

The Introduction of a Schedule A of Standard Powers for Trustees

Chapter 1

Introduction

This general review of trustees' powers has been finalised in the light of the Law Commission Consultation Paper No 146, **Trustees' Powers and Duties** which is a narrower review of trustees' powers. Like such paper, it was prompted by the recognition that the present law is no longer adequate to enable trustees to administer a trust to the best advantage of the beneficiaries or the objects of a trust, except for trust instruments drafted by expert trust lawyers in the last fifteen years or so. This is because trustees may only do things which they are expressly or impliedly empowered to do by the instrument creating the trust or by statute.

Trust legislation has not been kept up to date so that the existing statutory default provisions have long since ceased to confer upon trustees the powers that they need to administer a trust effectively (as recently emphasised in paragraph 1.6 of Law Commission Consultation Paper No. 146). There is too large a gap between statutory default provisions and those provisions currently inserted in trust instruments according to the best practice of trust draftsmen.

New statutory default provisions are needed, going beyond the Society of Trust and Estate Practitioners' provisions which have, anyhow, to be expressly incorporated into a trust instrument. It is not sufficient that an expert trust draftsman can today expressly confer upon the trustees all the powers they need to manage the trust to the best advantage, nor that if circumstances materialise in the future which cannot be coped with effectively by the trustees then, upon application, the court can confer the necessary powers under section 57 of the Trustee Act 1925.

After all, there will always be some testators who draft their own will trusts, there will always be those who die intestate so that their property passes on statutory trusts, and there will always be legally qualified draftsmen who will not draft trusts as ably as other draftsmen. How much fairer, simpler and cheaper if all settlors are treated equally and all trust instruments are significantly shortened by virtue of a wide range of statutory default powers conferred upon trustees, except to the extent extended, excluded or modified by the trust instrument. Moreover, there seems no reason why these powers should not be made applicable to existing trusts (as opposed to new trusts) so that, from the commencement of the proposed Act, the trustees

will be able, *inter alia*, to cope with fundamental changes in the way in which investment business is carried on without the time, trouble and cost of applying to the courts for new powers.

All of our provisional proposals for statutory default powers (except the proposal for protection of creditors where an awareness of the problems has only recently emerged) are justified as reflecting current best practice among skilled trust draftsmen and are based on the practice of conferring upon trustees the widest possible power to invest as if they were absolute beneficial owners of the trust fund themselves (unless the settlor specifically requires a narrower investment power for some exceptional reason).

Indeed, it is also best practice to confer upon trustees a power to vest property in nominees and power to employ discretionary portfolio managers, so as to enable the trust fund to be managed in the best financial interests of the beneficiaries, now that the pace of investment has dramatically quickened with dematerialised transfer of securities in CREST and rolling settlement of transactions within 5 days (intended to be reduced to 3 days in the future). At some stage (perhaps in the near future) it will become negligent not to confer such express powers on trustees in the absence of statutory default powers and it will become a matter of cogent criticism that trustees of the statutory trusts that arise on intestacy have no such powers.

The increasing pace of change is such that to cope with unforeseeable eventualities in the life of a trust which could last into the twenty-second century, it is only sensible for a good draftsman to confer the widest possible powers upon trustees. Thus, he currently gives them all the administrative and managerial powers that they would have if they were not trustees but the absolute beneficial owners of the property held by them.

One may expostulate that this is preposterously wide, and, superficially, this may seem to be the case today. But who knows what the next decade or next century will bring and, in any event, the simple fact that trustees have power to do x or y, so that they *can* do x or y, does not mean that they *will* or *must* do x or y. They are subject to extensive equitable obligations as trustees, so that in their investment function unpaid trustees must exercise the standard of care of a prudent person mindful that he is dealing with another's property and in their other functions exhibit the care of an ordinary prudent person in his own affairs, while paid professional trustees have to exercise a higher standard of care appropriate to the expertise that they purport to have.

It is better for trustees to have power to do x, but then decide that it would not be a proper exercise of their discretion to do x, rather than not to have power to do x when they consider that doing x would be in the best possible interests of the beneficiaries, but they cannot do x unless they incur the cost and delay of going to the court for the court to confer such power on them (or unless they commit a breach of trust and take

indemnities from adult beneficiaries in case they are later sued and made strictly liable for their positive wrongdoing under a falsification of their accounts).

Persons who are trustees will often be particularly able people but should always be people with enough common sense to comply with their equitable duty to take advice on matters that they do not understand before taking any action needed to comply with their standard of care. Where such advice relates to investments then the advice will usually have to be from someone regulated under the regulatory system which applies to the financial services industry and so also regulates discretionary portfolio managers.

We thus believe that there are sufficient safeguards in the equitable duties imposed upon trustees and in regulatory regimes designed to protect the public to justify following the practice of draftsmen in conferring the widest possible administrative powers upon trustees in a Schedule A to a Trustee Powers Act. Thus, just as promoters of companies have the Articles of a company in the form of Table A under the companies legislation (so far as not expressly modified or extended), so should settlors of trusts have trusts with powers in the form of Schedule A (so far as not expressly modified or extended).

