the power of delegation in this jurisdiction.

(a) Statutory power of delegation

6.18 The *Trustee Act 2000* allows trustees to delegate to an agent but imposes a number of restrictions. While trustees may delegate any or all of their “delegable functions”²⁷, there are four functions in relation to which delegation is not possible. These four “non-delegable functions” are:

- Any function relating to whether or in what way any assets of the trust should be distributed;
- 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;
- Any power to appoint a person to be a trustee of the trust or
- Any power conferred by any other enactment of 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.²⁸

6.19 In view of the fact that this approach has been widely welcomed in England and received widespread support during the consultation phase, the Commission recommends that legislation be introduced in terms similar to section 11 of the *Trustee Act 2000*. However, it was suggested in a response to the Consultation Paper that the scope of the non-delegable function regarding the distribution of the assets of the trust fund should be broadened to include the utilisation of the assets by beneficiaries who, for example, might be given

²⁶ Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 461.

²⁷ Section 11(1) of the English *Trustee Act 2000*.

²⁸ Section 11(2) of the English *Trustee Act 2000*. The issue of the power to appoint nominees and custodians is considered at paragraphs 6.36 to 6.52 below.

the benefit of residing in a residence which is owned by the trust. The Commission agrees with this suggestion.²⁹

6.20 *The Commission recommends the introduction of legislation, which provides that trustees may delegate their delegable functions to an authorised agent. The Commission recommends that the following functions should be non-delegable:*

(a) any function relating to whether or in what way the assets of the trust should be distributed or otherwise dealt with during the period of the trust,

(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.

(b) *Persons who may be appointed as agents*

6.21 Apart from a beneficiary, anyone can be appointed as an agent under section 11 of the *Trustee Act 2000* and this includes one or more of the other trustees.³⁰ In reality, the principal objection to permitting the employment of trustees as agents stems from the issue of remuneration and were safeguards regarding the reasonableness of remuneration in place, there would seem to be no real difficulty in permitting the delegation of delegable functions to co-trustees. The Commission is of the view that there is no need to exclude trustees from the class of permissible agents. In the making of the decision to appoint one of their number as agent, or the making of decisions with regard to remuneration, trustees will be subject to both the statutory duty of care and the fiduciary duties inherent in trusteeship.

6.22 *The Commission recommends the class of permissible agents should include trustees themselves but should exclude beneficiaries.*

²⁹ See also section 20(2)(a) of the *Land and Conveyancing Law Reform Bill 2006* which provides that trustees of land will have the full power of an owner and this will include permitting a beneficiary to occupy or otherwise use the land on such terms as the trustee thinks fit.

³⁰ Section 12(1) of the English *Trustee Act 2000*.

6.23 *The Commission recommends that where trustees appoint two or more persons to exercise the same function, such persons must exercise the function jointly.*³¹

(c) Duty of care

6.24 As discussed earlier, the standard currently required of trustees in exercising their existing powers of delegation is the standard of “the ordinary prudent man of business.”³² However, as a new statutory duty of care has been proposed which would be of general application, this would no longer be the standard required of trustees. This would also deal with the confusion and controversy surrounding the interpretation of the phrase “wilful default” contained in the current statutory indemnity provision, section 24 of *Trustee Act 1893*.³³

6.25 *The Commission recommends that the proposed statutory duty of care shall apply to trustees’ power of delegation.*

(d) Terms of agency

6.26 Although reform of trustees’ powers of delegation is undoubtedly necessary, there are a number of specific situations in which relaxation of the current restrictions on delegation may pose a higher degree of risk to the trust. These are:

- (a) where an agent is authorised to sub-delegate;
- (b) where an agent’s liability is excluded or limited; and
- (c) where an agent is permitted to act in circumstances which may give rise to a conflict of interest.

6.27 In relation to (a) and (b), it is to be expected that trustees will regularly wish to contract on terms which permit sub-delegation or exclude or restrict liability. In practice, trustees will often find that some agents will decline appointment unless the trustees agree to such terms. While it is less likely that trustees will wish to contract on terms which sanction a conflict of interest on the part of their agents, there may be some circumstances in which trustees will feel it is necessary to contract on that basis.³⁴

³¹ Section 12(2) of the English *Trustee Act 2000*.

³² *Speight v Gaunt* (1883) 22 Ch D 727.

³³ See paragraph 4.06 above.

³⁴ Examples of such circumstances were usefully provided by the English Law Commission in its *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997), at page 53. These included where trustees wish to allow agents to reserve contractual rights to sell their own property to the trust; to purchase

6.28 Following the recommendations of the Law Commission³⁵, the approach in the English *Trustee Act 2000* was to permit trustees to delegate on such terms subject to two safeguards: first, the general duty of care and secondly, a requirement that such terms should only be included where they are reasonably necessary.³⁶

6.29 The Commission is also of the view that a term authorising sub-delegation, restricting the liability of the agent to either the trustee or a beneficiary or sanctioning a conflict of interest should not be allowed unless such a term is 'reasonably necessary'. This would encourage trustees to closely examine the terms of agency and consider whether the term is indeed necessary or whether the service may be available from another agent on more acceptable terms. Furthermore, a further safeguard will be provided by the proposed statutory duty of care which, as discussed in Chapter 4, will be of general application and therefore will be owed by trustees exercising their powers of delegation.

6.30 *The Commission recommends that, where it is reasonably necessary, trustees should have the power:*

- (a) to permit an agent to appoint a substitute;*
- (b) to restrict the liability of an agent or his substitute to the trustees or the beneficiaries;*
- (c) to permit an agent to act in circumstances capable of giving rise to a conflict of interest.*

(e) Remuneration of agents

6.31 As discussed earlier, while settlors and the common law may have introduced exceptions to the general principle of non-delegation, Irish legislation has not kept pace with modern trust law development. Thus, although trustees may pay agents at the cost of the trust funds where they may be employed under one of the exceptions, there is at present no statutory power to pay agents.³⁷

property from the trust; to receive some additional commission or in some way profit from the agency.

³⁵ Law Commission *Report on Trustees' Powers and Duties* (No 260 1999) at paragraph 4.26.

³⁶ Section 14 of the English *Trustee Act 2000*.

³⁷ Section 24 of the *Trustee Act 1893* does provide 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."

6.32 As it is proposed to widen considerably trustees' statutory powers of delegation, the Commission considers it also necessary to introduce a statutory provision governing remuneration of agents. The Commission's view is that trustees should be permitted to pay their agents so long as remuneration does not exceed what is objectively reasonable for the particular services.³⁸ A further safeguard will be provided by the trustees complying with the statutory duty of care when employing and paying an agent.

6.33 *The Commission recommends that trustees should be conferred with the power to pay agents but this power should be restricted by providing that trustees are only authorised to pay the fees of their agents that are objectively reasonable and reimburse expenses that are properly incurred.*

(f) Supervision of agents

6.34 As discussed earlier, the courts have required trustees to exercise reasonable prudence in their supervision of the appointed agent's activities.³⁹ The Commission considers it appropriate to augment the judicial controls on delegation by introducing a statutory provision with similar effect.

6.35 *The Commission recommends the introduction of a new statutory provision which would oblige trustees to review the arrangements under which an agent acts and exercise any power of intervention if they consider it necessary.*

(2) Nominees and Custodians

6.36 There are a number of reasons why trustees might wish to appoint a nominee, for example:

- to provide an administration service in relation to investments;
- to facilitate dealings by a discretionary fund manager;
- as one method of using CREST⁴⁰;
- in relation to overseas investments which are traded using computerised clearing systems; and

³⁸ This qualification on the right to pay agents has also been introduced in England by section 32(2) of the *Trustee Act 2000*. See also *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313, 1324.

³⁹ See paragraph 6.08 above.

⁴⁰ CREST is a UK and Irish electronic paperless share transfer and settlement system that allows shares and other securities to be held in electronic rather than paper form.

- where registered land is held in trust, to obviate the need for regular changes to the register when trustees change.⁴¹

(a) Statutory power to appoint nominees and custodians

6.37 The Commission is of the view that trustees must be provided with statutory powers to appoint nominees and to appoint custodians.

6.38 Such powers have been introduced in England by the *Trustee Act 2000*. Section 16 provides that trustees may:

“(a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land), and

(b) take such steps as are necessary to secure that those assets are vested in a person so appointed.”

6.39 Section 17 provides that trustees may appoint a person as custodian in relation to assets of the trust and such a person will qualify as a custodian if he undertakes the safe custody of such assets or any documents or records relating to such assets.

6.40 *The Commission recommends that trustees should be provided with statutory powers to appoint nominees and custodians where it is reasonably necessary to do so.*

(b) Persons who may be appointed as nominees or custodians

6.41 In its *Report on Trustees’ Powers and Duties*, the Law Commission recommended that only those who act as such in the course of their business may be appointed as nominees and custodians.⁴² Although some of those who responded during the Law Commission’s consultation phase were of the view that this was an overly-prescriptive approach and that the matter should be governed instead by the statutory duty of care, the Law Commission considered that this did not pay sufficient regard to the inherent risks in the employment of nominees and custodians.

6.42 Section 19 of the English *Trustee Act 2000* provides that a person may not be appointed as nominee or custodian unless the person carries on a business which consists of or includes acting as a nominee or custodian. However the section also provides that a body corporate controlled by the trustees or an incorporated solicitors’ practice may be appointed as a nominee or custodian.

⁴¹ See Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No 146 1997) at paragraph 7.14.

⁴² Law Commission *Report on Trustees’ Powers and Duties* (No 260 1999) at paragraph 5.7.

6.43 The Commission agrees with the approach recommended by the Law Commission and considers that due regard must be paid to the inherent risks in the employment of nominees and custodians. However the Commission notes that, while section 70 of the *Solicitors (Amendment) Act 1994* appears to envisage incorporated solicitors' practices in Ireland, this has not been activated by the required Regulations in the intervening 14 years.

6.44 *The Commission recommends that a person may not be appointed as a nominee or a custodian unless the person carries on a business which consists of or includes acting as a nominee or custodian or the person is a body corporate controlled by the trustees.*

(c) Duty of care

6.45 Again, as the new statutory duty of care recommended by the Commission is proposed to be of general application, it shall also apply to the proposed statutory power to appoint nominees and custodians.

6.46 *The Commission recommends that the proposed statutory duty of care shall apply to trustees' power to appoint nominees and custodians.*

(d) Terms of appointment

6.47 In relation to permissible terms of appointment, the same issues apply as have been discussed in the context of agents.⁴³ Consequently, and in the interests of consistency, the Commission is of the view that trustees should have similar powers in relation to the terms of appointment of nominees and custodians.

6.48 *The Commission recommends that, where it is reasonably necessary, trustees should have the power:*

- (a) to permit a nominee or custodian to appoint a substitute;*
- (b) to restrict the liability of a nominee or custodian or his substitute to the trustees or the beneficiaries;*
- (c) to permit a nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.*

(e) Remuneration of nominees and custodians

6.49 Similarly, in relation to the remuneration of nominees and custodians, the same issues apply as have been discussed in the context of agents.⁴⁴ Accordingly, and to achieve consistency, the Commission is of the view that trustees should have similar powers in relation to the terms of appointment of nominees and custodians.

⁴³ See paragraphs 6.26 to 6.29 above.

⁴⁴ See paragraphs 6.31 to 6.32 above.

6.50 *The Commission recommends that trustees should be conferred with the power to pay nominees and custodians but this power should be restricted by providing that trustees are only authorised to pay fees that are objectively reasonable and reimburse expenses that are properly incurred.*

(f) *Supervision of nominees and custodians*

6.51 As discussed earlier, the courts have required trustees to exercise reasonable prudence in their supervision of the appointed agent's activities.⁴⁵ As it is now proposed to confer trustees with the power to appoint nominees and custodians, the Commission is of the view that protection must be afforded to beneficiaries. The obligation of trustees to comply with the statutory duty of care when appointing and supervising nominees and custodians will act as one positive safeguard. However the Commission considers it appropriate to introduce a further safeguard by imposing a positive obligation on trustees to keep any arrangements for the use of nominees or custodians under review. Similarly, the Commission recommends that this should be complemented by specific provisions setting out the extent, and limits, of the liability of trustees for the acts of agents, nominees and custodians, along the lines of sections 23 and 24 of the English *Trustee Act 2000*.

6.52 *The Commission recommends the introduction of a new statutory provision which would oblige trustees to review the arrangements under which a nominee or custodian acts and exercise any power of intervention if they consider it necessary. The Commission also recommends that this should be complemented by specific provisions setting out the extent, and limits, of the liability of trustees for the acts of agents, nominees and custodians.*

⁴⁵ See paragraph 6.08 above.

CHAPTER 7 POWER TO INSURE

A Introduction

7.01 In this Chapter the Commission examines the present law governing the powers and duties of trustees to insure the trust property and makes a number of proposals for reform.

7.02 Part B summarises the present law governing the power to insure while Part C revisits a number of issues examined in the Consultation Paper and makes recommendations for reform.

B Current position

(a) *Common law power to insure*

7.03 Although the matter is not without doubt, the authorities appear to establish that there is an implied power to insure trust property at common law, with the premiums being payable out of capital.¹ In *Kingham v Kingham*² Chatterton VC seemed to suggest that trustees may even have a duty to insure in some cases and logically this would presuppose the existence of a power to insure.³ However, it should be noted that there are also authorities that appear

¹ See *Kingham v Kingham* [1897] 1 IR 170; *Re Betty* [1899] 1 Ch 821.