We do not believe that statutory default powers should extend to dispositive powers beyond those conferred by the statutory powers of maintenance and advancement in sections 31 and 32 of the Trustee Act 1925. Would consultees prefer to leave those sections where they are or would they prefer to see them in an all-embracing Schedule A where trustees can find all they need? Indeed, should the opportunity be taken to delete the proviso to section 31(1) and the words 'one half' in section 32(1)(a) as in STEP's standard provisions? The pragmatic approach is probably to have legislative reform in a new Trustee Powers Act to cover those matters not covered in legislation following upon the Report of the Law Commission based on responses to its CP No 146. Before such reforming legislation is enacted, there will be time to deal with the miscellaneous powers implied by the Trustee Act 1925 so as to up-date them for twenty-first century conditions. Thus, sections 15 and 22 (1) which protect administrative actions of trustees if they act in good faith (but negligently) can be left on one side until we have completed investigation of the extent to which trustees in the twenty-first century should be able to be exempted from liability for negligence. Thereafter, we would hope to produce a draft Trustee Powers Act dealing with all these matters and containing a Schedule A combining the statutory powers in the legislation following upon Law Commission C P No 146 with the new proposed powers.

Initially, we were minded to try to solve current and future problems over the apportionment between income and capital beneficiaries of receipts or outgoings, by conferring on trustees a broad flexible power to allocate receipts or outgoings between the beneficiaries in such manner as they believed held a fair balance between the beneficiaries, irrespective of the income or capital nature of the relevant receipts or outgoings. However, because it is possible that such a power might have the effect of preventing an interest

in possession from arising, so as to have significant tax implications, we believe that such a power is not appropriate as a default power unless the Revenue can be persuaded formally to treat such a power as an incidental, administrative power not preventing an interest in possession from arising. Because there are also problems as to what in law amounts to an income or a capital receipt the whole apportionment question is currently the subject matter of a Consultation Paper issued by us in 1999 (published by Tolleys and STEP).

We were also minded to confer on trustees a broad flexible power whether to modify or enlarge their existing administrative and managerial powers or to confer on themselves extra powers if they considered this to be in the best interests of the beneficiaries. This would ensure that if the other Schedule A powers proved inadequate for any reason then adequate powers could be created. In the end, we provisionally concluded that such a power is not an appropriate default power because the need to invoke such a power should be extremely remote, while there could then be some argument as to whether a power is solely administrative and managerial.

Indeed, in an extreme isolated case an application could be made to the court under section 57 of the Trustee Act 1925. However, if a lacuna develops in the Schedule A powers then the Secretary of State should have power by statutory instrument under the proposed Trustee Powers Act to add powers to the Schedule A list whenever he deems this expedient.

Otherwise, such proposed Act merely needs to incorporate into all trusts the Schedule A powers, subject to any express or necessarily implied contrary intention in the terms of the trust created by the settlor or in any primary or subordinate legislation regulating particular types of trusts, such as debenture trusts and unit trusts.

We propose that such new powers should not just apply to new trusts created after the coming into force of the Schedule A powers. Such powers should also become available to trustees of old trusts without prejudice to any liabilities arising by virtue of the conduct of the trustees prior to the coming into force of the Schedule A powers.

There is likely to be difficulty in ascertaining what should be regarded as a contrary intention in some old trust instruments, for example, where the old trust instrument conferred specific powers of investment or of delegation which were much wider than otherwise would have been the case but which are narrower than the Schedule A powers. Where doubt exists as to contrary intention, one approach would be to allow the settlor, if alive and *sui juris*, to execute a deed incorporating Schedule A or, otherwise, to allow the trustees, as the persons best fitted to appreciate the settlor's intentions, to execute a deed incorporating Schedule A if certifying that it is their belief that this does not contravene the settlor's intentions: in default of the

execution of such a deed only the old powers (rather than the Schedule A powers) will be available. If it were then felt that to allow the existence of a contrary intent to be left to the discretion of the trustees affords the trustees too much discretion, which may embarrass them, then it could be left to the good sense of the court to determine what amounts to a contrary intention, perhaps placing the onus on those seeking to prove contrary intention to show the settlor's positive intention not to confer wider powers on the trustees.

However, to avoid such complexities we provisionally consider that while trustees of both old and new trusts should have the new powers, no trustee of an old trust should be liable for breach of trust for only using the powers available to him before commencement of the new Act.

Chapter 2

Powers to be included in Schedule A

1. Subject to contrary intention of the settlor and to general equitable duties

The following powers are all default powers, so that they are all subject to any express or necessarily implied contrary intention, or any requisite consents or conditions, in the terms of the trust created by the settlor or in any primary or subordinate legislation regulating particular types of trust (for example, unit trusts, debenture trusts), as should be made clear by the section that incorporates Schedule A as the schedule to the Act. While the following powers will ensure that the trustees will normally have powers to act in a very extensive range of circumstances, trustees will need to ensure that their *exercise* of the powers is proper, for example, neither negligent nor for improper purposes nor so as to prefer their personal interest to their fiduciary duty.

2. Interpretation

In the following provisions the following words shall have the following meanings unless the context otherwise requires:

'the Trustees' shall mean the trustees for the time being of the trust or the personal representatives of a deceased person;

'the Trust Property' shall mean any property comprised in the trust for the time being or the estate of a deceased person; and

'Income Beneficiary' in relation to Trust Property shall mean a person (including a Trustee who is also a beneficiary) to whom income of the Trust Property is or may be payable (as of right or at the discretion of the Trustees).

3. Broad new administrative power¹

Wording:

(1) For the purposes of exercising their administrative and managerial functions as trustees, the Trustees have in relation to the Trust Property all the powers of an absolute beneficial owner including,

¹A similar power exists in the following provisions: the Bermudian (Special Provisions) Act 1989, Sch para 4(20) and STEP Standard Provision 3(2)

particularly, power to make an investment (whether or not income-producing) of any kind anywhere in the world but excluding any power to trade other than pursuant to sub-paragraph (8) below.

Trustees of land have the benefit of a general power to manage the trust property as if they were the beneficial owners thereof ². Trustees of personalty, however, have no such general power and we recommend that, as there seems no practical justification for this distinction, such a power should be included in Schedule A so as to reflect current best practice and the recommendations of the Law Commission in CP No 146, paragraphs 8.11-8.12.

The ability of trustees to sell trust property and to invest the proceeds in other property is limited by the rule that they cannot lawfully invest trust funds other than as authorised by the terms of the trust instrument or by statute or, in rarer cases, by the court. Statutory powers of investment are currently contained in the Trustee Act 1925 and in the Trustee Investments Act 1961. The 1961 Act contained a list of permitted investments if complying with certain restrictions and if there was a division of the trust fund into 'narrower-range' and 'wider-range' parts. However, these powers have long been thought inadequate and out of date so that proposals were afoot ³ for the updating of the 1961 Act by removing the restrictions mentioned and abolishing the need for any division of the trust fund. Unfortunately, doubts over the authority given to the Minister under the Deregulation and Contracting Out Act 1994 made it impracticable to implement the broader changes canvassed in the Treasury's Consultation Document⁴, particularly the replacement of the 1961 Act by a broad power for trustees of all types of trust ⁵ to invest the trust fund as if they were the beneficial owners thereof.

Such proposed broad power received overwhelming support ⁶ and would much improve the position if enacted so as to accord with standard practice when drafting new trusts. It seems likely that such overwhelming support will make the Law Commission feel justified in adding such a broad power of investment to the other powers they will propose for legislation in their Report based on responses to CP No 146.

² The Trusts of Land and Appointment of Trustees Act 1996, s6(1)

³ See HM Treasury's Consultation Document "Investment Powers of Trustees" published May 1996

⁴ Ibid.

⁵ Some may argue that the Pensions Act 1995 should exclusively deal with pension trusts (s34) but, in principle, there is everything to be said for all trustees having the same broad powers unless the settlor provides to the contrary

⁶ The Treasury's proposals last year were backed by 144 out of 147 financial institutions, charities and other bodies which responded to the Treasury's consultation paper, and, of the other three, two gave qualified approval

Default powers, we believe, should not distinguish between investment powers and managerial powers because such distinction is imprecise and impracticable (see Law Commission CP No 146, paragraph 6.29). However, default powers should only be concerned with the administrative and managerial powers of trustees and not with their dispositive powers which should be governed by the wishes of the settlor as set out in the trust instrument and supplemented by existing statutory provisions like sections 31 and 32 of the Trustee Act 1925. We recommend that the new power make this clear as above.

A power to acquire property not for investment but for use by an income beneficiary is spelled out in paragraph 8.

The broad new power will be subject to trustees' existing duties in respect of investment judged by the standards of modern portfolio theory. The power will cover all manner of dealings with trust property (including trading, as where a trader dies intestate) and of obtaining advice in respect of projected dealings, both of a type currently foreseen as needed, so as not to hold back trustees in furthering beneficiaries' best interests, and those the need for which cannot currently be foreseen but which, as market practices develop, will become important if trustees are not to operate at a disadvantage to beneficial owners in that market. Because of this, it is not possible, and would, indeed, be counterproductive, to attempt comprehensively to list all of the types of activity which would be covered by the broad new power. We favour a broad facilitative approach where the beneficiaries' interests are protected by the general duties and standards of care imposed on trustees by trust law.

Schedule A should, however, set out various matters which it is intended should clearly be covered by the broad new power, although subject to some safeguards, and these are set out in paragraphs (2) to (13) below which should be expressed to be 'without prejudice to the generality of the foregoing'.

(2) The Trustees may from time to time in their discretion hold or acquire property in common with any other person including a person who is a Trustee.⁷

There is no implied power for trustees to hold or acquire trust property either jointly with others or in common (other than the power to invest in unit trusts) although there is a power for trustees to join with others to make joint sales⁸. We believe (like the Law Commission in CP No 146, paragraph 7.27) that it is sensible that a power for trustees to hold trust property jointly or in common should be a default power. This probably needs to be spelled out separately from the broad new administrative power.

⁷ A similar power exists in the following provision: STEP Standard Provision 3(3)

⁸ *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 ChD 802

(3) The Trustees may in their discretion from time to time, at the expense of the income or the capital of the Trust Property or partly out of each, take any steps which they may think proper for the insurance of any assets forming the Trust Property (including insuring any such assets at full replacement value) unless directed to the contrary by all the beneficiaries who are of full age and capacity and between them absolutely entitled to the Trust Property; and they may allocate the expense of insurance between capital and income of the Trust Property as they see fit.⁹

Section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996 confers an unlimited power upon trustees to insure trust land, while section 19 of the Trustee Act 1925 confers power upon trustees to insure personal property forming part of the trust fund but only up to three quarters of the value of the property. It is difficult to justify such a distinction. We therefore recommend that Schedule A includes an express power for trustees (like many a prudent beneficial owner) to insure any trust property against any risk up to the full market or replacement value of the property as the trustees may see fit. Despite the view expressed in Re McEacharn (1911) 103 LT 900, 902, a sensible trustee should feel obliged to insure trust property in circumstances where a reasonable prudent person would have insured his own property.