² [1897] 1 IR 170.

³ This was also the view of the English Law Commission in their *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) at paragraph 9.4.

to suggest there is neither a common law power to insure⁴ nor a common law duty to insure⁵ trust property.

(b) Statutory power to insure

7.04 Statutory powers of insurance have been in place in this jurisdiction since the introduction of the *Trustee Act 1893*. Section 18(1) of the Act provides that a trustee may insure any building or other insurable property against loss or damage by fire to any amount not exceeding three-quarters of the full value of the insured property. The subsection also provides that the insurance premiums may be paid out of trust income without obtaining the consent of any person entitled to such income. It would seem that the statutory power to insure does not apply to bare trustees as section 18(2) of the 1893 Act provides that the section does not apply to any property which the trustee is bound to convey absolutely upon being requested to do so.

C Discussion

(1) Specific criticisms

7.05 The Commission is of the view that the current law governing the power of trustees to insure trust property is “somewhat unsatisfactory”.⁶ In identifying the following specific criticisms, the Commission has drawn on the English Law Commission’s analysis of section 19 of the English *Trustee Act 1925* which was drafted in similar terms to section 18 of the *Trustee Act 1893*.⁷

⁴ See *Re Kinahan’s Trusts* [1921] 1 IR 210 where, in directing payment for insurance on the basis of the court’s ‘salvage’ jurisdiction, Powell J seemed to take the view that there was no such common law power to insure trust property. See also the comment of Delany that prior to the *Trustee Act 1893*, “trustees originally had no power to insure unless this was conferred by the trust instrument.” Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 466.

⁵ See *Bailey v Gould* (1840) 4 Y & C Ex 221; 160 ER 987 and *Fry v Fry* (1859) 28 LJCh 593 where it was held that executors who failed to insure trust property were not guilty of “wilful default” and *Re McEacham* (1911) 103 LT 900 which suggested that trustees are under no obligation to insure even in circumstances where a reasonable prudent person would do so.

⁶ Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 199.

⁷ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997) at paragraphs 9.9 to 9.12. Note however that there are some differences between section 18 of the *Trustee Act 1893* and section 19(1) of the *Trustee Act 1925*, which, as amended by the *Trusts of Land and Appointment of Trustees Act*

(a) Uncertainty

7.06 The Commission's first criticism of the present law governing the power of trustees to insure trust property is its uncertainty or lack of clarity. In circumstances where there are conflicting authorities regarding the existence of an implied power at common law and suggestions in some cases that there may in fact be a positive duty, it may be difficult for trustees to determine the extent of their obligations to insure the trust property.

(b) Conflict with trustees' duties to the trust

7.07 As mentioned above, there are authorities which suggest that trustees are under no duty to insure the trust property.⁸ If this is correct as a statement of the current law,⁹ it would seem to be at odds with the duty of trustees "to exercise their powers in the best interests of the present and future beneficiaries of the trust"¹⁰ and "to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs."¹¹ It would therefore appear to conflict with the trustees' duties to the trust and leave the beneficiaries with the risk of being inadequately protected.

(c) Deficiencies in statutory power

7.08 The Commission is of the view that the current statutory power to insure trust property is deficient in four respects. First, in its limitation to insurance against damage by fire, it would seem far too narrow in scope. Secondly, in its failure to permit trustees to insure up to the market value or full replacement value of the property, it appears to conflict with the trustee's present duty to act as a prudent person of business.¹² Thirdly, in its limiting of insurance premium payments to payments from trust income, the statutory

1996, limits the power to insure to trustees of personal property but empowers trustees to insure "against loss or damage" and not merely against "loss or damage by fire".

⁸ See fn 5 above.

⁹ In its *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) the Law Commission suggested at paragraph 9.10 that "there must be a real doubt whether a court would still adhere to the view that ...trustees are under no obligation to insure even in circumstances where a reasonable prudent person would do so."

¹⁰ *Cowan v Scargill* [1985] Ch 270, 286 per Megarry VC.

¹¹ *Bartlett v Barclays Bank Trust Co Ltd* (No 1) [1980] Ch 515, 531 per Brightman J.

¹² The present standard of care has been dealt with in Chapter 4.

power is at odds with what is understood to be the common law power of insurance¹³ and creates difficulties where no income is available to trustees. Finally, in its exclusion of bare trustees, it would seem unnecessarily restrictive. It seems the underlying aim of this restriction may be the protection of beneficiaries who are opposed to the insuring of the property but the Commission is of the view that excluding the power entirely is unnecessary.

(2) Recommendations

7.09 In the Consultation Paper the Commission carried out a comparative study of the law governing the powers and duties of trustees to insure trust property¹⁴ and emphasised a number of issues that required consideration:

- (a) What default powers of insurance should trustees have?
- (b) In what circumstances, if any, should trustees be under a duty to exercise that power?
- (c) Should special provision be made where any insurable property 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?
- (d) Should premiums be payable out of income or capital?
- (e) To which trusts should the powers apply?¹⁵

7.10 The Commission wishes to revisit these five issues and make final recommendations for reform.

(a) Default powers of insurance

7.11 The Commission is of the view that a new statutory default power should be introduced to deal with the existing deficiencies in the current power under section 18 of the *Trustee Act 1893*.¹⁶ This is essential to enable trustees to act in the best interests of the trust and provide adequate protection for the trust property.

¹³ See above at paragraph 7.03.

¹⁴ See the Consultation Paper at paragraphs 8.04 to 8.36.

¹⁵ These issues were identified by the Law Commission in its *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) at paragraph 9.16.

¹⁶ See above at paragraphs 7.05 to 7.08.

7.12 *The Commission recommends that a new statutory provision be introduced, extending the trustees' existing powers of insurance beyond the current limit of "loss or damage caused by fire". The Commission also recommends that trustees be empowered to insure trust property up to the replacement value.*

7.13 In considering the widening of powers to insure in England, the Law Commission expressed a concern that trustees might insure in cases where it was unnecessary. However, as discussed earlier the Commission has proposed a new statutory duty of care of general application¹⁷ and, consequently, trustees exercising either an express power to insure or a new statutory power to insure will be subject to the general statutory duty of care.¹⁸

7.14 *The Commission recommends that the exercise of the statutory power to insure should be subject to the general statutory duty of care.*

(b) A duty to insure?

7.15 Although it appears to be widely accepted that trustees may have a common law duty to insure trust property in some cases, none of the jurisdictions examined in the Consultation Paper, have chosen to impose a statutory duty on trustees to exercise their powers of insurance.¹⁹

7.16 The Law Commission in its Consultation Paper had proposed a statutory duty to insure that would be founded on a test of reasonableness which would necessarily take into account whether insurance was the most cost-effective way of protecting the property.²⁰ The Law Commission took the view that in circumstances where trustees are under a paramount duty to act in the best interests of the trust, they should also be under a duty to insure where a reasonable person would have insured the property. The duty therefore formulated by the Law Commission was that trustees would be under a duty:

“to insure trust property-

(1) in circumstances when;

¹⁷ See above at paragraphs 3.11 to 3.28.

¹⁸ Note that this will be the position unless the trust instrument expresses that the duty is not to apply.

¹⁹ See above at paragraph 7.03. See also Law Commission *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) at paragraph 9.4; New Zealand Law Commission *Report on Some Problems in the Law of Trusts* (NZLC R79 2002) at paragraph 26.

²⁰ Law Commission *Consultation Paper on Trustees' Powers and Duties* (No. 146 1997) at paragraph 9.20.

(2) against such risks as; and

(3) for such amount as;

a reasonable prudent person would have insured the property.”²¹

However, this was not supported on consultation and the proposal was ultimately abandoned. The principal objections to the Law Commission’s provisional proposal were that there may be a risk of uncertainty as to when the duty would arise, which may lead to unnecessary and wasteful insuring of trust property, and that some trusts may lack the resources to insure the trust property.

7.17 The Commission is also of the view that it is not appropriate to introduce a statutory duty to insure trust property. The Commission considers that decisions in relation to insuring should be left to the discretion of the trustees. In exercising their discretion trustees will have to consider the nature of the trust property, the assets of the trust and the cost-effectiveness of insurance. As the new statutory duty of care that has been proposed is to be of general application, the exercise of the trustees’ discretion will be subject to the statutory duty of care. Consequently, irrespective of whether a statutory duty to insure is introduced, in relation to decisions regarding the insuring of trust property, trustees will be under a duty to exercise such care and skill as is reasonable in the circumstances.

7.18 *The Commission recommends that any new legislation should not impose upon trustees a duty to insure.*

(c) *Insuring insurable property held upon a bare trust*

7.19 As discussed above, one of the defects in the existing powers of insurance is that section 18 of the *Trustee Act 1893* appears to have no application where property is held on a bare trust.²² Although the rationale for the existing provision may be that the beneficiaries of such a trust might not want the property to be insured, the Commission is of the view that excluding bare trusts from the statutory power is an unnecessarily restrictive way of meeting that concern. The Commission is instead of the view that, as has been provided in section 19 of the English *Trustee Act 1925*, beneficiaries of bare trusts should be capable of directing trustees not to insure where they consider insurance to be unnecessary or undesirable or not to insure except in accordance with certain specified conditions.

7.20 Similarly, the Commission considers that beneficiaries who are all *sui juris* and together absolutely entitled to the trust property should have the same

²¹ *Ibid* at 9.21.

²² See paragraph 7.08 above.

power to direct the trustees in relation to insurance where they are unanimous in their wish.²³ This power should of course be limited to the insurance of the trust property and should not apply where there is another party with an interest in the property.

7.21 *The Commission recommends that where insurable property is held either upon a bare trust or for beneficiaries who are of full age and capacity and, taken together, absolutely entitled to the trust property, the beneficiaries should have the power to direct (a) that any property should not be insured, or (b) that certain property should only be insured according to certain conditions.*

(d) Payment of premiums

7.22 As discussed earlier, the present statutory power under section 18 of the *Trustee Act 1893* permits insurance premiums to be paid from trust income only.²⁴ This is not consistent with the common law power which entitles trustees to pay insurance premiums out of trust capital. The limitation also poses obvious difficulties for trustees who have no available trust income to fund insurance costs. The Commission therefore recommends that a new statutory power to insure should confer upon trustees a discretion to pay insurance from the “trust funds”, with trust funds defined as comprising either trust income or capital. The Commission also notes that section 18 of the 1893 Act already refers to payment out of “any other property subject to the same trusts.”

7.23 *The Commission recommends that a new statutory power to insure should confer upon trustees a discretion to pay insurance from the “trust funds”, with trust funds defined as comprising either trust income or capital.*

(e) Application of power to insure

7.24 Finally, the Commission considers that the proposed statutory power to insure should be applicable to all trusts unless the trust instrument provides otherwise. Thus, subject to settlors’ contrary intention, widened powers of insurance would be available “to all types of trust, whatever the nature of the property held, whether the trust is a private trust, a charitable trust or a pension trust, and whenever created.”²⁵

²³ This power would be strictly limited to situations where beneficiaries may already put an end to the trust under the rule in *Saunders v Vautier* (1841) Cr & Ph 240 and appoint new trustees who would accord with their wishes in relation to insurance. See paragraph 2.30 above.

²⁴ See above at paragraph 7.04.

²⁵ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No. 146 1997) at paragraph 9.27. It should be noted however that charitable trusts and pension trusts are not included within the scope of this Report.

7.25 *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 8 POWERS OF INVESTMENT

A Introduction

8.01 It is well established that trustees have duties in relation to investment. In line with the paramount duty of trustees “to exercise their powers in the best interests of the present and future beneficiaries of the trust”¹, a trustee’s principal duty in relation to investment will be to endeavour to procure a steady income for beneficiaries with a current interest under the trust while preserving the capital value of the trust fund for beneficiaries who may be entitled to the remainder interest.²

8.02 In this Chapter, the Commission examines both the powers conferred on trustees for the purpose of investment of trust funds and the duty of care to which trustees are subject in the exercise of these powers. Part B examines the existing powers and duties in relation to investment while Part C makes various recommendations for reform.

B Current position

(1) Powers of investment

8.03 In examining the powers of investment presently conferred on trustees, it is necessary to consider both the terms of the trust instrument and the statutory scheme of default powers.

(a) Trust instrument

8.04 The primary source of powers of investment will be the express terms of the trust instrument. An investment clause may confer a very wide discretion upon trustees, for example, by permitting them to invest as if they were absolute beneficial owners³, or may limit the trustees to choosing certain stipulated types

¹ *Cowan v Scargill* [1985] Ch 270, 286.

² See *Stacey v Branch* [1995] 2 ILRM 136, 142 *per* Murphy J.