(4) Subject to sub-paragraph (5) below, the Trustees may from time to time delegate any of their administrative and managerial powers to any persons (including any of themselves) and in any part of the world, whether or not on a discretionary basis but subject to reviewing any delegation at regular intervals, PROVIDED THAT where the Trustees seek to confer on their delegate discretionary powers to select investments or to sell, lease or charge Trust Property or to grant options or rights of pre-emption over Trust Property or to acquire property for the benefit of the Trust they must

(i) consider the appropriateness of any such delegation before making it;

(ii) draw up and review at reasonable intervals a written statement of their policy in relation to the exercise of the powers delegated which reflects their fiduciary obligations to the beneficiaries or objects of the Trust;

(iii) provide the delegate with a copy of such statement; and

(iv) take reasonable steps to ensure that the delegate complies with it and reports back to the Trustees at regular intervals

⁹ A similar power exists in the following provisions: the Belize Trusts Act 1992, Sch 2 para 2(3) and 9, the Bermudan Trusts (Special Provisions) Act 1989, Sch para 4(6), the Florida Statutes, s737.402 (2)(r) and STEP Standard Provision 3(10)

(5) Trustees of a charitable trust may delegate only in respect of

(a) matters relating exclusively to the investment of Trust Property including powers to manage such property, or to sell or lease trust Property or to acquire property to become Trust Property, whether at a fixed price or at a consideration to be fixed by valuation;

(b) matters relating to the raising of funds for the charitable trust;

(c) acts of a ministerial character implementing decisions taken by the Trustees in the administration of the charitable trust;

but no others unless expressly authorised by the Charity Commissioners under powers conferred upon them by s. 26, Charities Act 1993.

(6) The Trustees may from time to time

(i) vest Trust Property in the name of a nominee (who may be one of themselves), provided that such person acts as a nominee in the course of his business, thereby holding the Property to the order of the Trustees who hold the benefit of their rights against the nominee on trust for the beneficiaries or objects under the Trust; and

(ii) deposit trust documents (whether of title or otherwise) or trust property with a custodian for safe keeping or vest Trust Property in a custodian, provided that such person is a custodian acting in the course of his business

(7) Once the Trustees have in good faith exercised their powers under sub-paragraphs (4), (5) and (6) above and, if applicable, in accordance with provisos (i), (ii), (iii) and (iv) to sub-paragraph (4) above, they may pay out of income and capital in such proportion as they in good faith consider fair any fees, remuneration or other expenses or outgoings reasonably payable in connection therewith and shall not be liable for any loss or damage to the Trust Property by virtue of the act or default of any delegate, nominee or custodian if the Trustees selected, agreed the terms of appointment of, and supervised such delegate, nominee or custodian 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 (such standard of care hereafter being referred to as “reasonable care”)

PROVIDED THAT in agreeing the terms of appointment of delegates, nominees and custodians, the Trustees may, where they have considered the risks inherent in such terms but have concluded in good faith that such terms would, on the whole, be in the interests of the beneficiaries or objects of the trust, accept terms allowing the delegates, nominees or custodians to self-deal and operate despite any conflict of interest, to exclude liability for negligence and to sub-delegate on similar terms, without being liable for any loss or damage to the Trust Property occurring by reason only of having agreed such terms

(a) Delegation of discretionary and non-discretionary tasks

Section 23(1) of the Trustee Act authorises trustees to appoint agents to carry out specific tasks. For the appointment of agents to carry out *discretionary* tasks, trustees may rely upon section 23(2) (for acts to be done outside the United Kingdom) or section 9 of the Trusts of Land and Appointment of Trustees Act 1996 (enabling trustees of land to delegate all their powers in respect of the land to any person of full age beneficially entitled to an interest in possession in the land). There are further powers for local authorities acting in respect of local government superannuation funds to delegate investment powers and discretions under the Local Government Superannuation (Investments) Regulations 1990 (SI 1990/2480 at Reg.2(3))¹⁰. Pension fund trustees can delegate discretionary investment powers under section 34 of the Pensions Act 1995.

In addition to the above limited powers, a general power exists in section 25 of the Trustee Act permitting an individual trustee to delegate his trusts, powers and discretions. The section was originally aimed at dealing with the delegation by individual trustees of all of their powers for a limited period, where the trustee appointed, for example, (in the case of a non-professional trustee) his brother, or (in the case of a solicitor trustee) one of his partners to act as trustee in his place. Despite this, the provision is now often used by all the trustees to delegate, for example, their discretionary management function to an experienced professional investor. Section 25 is then inadequate because:

- (a) the power lasts only for one year at a time ¹¹;
- (b) cumbersome notice provisions apply ¹²;
- (c) the delegating trustee is liable for all the acts and defaults of his delegate as if they were the trustee's own acts or defaults, the delegate being the *alter ego* of the trustee ¹³;
- (d) it would seem that if the trustees themselves have no right to be paid, it follows that their *alter ego* has no right to be paid; and
- (e) because the delegate is the alter ego ¹⁴ of the trustees, the same rules apply to him as to them and this may affect the ability of a professional discretionary investment manager to rely upon the

¹⁰ This regulation inserts a new enabling provision in regulation P3 of the Local Government Superannuation Regulations 1986 (SI 1986/24 as amended by the Local Government Superannuation (Amendment) Regulations 1989 (SI 1989/371)). These regulations are made under s7 of the Superannuation Act 1972

¹¹ At s25(1)

¹² At s25(4)

¹³ At s25(5)

¹⁴ In other words, where A, B and C are co-trustees, unless there is an express power A and B cannot, for example, authorise self-dealing by C. It follows that where C appoints X to act in his place as his attorney A and B cannot authorise self-dealing by X

standard terms of its Customer Agreement (complying with the rules of IMRO) so as to be able to self deal ¹⁵, to sub-delegate ¹⁶ or to exclude liability for negligence ¹⁷.

There are many practical advantages if the trustees can delegate their discretionary investment powers ¹⁸. In family trusts, where nice judgements have to be made about family members the benefits of having trustees with background knowledge of the family situation make it useful to enable trusted lawyers, accountants or family friends to continue to perform the trustee role. However, it is unlikely that such individuals serving as trustees will have the requisite investment expertise competently or advantageously to manage increasingly diverse and complex investments. If the appointment of discretionary investment managers is possible this allows lawyers, accountants or family friends to continue to act as trustees despite the increasing complexity of investment and the speed with which decisions have to be made in a narrow time frame.

In the current highly volatile markets, by the time trustees have sought and obtained the advisory services of an investment manager, considered the advice and issued instructions back to the manager, market circumstances may well have changed (perhaps as a result of the manager's dealing on behalf of other clients, where their market share is significant) so as to make the advice erroneous or useless. Furthermore, the knowledge that consultation is required may mean that the manager will not exploit an investment opportunity on behalf of trustee clients where there is even the possibility of delay so as not to miss the opportunity for other clients for whom he acts on a discretionary basis ¹⁹.

¹⁵ As opposed to authorising specific acts of self dealing which is possible, eg. *Boardman v Phipps* [1964] 1 WLR 993 at pp 1012-1013 (Wilberforce J); [1965] Ch 992 at p 1031 (CA)

¹⁶ In line with the general equitable rule against delegation (*delegatus non potest delegare*), nothing in the Trustee Act, s23(1) entitles the trustees to authorise sub-delegation by a manager appointed under those sections. Section 25(6) entitles the trustees to authorise sub-delegation in the limited case of a power to transfer inscribed stock

¹⁷ Where there is an attempt by the investment manager to insert a valid exclusion clause into a Customer Agreement, the trustees must decide whether or not to accept the clause. If the trustees are collectively taking advantage of the Trustee Act 1925, s25 to engage an investment manager they will be vicariously liable by s25(5) and so may accept an exclusion clause, although they will be reluctant to do so

¹⁸ These proposals would bring the position for trustees of private United Kingdom trusts more into line with the Pensions Act 1995, ss34-36 and with modern developments in similar societies like the USA and New Zealand

¹⁹ For this reason, many managers do not offer an advisory and execution service or only offer one to long-standing or favoured clients as an exception to their general rule. A discretionary portfolio manager, on the other hand, can seize an opportunity as soon as it arises

Whilst the manager's charges for advisory services will often be no greater than for a discretionary management service, the overall cost to the trust of a discretionary management service may be less because:

- (a) on receipt of advice more of the trustees' time will be taken up in making a decision as to whether or not to follow the manager's advice and this time may be charged to the trust; and
- (b) the discretionary service is more cost-effective from the point of view of the manager, so, to encourage clients to use this it provides an enhanced service to those who use it. Thus, periodic valuations (including indexed base costs for capital gains) and other relevant information for tax reporting purposes may be provided free of charge.

Moreover, the introduction of the Financial Services Act 1986 has meant that discretionary investment managers in the United Kingdom are regulated in such a way as significantly to reduce the danger of incompetence or abuse by the manager, while the increasingly complex array of investments has led to a greater use of investment managers.

(b) Terms of contracts with managers and other agents

Since Big Bang, when the various functions within the investment process have been carried out by multi-service organisations, many investment managers have sought to include in their contracts with clients power for the investment manager or its associate to effect transactions in which the manager or its associate has a material interest which may involve a potential conflict with the manager's duty to the customer. This enables, for example, a market-maker holding the shares of a public company to sell its shares directly to a customer or purchase shares directly from a customer in order to limit fluctuations in their price. So long as the sale is in the interests of the customer and at the best price, this is preferable to a situation where the market-making side of the organisation had to sell the shares in the market and the investment management side of the same organisation then bought them on behalf of those customers whose holding in such shares would benefit by being increased.

Many managers seek to include in their contracts with clients power to delegate any power or discretion to another company, especially where foreign investments are concerned. An investment manager wishing to use a delegate may wish to use a company which is not within the same group as the contracting company (for example, because the manager does not have a suitable company in its group or does not have such a

company in the jurisdiction in which dealing is to take place) and where a nominee acts, that nominee will usually *have* to be a separate company ²⁰.