³ This is the standard adopted by the English *Trustee Act 2000*. See the Consultation Paper at paragraphs 4.23 to 4.32. *Laffoy Irish Conveyancing Precedents* (Tottel 2008) provide the following investment clause as a precedent:

of investment. If an investment clause in the trust instrument delineates the scope of the trustees' powers of investment, the trustees will be in breach of trust if they fail to comply with these express stipulations.⁴

8.05 While the courts historically tended to construe investment clauses in a very narrow fashion, this approach no longer prevails.⁵ In discarding the narrow approach, it was recognised by the courts that "it is in the power of a testator or settlor to place in the hands of his trustee money to be invested in the fullest sense of the word."⁶

8.06 Conversely, there is authority for the proposition that the courts may make an order overriding an express direction in an investment clause where there is a conflict between the express direction and the predominating intentions of the settlor.⁷ It should be noted however that the general application of this authority would seem to be limited.⁸

(b) Statutory scheme of authorised investments

8.07 As mentioned above, the primary source of any powers of investment is the trust instrument and, as section 2(4) of the *Trustee (Authorised Investments) Act 1958* makes clear, nothing in the legislation "shall authorise a

"Any monies requiring investment may be invested in or upon any investments of whatever nature and wherever situate whether producing income or not (including the purchase of any immovable or movable property or any interest in such property) as the Trustees shall in their absolute discretion think fit so that the Trustees shall have the same full and unrestricted powers of making and changing investments of such monies as if they were absolutely and beneficially entitled to such monies and without prejudice to the generality of the above the Trustees shall not be under any obligation to diversify their investment of such monies."

⁴ See *Rochford v Seaton* [1896] 1 IR 18; *Re Webbers Settlement Trusts* [1922] 1 IR 49.

⁵ See *Re Harari's Settlement Trusts* [1949] 1 All ER 430 which may be contrasted with *Re Braithwaite* (1882) 21 Ch D 121.

⁶ *Re O'Connor* [1913] 1 IR 69, 76 per O'Connor MR.

⁷ *Re Lynch's Trusts* [1931] 1 IR 517.

⁸ See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007), at p.219, where Mee states that the case "should properly be viewed as a generous application (on hard facts) of the court's limited power to vary the terms of a trust to ensure the maintenance of minors."

trustee to do anything which he or she is expressly forbidden to do by the instrument creating the trust nor shall it prevent a trustee from doing anything which he or she is expressly permitted to do by the instrument creating the trust.” However, where the trust instrument does not include an investment clause, default powers of investment may be found in the statutory scheme of authorised investments contained in section 1 of the *Trustee Act 1893*, as amended by the 1958 Act and related legislation. Section 1 of the 1893 Act provides that a “trustee may, unless expressly forbidden by the instrument (if any) creating the trusts, invest any trust funds in his hands, whether at the time in a state of investment or not, in [the authorised investments listed] and may also from time to time vary any such investment.” Similarly, if an investment clause merely indicates potential investments without excluding other possibilities, trustees may also look to the statutory scheme for other possible investments.

8.08 Although the original list of authorised investments contained in section 1 of the *Trustee Act 1893* limited trustees to selecting from a very narrow class of investments, the *Trustee (Authorised Investments) Act 1958* revised the list and made provision for further variation by statutory instrument.⁹ Consequently, the scope of the statutory scheme of authorised investments has been extended on a number of occasions and the list was replaced in full by the *Trustee (Authorised Investments) Order 1998*¹⁰. The revised list is relatively broad and contains the following types of investments¹¹:

- (1) securities issued by the State;
- (2) securities guaranteed as to capital and interest by a Minister of the Government;
- (3) securities (other than shares) of certain State bodies¹²;
- (4) securities (other than shares) of authorised credit institutions;
- (5) securities of an issuer that have a specified rating from recognised credit-rating agencies;
- (6) an interest bearing deposit account with an authorised credit institution or the Central Bank;

⁹ See *Trustee (Authorised Investments) Act 1958*, sections 1 and 2.

¹⁰ *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998).

¹¹ The new list is set out in the First Schedule to the *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998).

¹² This class is subject to certain conditions; see the First Schedule to the *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998).

- (7) units or shares in a 'relevant collective investment scheme'¹³;
- (8) certain annuity contracts;
- (9) certain life assurance contracts;
- (10) certain life assurance contracts linked to investment funds;
- (11) the equity of companies listed on the Irish Stock Exchange whose market capitalisation was not less than €126,973,807 at the end of each of the three financial years immediately preceding the date of the investment;
- (12) the equity of companies listed on a recognised exchange, being companies whose market capitalisation was not less than €634,869,039 at the end of each of the three financial years immediately preceding the date of the investment.

8.09 Aside from the statutory list of authorised investments, there are a number of other legislative provisions governing trustee investments. First, the Second Schedule to the 1998 Order, as amended by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002*,¹⁴ contains restrictions on the proportion of trust funds that may be invested in foreign currencies or a single equity.¹⁵ Section 2 of the *Trustee Act 1893* provides for the purchase at a premium of redeemable stocks while section 4 of the *Trustee (Authorised Investments) Act 1958* provides for the effecting of redeemable bond insurance policies.

8.10 Section 5 of the *Trustee Act 1893* enlarges certain express powers of investment where the trustee has the power to invest in real securities and where enlargement is not expressly forbidden by the trust instrument.¹⁶ The

¹³ A 'relevant collective investment scheme' is defined to include, *inter alia*, unit trust schemes, designated investment companies and certain other collective investment schemes. See *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998), article 2(1).

¹⁴ *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI No.595 of 2002).

¹⁵ Article 3(2)(2) of the 2002 Order stipulates however that the restrictions on the proportion of trust funds that may be invested in a single equity shall not operate to prevent a trustee from taking up a bonus issue of shares, or a rights issue in shares, accruing to an investment of trust funds in the equity of a company.

¹⁶ Real securities are not included in the current list of authorised investments (as set out in the *Trustee (Authorised Investments) Order 1998*) but where an investment was made at a time when the investment was authorised, the funds may continue to be invested in that manner. See *Trustee (Authorised*

power to invest in real securities covers investment in mortgages of land¹⁷ but does not extend to the purchase of land¹⁸ and does not permit trustees to lend trust funds on the security of a judgment mortgage.¹⁹

8.11 Some protection is given to trustees who lend trust funds on the security of a mortgage by section 8 and section 9 of the *Trustee Act 1893*. Section 8 provides that a trustee will not be liable for 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 of the loan provided the trustee acted upon the report as to the value of the property by an independent person whom he reasonably believed to be an able practical surveyor or valuer and that the amount of the loan does not exceed two thirds of the value of the property as stated in the report. Section 9 of the 1893 Act provides that, where a trustee makes an improper investment of trustee money on a mortgage security that would have been proper had it been an investment of a smaller sum, security will be deemed authorised for the smaller sum and the trustee will be liable only for the excess with interest.

(c) Extension of investment powers by the court

8.12 The Commission in its *Report on the Variation of Trusts* noted that there is no legislative power to vary the terms of trust instruments in this jurisdiction.²⁰ Thus, even where it transpires that adequate investment powers have been omitted from the trust instrument and investment powers wider than those contained in the statutory scheme of authorised investments are necessary, the general rule that trustees must not deviate from the terms of the

Investments) Act 1958, section 5(1), as substituted by *Central Bank Act 1997*, section 80(b).

¹⁷ Historically where there was to be investment in mortgages of land, the mortgage was created by the trustees themselves and such private mortgages were a common investment. However, nowadays mortgages are a commercial business and the creation of private mortgages by trustees would be rare.

¹⁸ *Robinson v Robinson* (1877) IR 10 Eq 189.

¹⁹ *Johnston v Lloyd* (1844) 7 Ir Eq R 252. See however *Smithwick v Smithwick* (1861) 12 Ir Ch R 181 which suggested that there may be no objection to lending on a second mortgage if the trustees exercise greater caution than if there were no prior encumbrance.

²⁰ LRC 63-2000. At the time of writing (November 2008), the Commission understands that the Government proposes to bring forward amendments to the *Land and Conveyancing Law Reform Bill 2006* which will provide for a jurisdiction to allow for the variation of trusts in certain circumstances.

trust instrument precludes variation. As the Commission commented in its *Report on the Variation of Trusts*, “where exceptions to this general rule exist, they are few, narrowly drawn and, in all but a few cases, are of little use.”²¹

(2) Duties in relation to investment

(a) Common law duty of care

8.13 As noted in the Consultation Paper, trustees may not escape liability for a breach of trust simply because the investment was authorised by the trust instrument or statute.²² Thus, in exercising the power of investment, whether that power derives from the trust instrument or from statute, trustees must not only avoid unauthorised investments but must also employ the requisite degree of care in the selection of authorised investments. Furthermore, even where trustees are given an express absolute discretion in relation to investments, they will be subject to the common law duty of care.²³

8.14 The common law duty of care owed by trustees in relation to investment has been articulated by Murphy J in *Stacey v Branch*²⁴ as follows:

“What is the nature of the 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 taken in making an investment for the benefit of persons for whom he felt morally bound to provide. Businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character. But it is the duty of a trustee to confine himself not only to the class of investments which are

²¹ *Ibid* at paragraph 1.03.

²² See the Consultation Paper at paragraph 4.33.

²³ See *Re O'Connor* [1913] 1 IR 69 where O'Connor MR stated at 75 that “however unlimited the power of investment may be, the trustee remains subject to the jurisdiction of the court.”

²⁴ [1994] 2 ILRM 136, 142.

permitted by the settlement or by statute, but to avoid all such investments of that class as are attended with hazard.”

8.15 Thus the approach of Murphy J, which relied on the English decision of *Learoyd v Whitely*²⁵, holds cautionary advice for trustees considering speculative investment. However, as subsequent case law in England clarified, “that does not mean that the trustee is bound to avoid all risk and in effect act as an insurer of the trust fund ... [t]he distinction is between a prudent degree of risk on the one hand, and hazard on the other.”²⁶

8.16 As discussed earlier, it has been held that a higher duty of care may be expected of professional trustees as opposed to unpaid trustees.²⁷ Although the traditional formulation of the common law standard of care did not expressly distinguish between the two types of trustee²⁸, the courts have long held that it is appropriate to draw such a distinction.²⁹

8.17 However, the courts have at times displayed great leniency towards even professional trustees, particularly where loss is caused to the trust, not by the exercise of the powers of investment but by the failure to exercise such powers.³⁰

(b) Legislative duties

8.18 As well as being subject to the common law duty of care, trustees have recently become subject to a number of legislative duties. Paragraph 3(1) of the Second Schedule to the *Trustee (Authorised Investments) Order 1998*, as amended by the *Trustee (Authorised Investments) Order 1998 (Amendment)*

²⁵ (1887) 12 App Cas 727.

²⁶ *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, 531 *per* Brightman J.

²⁷ See paragraph 3.06 above.

²⁸ See for example *Speight v Gaunt* (1883) 9 App Cas 1.

²⁹ See *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 where Brightman J. relied on dicta of Harman J in *Re Waterman's Wills Trusts* [1952] 2 All ER 1054, 1055.

³⁰ See *Stacey v Branch* [1995] 2 ILRM 136, at 144, where, however, Murphy J doubted “that any competent valuer or other expert would have recommended the course adopted by the trustee”, the trustee escaped liability on the basis that he had been afforded an “absolute discretion” in relation to investment. See also *Nestle v National Westminster Bank* [1993] 1 WLR 1260 where a bank, described as a trustee that no testator would choose for the effective management of his investment, escaped liability on the basis that it could not be proved that its passive approach had resulted in loss.

Order 2002, created a number of duties of general application. Firstly, in making an investment of trusts funds, trustees are now obliged to take due account of three factors, the nature of the liabilities of the trust, an appropriate diversification of investment and risk and an appropriate liquidity of investments.³¹ The second duty created by the 1998 Order, as amended by the 2002 Order, is the duty “to review the investment of trust funds at intervals of not more than six months”.³²

8.19 It is arguable that, in light of the introduction of these legislative duties of general application, Irish courts may in future show a lesser degree of leniency in relation to trustees who have taken a passive approach towards their powers of investment. In any event, the Commission considers that these principles should be retained in any revised legislative code on the investment duties of trustees.

(3) Ethical investments

8.20 In the Consultation Paper the Commission considered the issue of ‘ethical investment’.³³ As noted in the Consultation Paper the question that arises is whether given the fundamental duty to provide the best financial return for the beneficiaries of the trust, trustees are permitted to take non-financial considerations into account when exercising their powers of investment.

8.21 The general position appears to be that, while settlors are free to draft trust instruments that include a policy of socially responsible or ethical investment, trustees without an express mandate are not permitted to allow their personal views dictate their approach to investment.³⁴ However, as noted

³¹ *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998), Schedule 2, paragraph 3(1), as substituted by *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI No.595 of 2002), article 3.

³² *Trustee (Authorised Investments) Order 1998* (SI 28 of 1998), Schedule 2, paragraph 3(2), as substituted by *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI 595 of 2002), article 3. See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007), at p 226, where Mee observes that “[i]t is unclear, however, whether [the duty to review the investment of trust funds] would apply... where the property has been left in its original form, rather than ‘invested’ by the trustee”.

³³ See the Consultation Paper at paragraphs 4.46 to 4.58. See also Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 438; Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 228; Hanbury & Martin *Modern Equity* (17th ed Sweet & Maxwell 2005) at 552 and Thornton “Ethical Investments; A Case of Disjointed Thinking” (2008) 67 CLJ 396.