In the investment sphere, portfolio managers commonly incorporate into their Customer Agreements clauses excluding liability for negligence, duty defining clauses and clauses which purport to make generalised advance disclosure of facts which can also amount to exclusion clauses ²¹. Indeed, agents in other areas commonly attempt by contract to exclude negligence liability in a variety of ways.

(c) Custodians and Nominees

Powers relating specifically to the appointment of custodians are contained in section 7 of the Trustee Act (which sets out limited circumstances in relation to bearer shares where an investment may be held in safe custody) and section 21 of the Trustee Act (which generally authorises deposit 'with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents') ²².

On a purposive, historical, contextual interpretation of it, section 23 of the Trustee Act has generally been considered to relate to the engagement of agents for isolated acts rather than the authorisation of delegation of custodianship or nomineehip ²³ which are long-running continuous tasks ²⁴.

It may be possible to appoint custodians and nominees using the powers in section 25 of the Trustee Act despite the problems arising from that section, and charity trustees are fortunate in that the Charity Commission²⁵ has told them that, by virtue of its power under section 26 of the Charities Act 1993, it can authorise them to use nominees unless there is an express prohibition in the trusts of the charity.

²⁰ Under the Securities and Investments Board Conduct of Business rules (at Part 12 para.12.02 or the equivalent rules of the relevant Self Regulatory Organisation such as IMRO, PIA, the Law Society or ICAEW

²¹ See Law Com (1992) No 124, para 3.4.3

²² It seems that there is no need for the banker, or banking or other company to carry on this business of custody with a view to a profit so that this paragraph seems to authorise the holding of documents by any of the many investment managers who do not charge for the undertaking of the safe custody of documents on the grounds that they wish to encourage clients to use this service to facilitate dealing. However, a judge may take the narrow view that only companies which charge for this service can properly be authorised

²³ A nominee is the legal owner of securities, so being entitled to the custody of documents relating thereto: the securities are vested in it for the convenience of the client and his advisers. Where securities held in nominee names are sold, it is, of course, the nominee (rather than the client) which signs the transfer forms

²⁴ See the Decisions of the Charity Commissioners, Volume 2, published April 1994 where the Charity Commission consider that s23 cannot be used to appoint custodians and nominees

Where securities are dealt with either on a regular basis or in circumstances such that settlement needs to be made in a short time, custodians and nominees are often used to facilitate this process.

With the recent introduction of CREST ²⁶ the use of nominees is likely to increase significantly; and where the paperless system is not used, the shorter settlement times are likely to lead to a greater use of custodians and nominees.

Where the trustees appoint an investment manager on a discretionary or an advice and execution only basis, they may also wish directly to appoint or indirectly to authorise the appointment of a custodian or nominee.

Where custodians and nominees are used, investment managers can deal with the client's securities in the knowledge that they can make settlement on time. Whereas an individual trustee may be unavailable to sign a transfer form and find and send a certificate within the restricted time-frame (for example, because he is on holiday or is simply too busy to do so), professional custodians will be able to locate and send the securities, and professional nominees will be able to sign and send the transfer at any time. Where several signatures have to be obtained because there are several trustees, the delays in obtaining all signatures emphasise the benefits of using a nominee. Furthermore, whilst professional custodians have efficient systems for retaining and passing on documents, many lay clients, including trustees, have no such system, and valuable documents may therefore be lost.

(d) Use of CREST

The situation with nomineehip is, however, a little more complex than that of custodians. Although the wording of CREST regulation 33 has been criticised as oblique, it would appear from it that trustees are able to act as system-members (including sponsored system-members). If this is the case, then in respect of those trustees who choose so to act, the need to put investments in nominee names will be eliminated. It is likely, however, that, although the price charged by CREST for sponsored membership is low, there will be a significant number of trustees who do not become members, whether because they deal infrequently, or because they do not want to risk the sponsor having access to a bank account of theirs, or for any other reason. Where trustees do not become sponsored system-members they are likely to be encouraged by investment managers to allow investments to be held in nominee names rather than to remain materialised.

²⁵ Decisions of the Charity Commissioners, Volume 2, published April 1994

²⁶ The paperless (in other words, computerised) securities settlement. Under CREST, companies are permitted to allow their securities to be transferred through an electronic share settlement system operated by CREST members ('system-members')

It has also been suggested that there will be costs penalties on remaining materialised which will exceed the small differential in the costs to a broker²⁷. Thus normal practice seems to be for trustees to use nominees.

However, trustees may wish to hold dematerialised securities in their own name and may, therefore, wish to become sponsored-members of CREST. The sponsored-member will pay a nominal fee but will not have a direct computer link-up with the CREST system, instead operating its membership via a sponsor, a system member with direct access to the system.

Under the CREST regulations²⁸, instructions transmitted by the sponsor will be valid without the need for CREST to satisfy itself that the message is one which the sponsored-member wished to transmit. Thus, sponsored-members will be bound by the instructions given although they can sue the sponsor if it has inputted incorrect information. However, the sponsor will wish to protect itself by ensuring that it has a valid power to dispose of the relevant securities without reference to the sponsored member-trustees. The effect of this is that, although not strictly bound under the CREST regulations to operate its relationship with the sponsored-member via a power of attorney, the sponsor will wish to ensure that its actions are properly authorised, and may therefore wish for a power of attorney in its favour to ensure that this is the case. The sponsor needs to control a bank account which will be in the sponsored-member's own name. A power of attorney is a useful way of achieving this.