³⁴ See *Cowan v Scargill* [1985] Ch 270.

in the Consultation Paper, it would seem that trustees may follow a ‘socially sensitive’ investment policy so long as the investments they select are equally sound in financial terms and do not prejudice the best interests of the beneficiaries.³⁵

C Discussion

(1) Powers of investment

(a) Settlor autonomy

8.22 In the context of considering possible reform of the powers and duties in relation to investment, the Commission believes it is important to acknowledge firstly a fundamental principle of trust law, the principle of settlor autonomy. In accordance with this principle, settlors are at all times free to provide trustees with very wide powers of investment and investment clauses will often go so far as to permit trustees to invest as if they were the sole beneficial owners of the trust fund in their absolute discretion.³⁶ The Commission recognises that it is customary that expansive investment clauses are included in well-drafted modern trust instruments.

(b) Statutory scheme of authorised investments

8.23 Following legislative intervention in England, in the form of the *Trustee Act 2000*, English trustees now have a default power of investment that permits them to invest as if they were the absolute owners of the trust assets.³⁷ In the Consultation Paper the Commission considered whether a similar statutory default power should be introduced in Ireland and concluded that such a measure “would be, on balance, inappropriate and inadvisable.”³⁸ The Commission provisionally recommended instead that the default powers of trustees in relation to investment should continue to be governed by the statutory scheme of authorised investments contained in section 1 of the *Trustee (Authorised Investment) Act 1958*, as amended.³⁹

8.24 This provisional recommendation was endorsed on consultation and the Commission remains of the view that it is appropriate to retain the statutory scheme of authorised investments for the following reasons.

³⁵ See the Consultation Paper at paragraphs 4.49 to 4.58. See also *Cowan v Scargill* [1985] Ch 270, 287.

³⁶ *In Re Harari's Settlement Trusts* [1949] 1 All ER 430.

³⁷ Section 3(1) of the English *Trustee Act 2000*.

³⁸ See the Consultation Paper at paragraph 4.24.

³⁹ *Ibid* at paragraph 4.43.

8.25 Firstly, as professional and experienced trustees generally operate with wide powers of investment provided by well-drafted trust instruments, it is arguable that resort to default powers of investment will be most likely in trusts with non-professional or inexperienced trustees. The Commission is of the view that a statutory scheme of authorised investments may provide invaluable guidance for trustees with limited experience of trust administration or financial investment and invaluable protection for beneficiaries. As noted in the Consultation Paper, this may be particularly pertinent in the context of default trusts.⁴⁰

8.26 Secondly, the Commission is of the view that the existing legislation, while stopping short of conferring trustees with the power to invest as if they were absolute owners, does provide trustees with relatively broad powers of investment. Mee considers that “given that the current regime does restrict trustees in their choice of investments, to the possible detriment of beneficiaries, a stronger argument would seem necessary if the current restrictions are to be justified.”⁴¹ However, the Commission takes the view that where there is a risk of possible detriment to the interests of beneficiaries, this may be countered through the invocation of a new legislative power to vary trusts and thus a stronger argument would seem necessary if the current guidance and protection provided to trustees and beneficiaries by the list of authorised investments is to be removed.⁴²

8.27 *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 investment, as contained in section 1 of the Trustee (Authorised Investments) Act 1958, as amended.*

⁴⁰ For example, trusts arising on an intestacy and which involve minors whose interests require protection.

⁴¹ Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 230.

⁴² At the time of writing (November 2008), the Commission understands that the Government proposes to bring forward amendments to the *Land and Conveyancing Law Reform Bill 2006* which will provide for a jurisdiction to allow for the variation of trusts in certain circumstances. This would implement the recommendations in the Commission’s *Report on Variation of Trusts* (LRC 63-2000).

(c) Improving the statutory scheme

8.28 In recommending the retention of the statutory scheme of authorised investments, the Commission does not mean to suggest the existing scheme cannot be improved.⁴³

8.29 The Commission's first criticism of the existing statutory scheme governing default powers of investment relates to the content of the present list of authorised investments. It was highlighted on consultation that the present list may contain investments that are unsuitable for inclusion. Firstly, although, as discussed earlier, trustees are bound to avoid hazardous or speculative investments,⁴⁴ the present list of authorised investment may include certain volatile stocks that would be classed as high-risk or speculative in nature. Secondly, although, as discussed earlier, trustees will be generally under a duty to procure a steady income for beneficiaries with a current interest under the trust while preserving the capital value of the trust fund for beneficiaries who may be entitled to the remainder interest, a number of stocks that currently qualify for inclusion in the present list of authorised investments do not pay a dividend. While it is acknowledged that the provision of income might not be important for every trust, the Commission considers that dividend income will be desirable in the majority of cases. The Commission is also of the view that it might be appropriate to review the existing market capitalisation threshold and that consideration should be given to indexation or incremental increases.

8.30 The Commission recommends the introduction of a revised list of authorised investments. Consideration should be given to determining suitable parameters for the selection process for authorised investments, for example, the provision of dividend income, bearing in mind the interests of both current and future beneficiaries. The Commission recommends that the existing market capitalisation threshold should be reviewed.

8.31 A second criticism of the present legislation governing default powers of investment is that the current list of authorised investments is written in overly technical inaccessible language. As the list will be most beneficial to non-professional or inexperienced trustees, it is desirable that it be presented in a more accessible fashion.

8.32 The Commission recommends that the revised list of authorised investments should be presented in a more accessible form.

⁴³ In identifying the following specific criticisms of the existing statutory scheme, the Commission draws on comments made in Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 230 to 231.

⁴⁴ See above at paragraphs 8.14 to 8.15.

8.33 A further criticism of the present legislation governing default powers of investment is that the rules relating to authorised investments are spread throughout multiple pieces of legislation.⁴⁵

8.34 *The Commission recommends that the rules relating to authorised investments be consolidated in the context of the legislation the Commission is proposing to modernise and update the law relating to the regulation of trusts and trustees.*

8.35 During the consultation phase a submission was made that any power in a trust instrument which restricts the trustees' right to invest in trustee securities should be void. Having given consideration to this submission, the Commission is of the view that it would not be appropriate to introduce such a provision as it would be contrary to the principle of settlor autonomy. In its 2000 *Report on Variation of Trusts*,⁴⁶ the Commission proposed legislative change to grant the court power to vary the terms of the trust instrument where such variation will be for the benefit of the beneficiary on whose behalf the court's consent is being sought. Where a power in a trust instrument restricts the right of trustees to invest in trust securities, rather than making such restriction automatically void, the Commission considers it appropriate that an application be made to court.

8.36 It was also submitted during the consultation phase that investment in land should be permitted as an authorised investment. The Commission does not see any reason for excluding land from the list of authorised investments and is therefore in agreement with this submission.⁴⁷

8.37 It should be noted that the English *Trustee Act 2000* limited this power to acquire land to land in the United Kingdom only. The Law Commission considered that it would not be appropriate to provide trustees with a default power to acquire land in other jurisdictions, primarily because, even in jurisdictions that recognise the concept of a trust, the law does not necessarily

⁴⁵ Namely the *Trustee Act 1893*, the *Trustee (Authorised Investments) Act 1958*, the *Central Bank Act 1989*, the *Central Bank Act 1997* together with the *Trustee (Authorised Investments) Order 1998* and the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002*.

⁴⁶ LRC 63-2000. At the time of writing (November 2008), the Commission understands that the Government proposes to bring forward amendments to the *Land and Conveyancing Law Reform Bill 2006* which will provide for a jurisdiction to allow for the variation of trusts in certain circumstances.

⁴⁷ See also section 20(2)(a) of the *Land and Conveyancing Law Reform Bill 2006* which provides that trustees of land will have the full power of an owner and this would include such a power.

give the same protection to the interests of beneficiaries against the claims of third parties that apply in England and Wales. The Commission has considered the appropriateness of such a restriction but does not feel that such a restriction is necessary. While the proper law of the jurisdiction in which the land is being purchased will apply, trustees will be subject to the duty of care in relation to the decision to purchase abroad and the Commission is of the view that this will act as an adequate safeguard for the interests of the beneficiaries.⁴⁸

8.38 *The Commission recommends that investment in land should be permitted as an authorised investment in a revised list of authorised investments.*

(2) Duties in relation to investment

(a) Duty of care

8.39 As discussed earlier, the standard currently required of trustees in exercising their existing powers of investment is the standard of the “prudent man of business.”⁴⁹ However, as a new statutory duty of care has been proposed which would be of general application, this would no longer be the standard required of trustees exercising their powers of investment.⁵⁰

8.40 *The Commission recommends that the proposed statutory duty of care shall apply to trustees’ powers of investment.*

(b) Legislative duties

8.41 As discussed earlier, trustees have recently become subject to a number of legislative duties which are set out in paragraph 3(1) of the Second Schedule to the *Trustee (Authorised Investments) Order 1998*, as amended by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002*. First, in making an investment of trusts funds, trustees are now obliged to take due account of three factors, the nature of the liabilities of the trust, an appropriate diversification of investment and risk and an appropriate liquidity of investments.⁵¹

8.42 During the consultation phase it was submitted that if land is to be permitted as an authorised investment, it may be necessary to amend the *Trustee (Authorised Investments) Act 1958* to accommodate the proposed

⁴⁸ See also section 20(2)(b) of the *Land and Conveyancing Law Reform Bill 2006*.

⁴⁹ *Stacey v Branch* [1995] 2 ILRM 136, 142.

⁵⁰ See above at paragraphs 3.11 to 3.28.

⁵¹ *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998), Schedule 2, paragraph 3(1), as substituted by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI No.595 of 2002), article 3.

statutory power to invest in land. The view that was expressed was that, as land might now represent the principal asset of the trust, this would be contrary to the diversification principle set out in the *Trustee (Authorised Investments) Order 1998*, as amended by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002*.⁵² The Commission has considered this submission but does not believe that such an amendment is necessary. The obligation imposed on trustees by the existing diversification principle is to “take account of an appropriate diversification of investments, including appropriate diversification of credit and counterparty risk” Consequently, the Commission is of the view that it will be a matter for the trustee to determine whether investing predominantly in land is “appropriate” and in the best interests of the beneficiaries and in making that decision he will be subject to the statutory duty of care.⁵³

8.43 The second duty created by the 1998 Order, as amended by the 2002 Order, is the duty “to review the investment of trust funds at intervals of not more than six months”.⁵⁴ The Commission is of the view that this latter duty is a disproportionately onerous obligation to be imposing on trustees and is of the view that a 12 month period should be substituted for the existing 6 month period. It has also been queried whether this duty to review applies only where an initial investment has been made by the trustees or whether trustees have an obligation to review the issue of investment even where the trust funds have been left in their original form.⁵⁵ Although the current wording in the 2002 Order imposes a duty to review ‘the investment of trust funds’ rather than the duty to review ‘investments’ as was previously imposed under the 1998 Order, the Commission is of the view that the statutory instruments should be amended to confirm that the duty to review is to apply even where trust funds remain in their original form. Thus, even where trustees decide not to make any investment of trust funds upon acquiring the assets of the trusts, they will be under an obligation to review that position within a 12 month period.

⁵² See *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998), Schedule 2, paragraph 3(1), as substituted by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI No.595 of 2002), article 3.

⁵³ See also section 20(2) of the *Land and Conveyancing Law Reform Bill 2006*.

⁵⁴ *Trustee (Authorised Investments) Order 1998* (SI No.28 of 1998), Schedule 2, paragraph 3(2), as substituted by *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI No.595 of 2002), article 3.

⁵⁵ See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007), at 226, where Mee observes that “[i]t is unclear, however, whether [the duty to review the investment of trust funds] would apply ... where the property has been left in its original form, rather than ‘invested’ by the trustee”.

8.44 It was submitted during the consultation phase that there should be a statutory power to retain investments, which could be particularly relevant in trusts where the assets are shares in private companies. However the Commission is of the view that implicit in the statutory power to invest is the power to retain investments. The *Trustee (Authorised Investments) Order 1998*, as amended by article 3 of the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002*, creates a duty to review the investment of trust funds rather than a duty to review and re-invest trust funds. Consequently, the Commission is of the view that so long as a trustee carries out periodic reviews in accordance with his or her legislative duty, he or she is free to retain the investments or vary the investments depending on which avenue is in the best interests of the trust.

8.45 *The Commission is of the view that the existing statutory duties set out in paragraph 3(1) of the Second Schedule to the Trustee (Authorised Investments) Order 1998, as amended by the Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002 should be reviewed.*⁵⁶

8.46 *The Commission recommends that the existing duty to review the investments of trust funds at intervals of not more than 6 months should be replaced with a duty to review investments at intervals of not more than 12 months. The Commission further recommends that it should be clarified that the duty to review applies also where the trusts funds have been left in their original form.*

(3) Ethical investments

8.47 In the Consultation Paper the Commission considered the issue of ethical investments and provisionally concluded that legislative intervention to allow trustees to follow an ethical investment policy is inappropriate.⁵⁷ The Commission's view, which has been supported on consultation, was that powers to follow an ethical investment policy, if any, should be dictated only by the terms of the trust instrument. It should be noted however, that in practice it may be difficult to object to the making of 'socially sensitive' investment decisions that are financially sound and non-prejudicial to the interests of the beneficiaries.

8.48 *The Commission recommends that legislative intervention to allow trustees to follow an ethical investment policy should not be made, and this should remain a matter for the terms of the trust instrument.*

⁵⁶ It might also be appropriate to provide for different levels of investment for trusts of different sizes, as the Commission understands is the position in the investment strategy of the Office of the Wards of Courts.