In the absence of an express power in the trust to use the services of a nominee with power to bind the trustees, it seems that English trustees should execute a power of attorney under the Trustee Act, section 25 (involving vicarious liability, annual renewal and notice). As CREST necessitates the installation of a permanent continuous structure (for example, as to banking arrangements), it seems likely that reliance cannot simply be placed on section 23(1), and the Charity Commission have made it clear²⁹ that they consider that the appointment of a nominee cannot properly be made under section 23(1).

This means that Scottish trustees, who do not have an equivalent of section 25, have legal problems if they seek to operate CREST via sponsored membership unless the courts are prepared to find that because Scottish and English trustees have power to become sponsored members of CREST they necessarily have implied power to confer on the sponsor the requisite powers to bind the trustees and draw on their bank account.

²⁷ Around £1 out of a total fee ranging from £10 for a small transaction upwards

²⁸ Regulation 29

²⁹ Decisions of the Charity Commissioners, Volume 2, published April 1994

However, it is in our experience much more usual for trustees to hold shares in nominee names whether under an express power or through use of section 25 or just risking the soundness of the nominee.

(e) Recommendation

This topic is the subject of a forthcoming Law Commission paper. Nonetheless, for the sake of completeness, we recommend that Schedule A should expressly include a broad flexible power for trustees collectively by power of attorney or by signed writing to delegate or sub-delegate their discretionary or non-discretionary administrative, management and investment functions³⁰ (including the use of custodians and nominees) where it is in the interests of the beneficiaries for them to do so and to pay the delegate or sub-delegate so long as they select, settle the terms of appointment of and supervise the delegate with reasonable care.

(8) The Trustees may borrow money with or without giving security and on such terms as to interest repayment and otherwise as they may think fit for any purpose connected with the trusts affecting the Trust Property (including the purchase of or subscription for assets to be held as Trust Property)

³⁰ We would suggest that there are certain types of powers which, being fundamentally linked to the main function of trustees (that of distributing trust capital or income to the beneficiaries), or which relate, broadly, to the long term management of the trust (such as transferring all or part of the trust fund to new trustees, whether local or foreign), should not be delegated and that such provision should make it clear that it does not enable trustees to delegate the exercise of (as opposed to the implementation of):

- (a) any power to distribute or appoint capital or income to a beneficiary or to pay or otherwise apply capital or income for the advancement, maintenance, education or benefit of a beneficiary or to lay down capital and income investment criteria for an investment manager or his sub-delegate
- (b) any power to apply or appropriate any capital or income from time to time comprising the trust fund for the benefit of or in satisfaction of the entitlements of a beneficiary including the power to allow a beneficiary to reside in any property or to use chattels from time to time comprising the trust fund or to loan any property from time to time comprising the trust fund to any person (whether or not a beneficiary) except on such terms as would be commercially available to that person at the time when and in the circumstances in which the proposed loan is sought
- (c) any power to treat capital or income expenditure or receipts as if they were otherwise than of such capital or income nature
- (d) any power to determine or change any of the beneficial entitlements under the trust
- (e) any power to add beneficiaries (including persons hitherto excluded from being beneficiaries) or to delete beneficiaries
- (f) any power to appoint or remove trustees or to give indemnities to former trustees
- (g) any power to add to or amend the administrative or substantive terms of the trust including the power to release or restrict powers and the power to change any class closing date or the closing date of the trust
- (h) any power to export the trust or to change its proper law
- (i) any power to change the currency unit of account for the trust accounts
- (j) the duty to prepare accounts accounting for the trustees' stewardship of the trust assets

PROVIDED that no lender from whom the Trustees borrow money in purported exercise of this power shall be concerned to enquire as to the propriety amount or purpose of any such borrowing.³¹

The important power to borrow requires separate treatment so as to make clear beyond doubt the validity of gearing up the trust fund to a greater or lesser extent in appropriate circumstances.

English trustees' powers of unsecured borrowing are unclear. Australian cases allow trustees to borrow money for a legitimate purpose of the trust such as to pay debts incurred in the management of trust property, to repair and, where proper, improve trust property and to carry on a business authorised to be carried on³². However, English cases only establish a power for trustees to take reasonable steps to preserve and protect trust property which may, in appropriate circumstances, require, for example, a loan to effect essential and immediate repairs to a building³³. Trustees wishing to repay debts out of trust assets³⁴ may do so as long as the borrowing was not made in breach of trust, the trustee is not indebted to the trust fund in an amount equal to or exceeding the amount of the indemnity and the trust instrument does not limit the trustees' indemnity. There is also a limited further right of indemnity for trustees where there has been a breach of trust, but where the trustees have thereby benefited the trust³⁵.

The position for trustees wishing to grant a charge over trust property is clearer than that for unsecured borrowing.