⁵⁷ See the Consultation Paper at paragraph 4.58.

CHAPTER 9 POWER CONCERNING DEBTS, SETTLING AND COMPOUNDING LIABILITIES

A Introduction

9.01 As noted in the Consultation Paper, “[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 trustee to protect.”¹ This Chapter examines the valuable power of trustees to settle claims that may be made by third parties against the trust estate or by the trust estate against third parties and makes various proposals for reform.

9.02 Part B looks at the statutory power to compound liabilities currently provided to trustees by the *Trustee Act 1893*. Part C discusses this statutory power and identifies a number of ways in which it might be improved.

B Current Position

9.03 The existing power to compromise and settle disputes is contained in section 21 of the *Trustee Act 1893*. Section 21 provides trustees with the statutory power to “accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed and [to] allow any time for payment for any debt” and to “compromise, compound, abandon, submit to arbitration, otherwise settle any debt, account, claim or thing whatever” relating to the trust. Section 21 further provides that trustees may enter into such agreements and execute such instruments as may be expedient for the exercise of their statutory power.

9.04 Trustees are therefore currently provided with a wide discretion in settling disputes with persons claiming to be beneficiaries² or disputes with beneficiaries on the question of whether certain property is subject to the trust

¹ See the Consultation Paper at paragraph 9.01 where the Commission noted the observations in Pettit *Equity and the Law of Trusts* (9th ed Butterworths 2001) at 462.

² See *Eaton v Buchanon* [1911] AC 253 and *Abdallah v Rickards* (1888) 4 TLR 622.

or not.³ As Martin notes, “[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.”⁴

9.05 Section 21 of the *Trustee Act 1893* also provides that the trustees will not be responsible for any loss that might result from their actions provided they were taken in good faith.

C Discussion

9.06 Whilst trustees are currently provided with a relatively wide and flexible discretion in relation to settling claims and disputes, the Commission considers that there is scope for improvement. The Commission is of the view that the current provision, section 21 of the *Trustee Act 1893*, should be both simplified and enlarged and that the statutory protection from liability currently afforded to trustees should be brought in line with the proposed hybrid objective and subjective test for determining the liability of trustees.

(1) *The powers concerning debts, settling and compounding liabilities*

9.07 As noted in the Consultation Paper, the wording of the current provision, section 21 of the *Trustee Act 1893*, is complex and should be simplified in the interests of accessibility and clarity.⁵ The Commission suggests that a useful model is provided by section 60(8) of the *Succession Act 1965*, which largely follows the format of section 15 of the English *Trustee Act 1925* and which confers similar powers on personal representatives.

9.08 Section 60(8) of the *Succession Act 1965* provides:

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;

³ See *Re Earl of Strafford* [1980] Ch 28.

⁴ Hanbury & Martin *Modern Equity* (17th ed Thomson Sweet & Maxwell 2005) at 581.

⁵ See the Consultation Paper at paragraph 9.11.

- (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,
- 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.”

(2) *The protection from liability*

9.09 As noted earlier, in exercising their discretion under section 21 of the *Trustee Act 1893*, trustees will not be liable for any loss as a result of their actions provided such actions were taken in good faith.

9.10 However, as a new statutory duty of care has been proposed which would be of general application, establishing a lack of “good faith” would no longer be the test for determining the liability of trustees. This may also deal with any inconsistency that may arise from the interpretation of the phrase “in good faith” in this context. As the Law Commission noted in relation to section 15 of the *Trustee Act 1925*, the section “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* exercise of the statutory power by him or her. In short, honest but perhaps foolish action would be excused but not negligent inaction.”⁶

9.11 However, were the envisaged statutory duty of care of general application introduced, trustees would be liable to beneficiaries in respect of any compromise where they have failed to discharge the statutory duty of care, whether through action or inaction.

9.12 Where trustees are in doubt with regard to the appropriate course of action, it may be prudent to seek the directions of the court before entering into any compromise. As Martin notes “[t]he court must consider what is the best

⁶ Law Commission *Consultation Paper on Trustees’ Powers and Duties* (No 146 1997) at paragraph 4.23. It should be noted that the Law Commission’s consideration took place prior to the introduction of the *Trustee Act 2000* which has removed the “in good faith” test and applied the statutory duty of care to the power to compound liabilities.

from the point of view of everybody concerned, paying especial attention to the interests of child beneficiaries.”⁷

D Recommendations

9.13 In light of the discussion in this Chapter, the Commission has concluded that section 21 of the Trustee Act 1893, which deals with debts, settling and compounding liabilities, is in need of reform.

9.14 The Commission therefore recommends that the existing power of trustees to deal with debts, to settle and to compound liabilities should be enlarged slightly by giving trustees the discretion to “accept any property before the time at which it is transferable or payable”⁸ and “to sever and apportion any blended trust funds or property”⁹ The Commission also recommends that the power to deal with debts, to settle and compound liabilities should be made subject to the proposed statutory duty of care. The general terms of the reform should be based on the elements in section 60(8) of the *Succession Act 1965*.

9.15 *The Commission recommends that the existing power of trustees to deal with debts, to settle and to compound liabilities should be enlarged by giving trustees the discretion to “accept any property before the time at which it is transferable or payable” and “to sever and apportion any blended trust funds or property.” The general terms of the reform should be based on the elements in section 60(8) of the Succession Act 1965. The Commission also recommends that the power to deal with debts, to settle and compound liabilities should be made subject to the proposed statutory duty of care.*

9.16 *The Commission recommends that the new powers concerning debts, settling and compounding liabilities should provide that trustees may:*

⁷ Hanbury & Martin *Modern Equity* (17th ed Thomson Sweet & Maxwell 2005) at 581 referring to *Re Ezekiel's S.T.* [1942] Ch 230 and *Re Earl of Strafford* [1980] Ch 28.

⁸ This power is afforded to personal representatives in Ireland under section 60(8) of the *Succession Act 1965*, and to trustees under section 15 of the English *Trustee Act 1925* (as amended by Schedule 2 of the *Trustee Act 2000*) and under section 15(1) of the *Trustee Act (Northern Ireland) 1958* (as amended by Schedule 2 of the *Trustee Act (Northern Ireland) 2001*).

⁹ This power is afforded to trustees under section 15 of the English *Trustee Act 1925* (as amended by Schedule 2 of the *Trustee Act 2000*) and under section 15(1) of the *Trustee Act (Northern Ireland) 1958* (as amended by Schedule 2 of the *Trustee Act (Northern Ireland) 2001*).

(a) accept any property before the time at which it is transferable or payable;

(b) sever and apportion any blended trust funds or property;

(c) pay or allow any debt or claim on any evidence they may reasonably deem sufficient;

(d) accept any composition or security for any debt or property claimed;

(e) allow time for payment of any debt;

(f) compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim or other matter relating to the trust;

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 if they have discharged the statutory duty of care.

CHAPTER 10 POWER OF MAINTENANCE AND ADVANCEMENT

A Introduction

10.01 In this Chapter, the Commission considers the powers of maintenance and advancement. The power of maintenance refers to the power in trustees to apply the income of trust property towards the maintenance of a beneficiary who is a minor or whose interest is still contingent. The power of advancement refers to the power in trustees to advance capital to a beneficiary before that beneficiary becomes entitled to an interest under the trust.

B Current Position

(1) *Maintenance*

10.02 Where a trust fund is held for a beneficiary with a contingent interest, it may be necessary to use the income of the trust for the beneficiary's benefit before the interest vests. The power to use income for this purpose will be most apposite where the beneficiary is a minor and the income is required for his maintenance, education or benefit. Where income is required in this way, trustees may be able to invoke either express or statutory powers of maintenance. Furthermore the court has both an inherent and a statutory jurisdiction to order provision to be made for an infant in appropriate cases.

(a) *Express powers*

10.03 Modern trust instruments usually give trustees an express power to apply the income of trust property for the benefit of beneficiary. Where the trust instrument contains such a power, the extent of the power is to be determined in accordance with the terms of the express provision.

(b) *Statutory powers*

10.04 Where the trust instrument is silent the trustees can rely on the statutory powers of maintenance unless they are expressly or impliedly excluded by other provisions of the deed.

10.05 Sections 42 and 43 of the *Conveyancing Act 1881* confer statutory powers of maintenance on trustees. Section 42 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 and benefit, or pay thereout any money to the infant’s parent or guardian to be applied for the same purposes.”

Therefore the power of maintenance contained in section 42 applies only to income from land in which a minor has an interest.

10.06 Section 43 of the 1881 Act deals with the application of income of property held in trust for an infant and provides that:

“[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 years¹, 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 towards the infant’s maintenance, 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.”

Therefore the power of maintenance contained in section 43 applies only in relation to a minor who is entitled for life or for any greater interest in property and whether absolutely or contingently on attaining 18 years² or on the occurrence of some event before attaining that age. It will not apply if the vesting of the beneficiary’s interest is contingent on the reaching of a greater age or on the occurrence of a future event after the attaining the age of 18 years.

¹ See the *Age of Majority Act 1985* which provides in section 2 that a person reaches the age of majority at 18 years, or upon marriage, and that references to the age of 21 years in any statutory provision passed before the commencement of the Act are to be construed as if they are references to the age of 18 years. Note however the provision in paragraph 3 of the Schedule to the 1985 Act which provides that the age of 21 years will remain the relevant age for the purposes of section 42 and 43 of the *Conveyancing Act 1881* in relation to trust instruments made before the commencement of the Act. Paragraph 3(2) of the Schedule to the 1985 Act further provides however that in such a situation the trustees have the power to pay the income directly to the beneficiary.

² Unless the trust instrument was executed prior to the commencement of the *Age of Majority Act 1985*, in which case the saver referred to in fn 1 will apply and the relevant age will remain 21 years.

10.07 It has also been held that the statutory power will not apply unless the beneficiary's interest in the property 'carries the intermediate income'.³ The 'intermediate income' is the income generated between the time the trust comes into effect and the time when the beneficiary's interest ultimately vests. A property will not carry the intermediate income where it is payable to some other person or where the settlor has expressly provided that it is to be accumulated on behalf of the infant.⁴

10.08 The general rule is that a future or contingent gift will not carry the intermediate income except where it is a gift of residual personalty as in such cases no one but the residual legatee could lay claim to it.⁵ The general rule is subject however to a number of exceptions:

- (a) where the donor stood in *loco parentis* to the infant and no other fund has been provided for the infant's maintenance
- (b) where the will or trust instrument shows an intention that the infant is to be maintained;
- (c) where the gift has been segregated from the rest of the estate.⁶

(c) Powers of the court

10.09 In addition to the statutory powers under section 42 and 43 of the *Conveyancing Act 1881*, a further statutory power permits the court to make orders in relation to the payment of income or capital. Section 11(1) of the *Guardianship of Infants Act 1964* provides that on the application of the guardian of an infant for directions on any question affecting the welfare of that infant, the court may make such order as it thinks proper. Therefore where the payment of income or capital is necessary for the maintenance, education or benefit of the infant, the court has the jurisdiction to make an order to this effect.⁷

10.10 Finally, the court has an inherent jurisdiction to authorise the use of capital for the payment of maintenance of an infant. In *Re O'Neill*⁸ Maguire P

³ *Re Dickson, Hill v Grant* (1885) 29 Ch D 331.

⁴ Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at 120.

⁵ See Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 463.

⁶ See Keogan, Mee and Wylie *The Law & Taxation of Trusts* (Tottel 2007) at 201.

⁷ *Re Meade* [1971] IR 327.

⁸ [1943] IR 562.

stressed that this jurisdiction should not be exercised lightly and that the court must be satisfied that the payment is necessary rather than simply to the infant's benefit.

(2) Advancement

10.11 As stated above, the power of advancement allows trustees to make payments out of trust capital to a beneficiary before the time that the beneficiary is entitled to demand his interest under the trust. As Viscount Radcliffe explained in *Pilkington v IRC*⁹:

“It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The two things have only a casual connection with each other. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation.”¹⁰

10.12 As a general statutory power of advancement has not been provided in this jurisdiction, trustees generally will not have the power to advance capital sums to a beneficiary except under the authority of an express provision in the trust instrument or under an order of the court.¹¹

(a) Express powers

10.13 A power to make advancements out of trust capital may be expressly conferred by the trust instrument and where such a power is conferred, its scope will depend upon the terms of the instrument. For example, the power may be limited to the “advancement” of a minor or contingent beneficiary or it may extend to the “advancement or benefit” of such a beneficiary. It has been said that “advancement” suggests the establishing of a beneficiary in life or the making of some permanent provision for a beneficiary¹² while “benefit” is a word of wider import.¹³ Therefore it would seem that a trust instrument that authorises the payment or application of capital “for the advancement or benefit”

⁹ [1964] AC 612.

¹⁰ *Ibid* at 625.

¹¹ Although section 58 of the *Succession Act 1965* does provide trustees with the power to apply capital for the benefit of an infant this statutory power only applies where the infant is absolutely entitled under a will.

¹² *Pilkington v IRC* [1964] AC 612 at 633.

¹³ McGhee *Snell's Equity* (30th ed Sweet & Maxwell 2000) at 310.

of a beneficiary authorises any use of the money which will improve the material situation of the beneficiary.¹⁴

10.14 It is important to note that the power of advancement is a fiduciary power and however wide the scope of the power the trustees must have a good reason for making payments out of the trust capital. Furthermore, prior to any such payment, “the trustees must weigh the benefit to the proposed advancee against the interests of those who are or might become interested under the settlement and whose interest would be adversely affected by the advance.”¹⁵

10.15 It would also seem that where trustees consider that it is appropriate to make a payment of capital to a beneficiary for a particular purpose, they are then under a duty to see that the money is applied for that purpose and should not leave the beneficiary free to deal with the money in whatever way he or she chooses.¹⁶

(b) Statutory powers

10.16 As noted above, general statutory powers of advancement have not been introduced in Ireland. A statutory power of advancement has been provided however to trustees who have been appointed under section 57 of the *Succession Act 1965*. Section 57 of the 1965 Act makes provision for the appointment of trustees by the personal representatives of a deceased person where an infant is entitled to a share in the deceased’s estate and there are no trustees able and willing to act. Section 58(5) of the 1965 Act then provides such trustees with the power to apply the capital of that share for the advancement or benefit of the infant in such manner as they may, in their absolute discretion, think fit.

(c) Powers of the court

10.17 As noted above, section 11(1) of the *Guardianship of Infants Act 1964* provides that on the application of the guardian of an infant for directions on any question affecting the welfare of that infant, the court may make such order as it thinks proper. Therefore, where the payment of capital is necessary for the maintenance, education or benefit of an infant, the court has the jurisdiction to make an order to this effect.¹⁷

¹⁴ *Pilkington v IRC* [1964] AC 612, 635.

¹⁵ Lloyd Gibson Finely & Wells *A Practitioner’s Guide to Powers and Duties of Trustees* (Tolley LexisNexis 2002) at 236.

¹⁶ *Re Pauling’s Settlement Trusts* [1964] Ch 303, 334.

¹⁷ *Re Meade* [1971] IR 327.

C Discussion

10.18 In the Consultation Paper, the Commission took the provisional view that statutory intervention with regards to the powers of maintenance and advancement was not necessary. However the Commission expressly welcomed submissions on this point and, in light of the response of consultees, the Commission has given this issue further consideration.

10.19 The Commission is of the view that it would be preferable to extend the existing statutory powers of maintenance and advancement rather than requiring court applications in cases where trustees are of the view that the maintenance or advancement is clearly appropriate.

(1) Maintenance

10.20 In relation to maintenance, the Commission is of the view that the existing statutory powers contained in section 42 and 43 of the *Conveyancing Act 1881* should be extended. As mentioned earlier, the power of maintenance contained in section 42 applies only to income from land in which a minor has an interest while the power of maintenance contained in section 43 applies only in relation to a minor who is entitled for life or for any greater interest in property and whether absolutely or contingently on attaining 18 years or on the occurrence of some event before attaining that age. Therefore where the vesting of the beneficiary's interest is contingent on the reaching of a greater age or on the occurrence of a future event after the attaining the age of 18 years, trustees will not be able to avail of the power under section 43.

10.21 The Commission can see no reason why the statutory power should be limited in a manner which imposes the necessity for court applications in cases where the beneficiary's interest is contingent on reaching a greater age than 18 years or on the occurrence of a future event after the attainment of 18 years.

10.22 Furthermore, where the beneficiary who requires maintenance is no longer a minor, the trustees cannot even rely on the court's jurisdiction under section 11 of the *Guardianship of Infants Act 1964*.

10.23 The Commission recommends that trustees should be provided with a general statutory power to apply income for the maintenance of beneficiaries in appropriate cases.

(2) Advancement

10.24 In relation to advancement, without a statutory power trustees currently may not advance capital sums to a beneficiary except under the authority of an express provision in the trust instrument or under an order of the court. To minimise the necessity for time-consuming and costly court applications, the Commission is of the view that it would be beneficial for

trustees to be provided with a statutory power to advance capital and considers the statutory power contained in section 32 of the English *Trustee Act 1925* to be a useful model in this regard.

10.25 Section 32(1) of the *Trustee Act 1925* provides as follows:

“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.”

10.26 The Commission is of the view that a statutory power along the lines of section 32 of the *English Trustee Act 1925* should be introduced. However, as this section has been judicially described as “by no means easy to follow”¹⁸, the Commission is of the view that the proposed statutory proper should be simplified and clarified as much as possible.

10.27 *The Commission recommends the introduction of a statutory power to advance capital.*

¹⁸ Per Evershed MR in *Re Vestey's Settlement* [1951] Ch 209.

10.28 The Commission has considered the provisions of section 32 of the English *Trustee Act 1925* and is also of the view that the statutory power to advance capital being proposed for this jurisdiction should be subject to similar conditions. Firstly, the Commission agrees that it is appropriate to stipulate a cap on the proportion of a beneficiary's share that may be advanced. As one half is the proportion that has been specified in the English legislation and has been suggested by consultees during the consultation phase, the Commission is of the view that the amount advanced should not exceed half of the presumptive or vested share of the beneficiary.

10.29 Therefore, where the trustees exercise the power to its full extent and advance half of a beneficiary's share, the power will be exhausted in relation to that particular beneficiary. The effect of this may be that, even where the value of the retained assets increases and the amount that has been advanced is less than one half of the new value, the trustees will be unable to carry out a further exercise of the statutory power. Where a settlor wishes to avoid this result, the trust instrument should specify that the power continues to be exercisable in respect of one half of any increase in value. Alternatively, where the settlor fails to so specify in the trust instrument, the trustees may avoid this result by making sure slightly less than the one half limit is originally advanced so that the statutory power is not exhausted.

10.30 *The Commission recommends that the amount advanced should not exceed half of the presumptive or vested share of the beneficiary.*

10.31 The second condition in section 32 of the English *Trustee Act 1925* is that if the beneficiary is or becomes absolutely and indefeasibly entitled to a share in the trust property the money shall be brought into account as part of such share. Again, in the interests of protecting the interests of all beneficiaries, the Commission is agreement with this condition.

10.32 *The Commission recommends that the statutory power should be subject to the further proviso that the money advanced is to be brought into account on the beneficiary becoming absolutely entitled.*

10.33 The final condition in section 32 of the English *Trustee Act 1925* is that an advancement cannot be made that would prejudice any person entitled to any prior or life interest in the money advanced unless such person is in existence and of full age and consents in writing to such advancement. Again, in the interests of protecting all beneficiaries, the Commission agrees that the consent of such a person should be obtained.

10.34 *The Commission recommends that, so as not to prejudice a person who is entitled to a prior life or other interest, it should be a necessary precondition that such person's consent in writing to the advancement is first obtained.*

10.35 *The Commission recommends that there should not be a statutory power to apply capital to a life tenant. The Commission recommends that this should come within the scope of the proposed variation of trusts regime so that an application to court would be made in an appropriate case.*¹⁹

(3) Duty of care

10.36 As discussed earlier, trustees must have a good reason for making payments out of the trust capital and must balance the needs and interests of the proposed advancee and the other beneficiaries.²⁰

10.37 As the new statutory duty care being recommended by the Commission is to be of general application, trustees exercising the proposed powers of maintenance and advancement will also be subject to the statutory duty of care.

10.38 *The Commission recommends that the powers of maintenance and advancement should be subject to the proposed statutory duty of care.*²¹

(4) Excluding the statutory power

10.39 Again, in accordance with the principle of settlor autonomy, the Commission recommends that it should be possible for the proposed statutory powers of maintenance and advancement to be excluded wholly or modified by express provision in the trust instrument.

10.40 *The Commission recommends that it should be possible for the proposed statutory powers of maintenance and advancement to be excluded wholly or modified by express provision in the trust instrument.*

¹⁹ At the time of writing (November 2008), the Commission understands that the Government proposes to bring forward amendments to the *Land and Conveyancing Law Reform Bill 2006* which will provide for a jurisdiction to allow for the variation of trusts in certain circumstances. This would implement the recommendations to that effect in the Commission's *Report on Variation of Trusts* (LRC 63-2000).

²⁰ See paragraph 10.14 above.

²¹ See Chapter 3 above.

CHAPTER 11 POWER OF SALE, OF PURCHASE AND TO ISSUE RECEIPTS

A Introduction

11.01 In this Chapter, the Commission considers the powers of trustees concerning sales, purchase and to issue receipts.

11.02 Part B Chapter refers to the trustees' power of purchase. As explained in paragraph 4 of the Introduction to this Report, the Commission will return to deal with a specific aspect of the power of purchase in the remaining project in the review of trust law, the effect on the relationship between trustees and beneficiaries of the repeal of the *Settled Land Acts* when the *Land Law and Conveyancing Law Reform Bill 2006* is enacted.¹

11.03 Part C of the Chapter deals with the power to borrow. Part D deals with the power of sale by setting out the current position under Irish law and discussing the introduction of a statutory power for trustees. Finally Part E deals with the power to issue receipts.

B Power of Purchase

11.04 The power of purchase is inextricably linked to the power of investment, which has already been covered in Chapter 8. In Chapter 8 the Commission recommended that the power of 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. The Commission made further recommendations with regard to improving the existing statutory scheme.

¹ Project 21 in the Commission's *Third Programme of Law Reform 2008-2014* (LRC 86--2007) (available at www.lawreform.ie) commits the Commission to consider the consequences of the repeal of the *Settled Land Acts* when the *Land Law and Conveyancing Law Reform Bill 2006* is enacted.

C Power to Borrow

(1) Current Position

11.05 At present there is no statutory power allowing trustees to borrow money.

11.06 Consequently, trustees at present will only be able to borrow where such a power is expressly or impliedly conferred by the trust instrument. The authorities suggest however that an implied power to borrow will not be inferred lightly. For example, it seems that the existence of a trust for sale will not alone be sufficient to imply a power to raise money by mortgage.² One example of where the courts may be prepared to concede the trustee an implied power to borrow is where there exists a power to carry on business.³

(2) Discussion

11.07 The Commission is of the view that it is desirable that trustees should have the power to borrow where it is in the best interests of the trust or the beneficiaries. At present trustees who wish to purchase property as a residence for a beneficiary may be unable to do so without selling other trust property and this may not be in the best interests of the other beneficiaries or the trust as a whole.

11.08 Although trustees of land are to be provided the power to purchase land with the aid of a mortgage, by virtue of being conferred with “the full power of an owner” by the *Land and Conveyancing Law Reform Bill 2006*, other trustees will not have an equivalent power without further statutory intervention. The Commission is of the view that such statutory intervention is appropriate and that such a power should be given to all trustees.

11.09 The Commission notes the view that the power to borrow should be limited to not more than two-thirds of the value of the house.⁴ However, the Commission agrees with the English Law Commission, which considered that such a restriction was unnecessary and that it was better to leave the matter to

² See Wylie, *Irish Land Law* (3rd ed Butterworths 1997) at 608, citing *Devaynes v Robinson* (1857) 24 Beav 89, 91 per Romilly MR.

³ See *Reilly v Reilly* (1975) ILTR 121, for example, where Kenny J held that a trust, under which the trustees were empowered to keep a farming business “as if they were beneficially entitled thereto”, included by implication, a power to mortgage the farm land to purchase farm equipment.

⁴ Law Reform Committee *The Powers and Duties of Trustees* (Cmnd 8733 1982) at paragraph 3.11.

be regulated by the trustees' common law obligations to act with reasonable prudence in the best interests of the trust.⁵

11.10 *The Commission recommends that, when exercising the proposed power to purchase land, trustees should have the power to do so with the aid of a mortgage, unless such a power is expressly excluded by the trust instrument.*

11.11 *The Commission recommends that there should be a general power to borrow and that this power should be subject to the proposed statutory duty of care.*

D Power of Sale

(1) Current Position

11.12 Currently a trustee has no automatic power of sale and trust property may only be sold where an express power of sale is conferred by the trust instrument, where there is an implied power of sale⁶ or where a power of sale arises by virtue of statute⁷ or by virtue of a court order.

11.13 Where the trust instrument does contain an express power of sale, the conduct of any sale is currently governed by sections 13 to 15 of the *Trustee Act 1893*. Section 13 gives wide powers in relation to the conduct of the sale by providing that, subject to any contrary intention being expressed in the trust instrument, a trustee may sell all or any part of the property, by public auction or private contract and may impose any conditions he or she thinks fit.

11.14 It was established in *Buttle v Saunders*⁸ that trustees are under a duty to sell at the best price reasonably obtainable and that this duty must

⁵ Law Commission for England and Wales *Report on Trustees' Powers and Duties* (No 260 1999) at paragraph 8.12.

⁶ For example, where the rule in *Howe v Earl of Dartmouth* (1802) 7 Ves 137 applies. This rule provides that "where residuary personalty is settled by will in favour of persons who are to enjoy it in succession, subject to a contrary provision 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 character." See Delany *Equity and the Law of Trusts in Ireland* (4th ed Thomson Round Hall 2007) at 462.

⁷ For example, section 34 of the *Charities Act 1961*, as substituted by section 11 of the *Charities Act 1973*, enables the Commissioners of Charitable Donations and Bequests to authorise the disposition of land held on a charitable trust.

⁸ [1950] 2 All ER 193.

override commercial morality.⁹ However, section 14 of the *Trustee Act 1893* provides that no sale made by a trustee may be impeached by any beneficiary on the ground that any of the conditions of sale were unnecessarily depreciatory unless it appears that the consideration for the sale was thereby rendered inadequate. Section 14 also protects purchasers in such cases by providing that no sale made by a trustee can, after the execution of the conveyance, be impeached as against the purchaser on the ground that any of the conditions of sale were unnecessarily depreciatory unless it appears that the purchasers was acting in collusion with the trustee at the time when the contract for sale was made.

11.15 Finally, under section 15 of the *Trustee Act 1893* a trustee who is either a vendor or a purchaser may sell or buy property without excluding the application of section 2 of the *Vendor and Purchaser Act 1874*.¹⁰

(2) Discussion

(a) Statutory Power of Sale

11.16 As noted in the Consultation Paper, the issue of trustees' powers of sale under Irish law is currently unsatisfactory. As the existing legislation does not provide trustees with a statutory power of sale, trustees wishing to dispose of trust assets are reliant on the presence of an express power in the trust instrument. In the absence of such an express power, the trustees will be unable to deal with the assets by way of sale without making an application for court sanction. This is clearly unsatisfactory.

11.17 The absence of a statutory power of sale may also create a somewhat anomalous situation for trustees who have acted previously in the capacity of executor under the will creating the trust. Section 50 of the *Succession Act 1965* provides personal representatives with a statutory power to sell the whole or any part of the estate of the deceased person for the purpose of paying debts or of distributing the estate among the persons entitled. Although it is common for the executors appointed under a will to be also appointed as trustees of trusts created under the will, trustees do not have a statutory power of sale similar to that provided to personal representatives under the 1965 Act. Consequently, where no power of sale has been granted under the will, the persons acting as executors can avail of a statutory power of sale if a sale is to occur in the course of the administration of the estate.

⁹ See also *Boyle v Lee* [1992] 1 IR 555, 585.

¹⁰ 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. Note that the *Land Law and Conveyancing Law Reform Bill 2006* proposes to repeal the 1874 Act so far as it is unrepealed.

However, notwithstanding that the same persons may subsequently act as trustees, when the administration of the estate has been completed and a trusteeship has commenced, the trustees will have no statutory power to sell the assets of the trust.

11.18 The Commission recommends that trustees should be provided with a statutory power of sale.

11.19 In the Consultation Paper, the Commission observed 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. The Commission stated that, in order to deal with such money laundering concerns, issues such as disclosure of beneficial ownership and the ability to trace such ownership, would have to be considered in the context of any reform of the power of sale of trust assets. Since the publication of the Consultation Paper, the Third Money Laundering Directive¹¹ has been adopted by the European Union which, when transposed into Irish legislation¹², will deal with the concerns raised by the Commission by imposing requirements for customer due diligence and the taking of measures to identify the beneficial ownership of trust assets.

(b) Restrictions on the Statutory Power

(i) Duties of the trustee

11.20 The Commission is of the view that any statutory power of sale in relation to trust assets must be subject to the duties of trustees, which, under the general law of trusts, are aimed at ensuring that the trustees always act in the interests of the beneficiaries.

11.21 The Commission recommends that the proposed statutory power of sale should be subject to the duties of trustees under the general law of trusts.

(ii) Settlor autonomy

11.22 In the context of considering a statutory power of sale, the Commission believes it is important to again acknowledge a fundamental

¹¹ See the Third Money Laundering Directive 2005/60/EC. At present the main provisions in Irish law relating to money laundering are set out in section 31 of the *Criminal Justice Act 1994*, (as amended by section 21 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*), sections 32 and 57 of the *Criminal Justice Act 1994*, and section 23 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

¹² In February 2008 the Government published the General Scheme of the *Criminal Justice (Money Laundering) Bill 2008*, which would consolidate the existing law on money laundering and enact new provisions to give effect to the Third EU Money Laundering Directive (2005/60/EC).

principle of trust law, the principle of settlor autonomy, which states that settlors should enjoy freedom to dictate the terms of the trust. In accordance with this principle, the Commission is of the view that settlors should remain free to impose restrictions on trustees' powers, including the power of sale.

11.23 Consequently, the Commission is proposing to reverse the current position regarding trustees' power of sale. Currently, trustees will not have a power of sale unless the settlor has expressly included one in the trust instrument. The Commission is proposing to reverse this by providing trustees' with a default statutory power unless it has been expressly excluded or restricted by the settlor. This is consistent with the approach in section 20 of the *Land and Conveyancing Law Reform Bill 2006*, which follows the recommendations in the Commission's 2005 *Report on the Reform and Modernisation of Land Law and Conveyancing Law*.¹³ Thus, the trustees would have the full power of sale of an owner unless the trust instrument, if any, provides otherwise.

11.24 *The Commission recommends that trustees should be provided with a statutory power of sale subject to any restriction imposed by the settlor in the trust instrument.*

(iii) Other restrictions

11.25 The Commission is of the view that any statutory power of sale should also be subject to any restriction imposed by statute law or the general law of trusts or any court order relating to the trust assets.

11.26 *The Commission recommends that the proposed statutory power of sale should be subject to any restriction imposed by statute law or the general law of trusts or any court order relating to the trust assets.*

E Power to Issue Receipts

(1) Current position

11.27 A statutory power is presently 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.”

¹³ LRC 74-2005.

11.28 Although section 20(1) does not state so expressly, Wylie has suggested that a person who had prior knowledge of an intended breach of trust by the trustee, will not be exonerated.¹⁴

11.29 As a general rule, all the trustees must join in the giving of the receipt.¹⁵ However, where there is a stipulation to the contrary in the trust instrument, the terms of the trust instrument will dictate the number that is necessary and where the trust is a charitable trust, a majority of two-thirds of the trustees will be sufficient.¹⁶

(2) Discussion

11.30 The Commission is of the view that the statutory power to give receipts should be retained. In circumstances where trustees are being provided with a new statutory power of sale, it is particularly appropriate that they should also have a statutory power to give receipts. However, the Commission is of the view that the statutory power should make expressly clear that a person with prior knowledge of an intended breach of trust by a trustee will not be exonerated.

11.31 *The Commission recommends that the statutory power conferred on trustees to give receipts should be retained. The Commission also recommends that the statutory power provide that a person with prior knowledge of an intended breach of trust by a trustee will not be exonerated.*

¹⁴ Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 606, citing *Fernie v Maguire* (1844) 6 Ir Eq R 137.

¹⁵ *Lee v Sankey* (1873) LR 15 Eq 204.

¹⁶ See section 55 of the *Charities Act 1961*.

CHAPTER 12 SUMMARY OF RECOMMENDATIONS

The recommendations made in this Report may be summarised as follows:

12.01 The Commission recommends that the legislation setting out the powers and duties of trustees should include an express statement that a trustee, as a fiduciary, must perform the trust honestly and in good faith for the benefit of the beneficiaries. [Paragraph 1.32]

12.02 The Commission recommends that a minor (within the meaning of the *Age of Majority Act 1985*) 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. The Commission recommends however that where a minor is named in the original trust instrument and appointed in writing, he or she should be permitted to act as an additional trustee when they reach the age of majority at 18 years of age (or by marriage). [Paragraph 2.12]

12.03 The Commission recommends that qualifying criteria in relation to mental capacity for trustees should not be introduced. The Commission recommends that the general functional approach recommended in its *2006 Report on Vulnerable Adults and the Law* in relation to legal capacity should instead apply. [Paragraph 2.14]

12.04 The Commission recommends that, in the case of non-charitable trusts, two trustees or a corporate trustee should be required. [Paragraph 2.22]

12.05 The Commission recommends that no restriction on the number of trustees should be imposed. [Paragraph 2.25]

12.06 The Commission recommends where (a) there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, and (b) the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust, they should be entitled to direct the appointment of a new trustee or trustees. [Paragraph 2.38]

12.07 The Commission recommends that the statutory powers of appointment of trustees should remain subject to any contrary intention that is expressed in the trust instrument. [Paragraph 2.46]

12.08 The Commission recommends that a statutory power to appoint additional trustees without recourse to the courts be introduced. As the Commission has already recommended that there be no limit on the maximum number of trustees, the Commission recommends that it should not be provided that the number of trustees may not be increased beyond four by virtue of an appointment under the statutory power. [Paragraph 2.49]

12.09 The Commission recommends that the statutory provision regarding the removal of a trustee on the ground of absence from the jurisdiction for 12 months or more should be deleted. [Paragraph 2.54]

12.10 The Commission recommends that the statutory power of appointment should not apply to situations where trustees refuse to act subsequent to accepting trusteeship. [Paragraph 2.58]

12.11 The Commission recommends that the statutory provision regarding the removal of a trustee on the ground that he or she is “unfit” to act or “incapable” of acting should be deleted and replaced with a number of additional clear and objectively definable grounds. [Paragraph 2.60]

12.12 The Commission recommends that the non-judicial power of appointment should be exercisable where a replacement trustee is required because a minor has been invalidly appointed. [Paragraph 2.63]

12.13 The Commission recommends that instances where a trustee is made a ward of court or an enduring power of attorney comes into effect should be specifically included as grounds for the exercise of the non-judicial power of appointment. [Paragraph 2.65]

12.14 The Commission recommends that the non-judicial power of appointment should not be exercisable in circumstances where one of the trustees has been declared bankrupt. [Paragraph 2.68]

12.15 The Commission recommends that where a corporate trustee is in liquidation or has been wound-up, an application to court should not be necessary. The Commission recommends that instances where a corporate trustee is in liquidation or has been wound up should be specifically included as grounds for the exercise of the non-judicial power of appointment. [Paragraph 2.70]

12.16 The Commission recommends 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 2.73]

12.17 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 2.78]

12.18 The Commission recommends that where the trust instrument makes no express nomination or where the person nominated is not able or willing to act, the continuing trustees should be maintained as the next category of persons with the capacity to exercise the non-judicial power of appointment. The Commission recommends that continuing trustees should continue to include refusing or retiring trustees. [Paragraph 2.81]

12.19 The Commission recommends that a trustee who is being compulsorily removed should not be permitted to exercise the non-judicial power of appointment. [Paragraph 2.83]

12.20 The Commission recommends that any new legislative provision governing the appointment of trustees should make clear that a person who has disclaimed the position of trustee is excluded from exercising the power to appoint new trustees. [Paragraph 2.85]

12.21 The Commission recommends that the power of appointment given to the personal representative or personal representatives of a surviving or continuing trustee shall be deemed to be exercisable by the executor or executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by the administrator or administrators for the time being of such trustee, without the concurrence of any executor or executors who has renounced or has not proved. [Paragraph 2.88]

12.22 The Commission recommends that, where a corporate trustee is in liquidation or has been wound-up, the liquidator should be allowed to join in the exercise of a power of appointment if there is no person nominated for that purpose in the trust instrument. [Paragraph 2.94]

12.23 The Commission recommends that the categories of persons who may exercise the non-judicial power of appointment under statutory authority should be:

- the persons nominated in the trust instrument;
- the surviving or continuing trustees or trustee for the time being;
- the personal representative or personal representatives of the last surviving or continuing trustee;
- the liquidator of a corporate trustee which is in liquidation or wound-up; and
- the beneficiaries, where *sui juris* and together absolutely entitled to the entire beneficial interest in the trust. [Paragraph 2.98]

12.24 The Commission recommends that the provisions in the *Land and Conveyancing Law Reform Bill 2006* in relation to the formalities required for deeds should apply similarly to any formal documents required in relation to the appointment and retirement of trustees. [Paragraph 2.103]

12.25 The Commission 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 be included as possible grounds for the removal of a trustee and the appointment of a replacement by the court. [Paragraph 2.108]

12.26 The Commission recommends that section 36(1) of the *Trustee Act 1893* should be expanded to allow for applications to court for the appointment of a new trustee by any person with an interest in the trust. [Paragraph 2.111]

12.27 The Commission recommends that a person who is appointed an executor of a will and nominated as a trustee and who proves the will shall be presumed to have accepted the office of trustee, but that person may be discharged of his or her duties. The Commission also recommends that a person who is appointed an executor of a will and nominated as a trustee but who does not prove the will shall be presumed not to have accepted the office of trustee, and shall be deemed to have disclaimed the office of trustee, unless there is evidence to the contrary. The Commission also recommends that sections 50 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 2.122]

12.28 The Commission recommends that nothing in the trust instrument should be capable of restricting the right of a trustee to retire. [Paragraph 2.133]

12.29 The Commission recommends that the requirement for the consent of the co-trustees and any person empowered by the trust instrument to appoint trustees should be retained. If such consent is not obtained, a court application will be necessary. [Paragraph 2.135]

12.30 The Commission recommends that beneficiaries who are *sui juris* and collectively entitled to the whole beneficial interest under the trust should have a statutory power to direct an existing trustee to retire. [Paragraph 2.137]

12.31 The Commission recommends that the retirement provisions should make it clear that a trustee may 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 2.139]

12.32 In keeping with the Commission's earlier recommendation that, in the case of non-charitable trusts, two trustees or a corporate trustee should be required, the Commission recommends that a trustee should not be permitted to retire unless at least two trustees or a corporate trustee remains. [Paragraph 2.141]

12.33 The Commission recommends that beneficiaries who are *sui juris* and collectively entitled to the whole beneficial interest under the trust should have a statutory power to remove an existing trustee. [Paragraph 2.151]

12.34 The Commission recommends that removal without replacement should not be permitted by statute unless at least two trustees or a corporate trustee remains. [Paragraph 2.153]

12.35 The Commission 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. [Paragraph 2.156]

12.36 The Commission makes no recommendations in relation to the disqualification of trustees of non-charitable trusts. [Paragraph 2.160]

12.37 The Commission makes no recommendations in relation to the suspension of trustees of non-charitable trusts. [Paragraph 2.163]

12.38 The Commission recommends that a statutory default provision in relation to trustee remuneration should not be introduced. [Paragraph 2.184]

12.39 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 recommends that trustees should have to exercise such care and skill as is reasonable in the circumstances, having regard in particular-

- (a) to any special knowledge or experience that they have or hold themselves out as having, and
- (b) if they act 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. [Paragraph 3.15]

12.40 The Commission recommends that the statutory duty of care should allow for a distinction to be drawn between professional and non-professional trustees by demanding a higher standard of care from trustees who are qualified professionals. [Paragraph 3.23]

12.41 The Commission recommends that the statutory duty of care should be of general application. [Paragraph 3.26]

12.42 The Commission recommends that the statutory duty of care should replace the common law duty of care. [Paragraph 3.29]

12.43 The Commission recommends that a legislative statement concerning the status and enforceability of trustee exemption clauses should be made. [Paragraph 4.22]

12.44 The Commission recommends regulation of trustee exemption clauses, such that liability for breach of the irreducible core obligations of trustee may not be excluded. [Paragraph 4.26]

12.45 The Commission recommends that it should not be possible to absolve a trustee from the duty to perform the trusts honestly and in good faith. [Paragraph 4.29]

12.46 The Commission recommends that it should not be possible to absolve a trustee from the duty to account to the beneficiaries of the trust. [Paragraph 4.32]

12.47 The Commission recommends that trustee exemption clauses should be worded in clear, unequivocal and unambiguous terms. [Paragraph 4.36]

12.48 The Commission recommends that the existence and effect of trustee exemption clauses should be made clear to the settlor prior to the execution of the trust. [Paragraph 4.42]

12.49 The Commission recommends the introduction of a provision which would confer upon the courts a discretion to relieve trustees from liability for breach of trust in circumstances where they have acted honestly and reasonably and ought fairly to be excused for the breach of trust. [Paragraph 4.45]

12.50 The Commission recommends that the proposed statutory provision providing for the relieving of liability for breach of trust should not distinguish between professional and lay trustees. [Paragraph 4.47]

12.51 The Commission recommends that further provisions dealing with the relocation of trusts outside the jurisdiction should not be introduced on the basis that they are unnecessary. [Paragraph 4.51]

12.52 The Commission recommends that the proposed legislative regulation of trustee exemption clauses should be prospective in approach, applying to breaches of trust which occur after the date of any legislation coming into force. [Paragraph 4.55]

12.53 The Commission recommends that the proposed legislative regulation of trustee exemption clauses should apply to all trust instruments, whenever executed and should operate from the date of commencement. [Paragraph 4.56]

12.54 The Commission recommends that beneficiaries should be provided with a statutory right to be provided with the deed of settlement, which should be defined to include any will as proved. The Commission recommends that disclosure of documents other than the deed of settlement should be a matter for the discretion of the trustees and/or the courts. [Paragraph 5.60]

12.55 The Commission recommends the introduction of legislation, which provides that trustees may delegate their delegable functions to an authorised agent. The Commission recommends that the following functions should be non-delegable:

- (a) any function relating to whether or in what way the assets of the trust should be distributed or otherwise dealt with during the period of the trust.
- (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 6.20]

12.56 The Commission recommends the class of permissible agents should include trustees themselves but should exclude beneficiaries. [Paragraph 6.22]

12.57 The Commission recommends that where trustees appoint two or more persons to exercise the same function, such persons must exercise the function jointly. [Paragraph 6.23]

12.58 The Commission recommends that the proposed statutory duty of care shall apply to trustees' power of delegation. [Paragraph 6.25]

12.59 The Commission recommends that, where it is reasonably necessary, trustees should have the power:

- (a) to permit an agent to appoint a substitute;
- (b) to restrict the liability of an agent or his substitute to the trustees or the beneficiaries;
- (c) to permit an agent to act in circumstances capable of giving rise to a conflict of interest. [Paragraph 6.30]

12.60 The Commission recommends that trustees should be conferred with the power to pay agents but this power should be restricted by providing that trustees are only authorised to pay the fees of their agents that are objectively reasonable and reimburse expenses that are properly incurred. [Paragraph 6.33]

12.61 The Commission recommends the introduction of a new statutory provision which would oblige trustees to review the arrangements under which an agent acts and exercise any power of intervention if they consider it necessary. [Paragraph 6.35]

12.62 The Commission recommends that trustees should be provided with statutory powers to appoint nominees and custodians where it is reasonably necessary to do so. [Paragraph 6.40]

12.63 The Commission recommends that a person may not be appointed as a nominee or a custodian unless the person carries on a business which consists of or includes acting as a nominee or custodian or the person is a body corporate controlled by the trustees. [Paragraph 6.44]

12.64 The Commission recommends that the proposed statutory duty of care shall apply to trustees' power to appoint nominees and custodians. [Paragraph 6.46]

12.65 The Commission recommends that, where it is reasonably necessary, trustees should have the power:

- (a) to permit a nominee or custodian to appoint a substitute;
- (b) to restrict the liability of a nominee or custodian or his substitute to the trustees or the beneficiaries;
- (c) to permit a nominee or custodian to act in circumstances capable of giving rise to a conflict of interest. [Paragraph 6.48]

12.66 The Commission recommends that trustees should be conferred with the power to pay nominees and custodians but this power should be restricted by providing that trustees are only authorised to pay fees that are objectively reasonable and reimburse expenses that are properly incurred. [Paragraph 6.50]

12.67 The Commission recommends the introduction of a new statutory provision which would oblige trustees to review the arrangements under which a nominee or custodian acts and exercise any power of intervention if they consider it necessary. The Commission also recommends that this should be complemented by specific provisions setting out the extent, and limits, of the liability of trustees for the acts of agents, nominees and custodians. [Paragraph 6.52]

12.68 The Commission recommends that a new statutory provision be introduced, extending the trustees' existing powers of insurance beyond the current limit of "loss or damage caused by fire". The Commission also recommends that trustees be empowered to insure trust property up to the replacement value. [Paragraph 7.12]

12.69 The Commission recommends that the exercise of the statutory power to insure should be subject to the general statutory duty of care. [Paragraph 7.14]

12.70 The Commission recommends that any new legislation should not impose upon trustees a duty to insure. [Paragraph 7.18]

12.71 The Commission recommends that where insurable property is held either upon a bare trust or for beneficiaries who are of full age and capacity and, taken together, absolutely entitled to the trust property, the beneficiaries should have the power to direct (a) that any property should not be insured, or (b) that certain property should only be insured according to certain conditions. [Paragraph 7.21]

12.72 The Commission recommends that a new statutory power to insure should confer upon trustees a discretion to pay insurance from the “trust funds”, with trust funds defined as comprising either trust income or capital. [Paragraph 7.23]

12.73 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 7.25]

12.74 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 investment, as contained in section 1 of the *Trustee (Authorised Investments) Act 1958*, as amended. [Paragraph 8.27]

12.75 The Commission recommends the introduction of a revised list of authorised investments. Consideration should be given to determining suitable parameters for the selection process for authorised investments, for example, the provision of dividend income, bearing in mind the interests of both current and future beneficiaries. The Commission recommends that the existing market capitalisation threshold should be reviewed. [Paragraph 8.30]

12.76 The Commission recommends that the revised list of authorised investments should be presented in a more accessible form. [Paragraph 8.32]

12.77 The Commission recommends that the rules relating to authorised investments be consolidated in the context of the legislation the Commission is proposing to modernise and update the law relating to the regulation of trusts and trustees. [Paragraph 8.34]

12.78 The Commission recommends that investment in land should be permitted as an authorised investment in a revised list of authorised investments. [Paragraph 8.38]

12.79 The Commission recommends that the proposed statutory duty of care shall apply to trustees’ powers of investment. [Paragraph 8.40]

12.80 The Commission is of the view that the existing statutory duties set out in paragraph 3(1) of the Second Schedule to the *Trustee (Authorised*

Investments) Order 1998, as amended by the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* should be reviewed. [Paragraph 8.45]

12.81 The Commission recommends that the existing duty to review the investments of trust funds at intervals of not more than 6 months should be replaced with a duty to review investments at intervals of not more than 12 months. The Commission further recommends that it should be clarified that the duty to review applies also where the trusts funds have been left in their original form. [Paragraph 8.46]

12.82 The Commission recommends that legislative intervention to allow trustees to follow an ethical investment policy should not be made, and this should remain a matter for the terms of the trust instrument. [Paragraph 8.48]

12.83 The Commission recommends that the existing power of trustees to deal with debts, to settle and to compound liabilities should be enlarged by giving trustees the discretion to “accept any property before the time at which it is transferable or payable” and “to sever and apportion any blended trust funds or property.” The general terms of the reform should be based on the elements in section 60(8) of the *Succession Act 1965*. The Commission also recommends that the power to deal with debts, to settle and compound liabilities should be made subject to the proposed statutory duty of care. [Paragraph 9.15]

12.84 The Commission recommends that the new powers concerning debts, settling and compounding liabilities should provide that trustees may:

- (a) accept any property before the time at which it is transferable or payable;
- (b) sever and apportion any blended trust funds or property;
- (c) pay or allow any debt or claim on any evidence they may reasonably deem sufficient;
- (d) accept any composition or security for any debt or property claimed;
- (e) allow time for payment of any debt;
- (f) compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim or other matter relating to the trust;

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 if they have discharged the statutory duty of care. [Paragraph 9.16]

- 12.85 The Commission recommends that trustees should be provided with a general statutory power to apply income for the maintenance of beneficiaries in appropriate cases. [Paragraph 10.23]
- 12.86 The Commission recommends the introduction of a statutory power to advance capital. [Paragraph 10.27]
- 12.87 The Commission recommends that the amount advanced should not exceed half of the presumptive or vested share of the beneficiary. [Paragraph 10.30]
- 12.88 The Commission recommends that the statutory power should be subject to the further proviso that the money advanced is to be brought into account on the beneficiary becoming absolutely entitled. [Paragraph 10.32]
- 12.89 The Commission recommends that, so as not to prejudice a person who is entitled to a prior life or other interest, it should be a necessary precondition that such person's consent in writing to the advancement is first obtained. [Paragraph 10.34]
- 12.90 The Commission recommends that there should not be a statutory power to apply capital to a life tenant. The Commission recommends that this should come within the scope of the proposed variation of trusts regime so that an application to court would be made in an appropriate case. [Paragraph 10.35]
- 12.91 The Commission recommends that the powers of maintenance and advancement should be subject to the proposed statutory duty of care. [Paragraph 10.38]
- 12.92 The Commission recommends that it should be possible for the proposed statutory powers of maintenance and advancement to be excluded wholly or modified by express provision in the trust instrument. [Paragraph 10.40]
- 12.93 The Commission recommends that, when exercising the proposed power to purchase land, trustees should have the power to do so with the aid of a mortgage, unless such a power is expressly excluded by the trust instrument. [Paragraph 11.10]
- 12.94 The Commission recommends that there should be a general power to borrow and that this power should be subject to the proposed statutory duty of care. [Paragraph 11.11]
- 12.95 The Commission recommends that trustees should be provided with a statutory power of sale. [Paragraph 11.18]

12.96 The Commission recommends that the proposed statutory power of sale should be subject to the duties of trustees under the general law of trusts. [Paragraph 11.21]

12.97 The Commission recommends that trustees should be provided with a statutory power of sale subject to any restriction imposed by the settlor in the trust instrument. [Paragraph 11.24]

12.98 The Commission recommends that the proposed statutory power of sale should be subject to any restriction imposed by statute law or the general law of trusts or any court order relating to the trust assets. [Paragraph 11.26]

12.99 The Commission recommends that the statutory power conferred on trustees to give receipts should be retained. The Commission also recommends that the statutory power provide that a person with prior knowledge of an intended breach of trust by a trustee will not be exonerated. [Paragraph 11.31].

¹ This draft *Trustee Bill 2008* implements the recommendations in the Report that involve the reform and modernisation of the law of trusts, including the replacement of most of the *Trustee Act 1893* (as amended) with a modern legislative code. Some sections of the draft Bill replicate, without amendment (other than small drafting changes), those provisions of the 1893 Act which do not require reform but which are required in the new legislative code. These include, notably, the powers of the Court in Part 6 of the draft Bill. As pointed out in the Introduction to the Report, the Commission will complete its review of the law of trusts in Project 21 of its *Third Programme of Law Reform 2008-2014*, which concerns the effect on trust law of the impending repeal of the *Settled Land Acts 1882 to 1890* by the *Land and Conveyancing Law Reform Bill 2006*. On completion of that project, the replacement in full of the 1893 Act would be possible.