Trustees with a power of sale (as opposed to a trust for sale) have the power to mortgage trust property if the purpose of the exercise of the power is to enable a sum of money to be raised for a beneficiary³⁶. Under section 16 of the Trustee Act trustees have the power to raise money by the "sale, conversion, calling in or mortgage" of trust assets where trustees have power to pay or apply capital money of the trust "for any purpose or any manner". This power overrides any contrary provision in the trust instrument itself (as long

³¹ Wording adapted from that in Williams on Wills B20.32. A similar power exists in the following provisions: Trusts (Scotland) Act, s4(d), (h), (l) and (n), the Belize Trusts Act 1992, Sch 2 paras 6(a) and 8, the Bermudan Trusts (Special Provisions) Act 1989, Sch para 4(2), (12) and (20), the Florida Statutes, s737.402 (2)(s) and (u) and STEP Standard Provisions 3(9), (15) and (17)

³² See Ford & Lee, Principles of the Law of Trusts, (3rd ed 1996) para 12570

³³ *Bright v North* (1847) 2 Ph 216, 220

³⁴ Trustees entering into trust debts incur liabilities in their personal capacity and are personally liable to repay the whole debt except to the extent that they effectively limit their liability to the creditor to the extent that they have a right of indemnity over the trust fund. Whether or not they contract for such a limitation, the existence of their right of indemnity will mean that the debt will often not ultimately be met out of their pocket

³⁵ See the paper 'Rights of Creditors against Trusts and Trustees' produced by the Trust Law Committee for the limits of this exception

³⁶ *Ball v Harris* (1839) 4 My & Cr 264

as the power to pay or apply capital money is present), but does not apply to charitable trusts or to certain trusts governed by the Settled Land Act 1925. It is limited to payments or applications of capital, and does not extend to payments or applications in order to make further investments by way of gearing up the value of the trust fund³⁷.

Under section 71 of the Settled Land Act the tenant for life of a strict settlement has the power to charge trust assets, principally in relation to improvements to the land to be charged or for discharging encumbrances and costs or claims in relation to that land. In relation to land, by virtue of the Trusts of Land and Appointment of Trustees Act 1996, trustees of land (including personal representatives and charitable trustees) have all the powers of an absolute owner³⁸ which will include a power to use the land as security.

Under section 39 of the Administration of Estates Act 1925, as regards the personal estate³⁹ personal representatives have power to raise money by mortgage and have all the statutory powers of trustees of land.

In respect of charitable property other than land, the restrictions upon charging a charity's permanent endowment under section 29 of the Charities Act 1960 have now been repealed and the Charities Act 1993 has no application to charging other types of charity property. This implies that a charity's property can be charged without the consent of the Charity Commissioners as long as the property concerned is not land, whether or not that property forms part of a charity's permanent endowment. However, it is still necessary to check that there is power to charge the charity's property⁴⁰, and express restrictions upon charging charity property (other than land) may be imposed by the conditions of gift of that particular property.

Whilst these piecemeal powers of secured borrowing are useful, we believe that a broad power of secured and unsecured borrowing for trustees expressed in general terms would free them from the need, perhaps artificially, to justify their actions in terms of the purpose of the loan (as they may have to under the powers listed above) and would enable trustees to gear the trust fund where this could properly be said to be appropriate as one of the legitimate investment functions of the trustees. We recommend that a power to

³⁷ *Re Suenson-Taylor's Settlement*, [1974] 3 All ER 397, [1974] 1 WLR 1280

³⁸ See s6(1) and Sch 3 para 6(2)(b)

³⁹ See Sch 3 para 6(2)(a)

⁴⁰ Where charity trustees or their creditors have any doubts as to the extent of their powers, they may seek an order of the Charity Commissioners under the Charities Act 1993, s26 to authorise the proposed transaction. This will give them power to carry out the transaction even if they have no express power to do so under their governing instrument or implied power under the general law

this effect be specifically included in Schedule A to allow trustees to borrow with or without security over trust assets⁴¹, whether land or personalty.

Borrowing may amount to any percentage of the fund so long as this is in the best interests of the beneficiaries and complies with the trustees' duty of care.

(9) The Trustees may acquire, purchase or promote or join in promoting any company wherever situated or resident for the purpose of holding investments or carrying on or taking over a trade and may concur in any scheme or arrangement for the reconstruction of any such company or for its amalgamation with any other company or for its dissolution or to effect any other change in the form of the company or for the transfer of any such trade carried on by such company to another company PROVIDED that any expense incurred by the Trustees in the acquisition, purchase or promotion of any such company or in entering into any such scheme or arrangement as is contemplated above shall be payable out of the capital of the Trust Property.

(10) For the purpose of carrying on any trade mentioned in sub-paragraph (10) above any company acquired, purchased or promoted to carry on or take over such trade may employ in any such business Trust Property and may engage and determine the terms of employment of any managers (whether corporate or not) and other employees of the business and the trustees may delegate to any such person or corporation any power that they may have to be exercised in relation only to Trust Property held by or used in the trade and may otherwise act in relation to such trade as if they were beneficially entitled to any shares of the company held as Trust Property.

(11) All contracts or arrangements made or entered into by any company acquired, purchased or promoted under sub-paragraph (10) above in pursuance of the exercise of any of the powers contained in sub-paragraphs (10) and (11) shall be valid and effectual notwithstanding that the Trustees or any of them shall have acquired, purchased or promoted any such company or be partners or a partner in any such trade or otherwise interested in the same otherwise than as the Trustees or one of them under the trust so long as the conditions of [paragraph 6] are satisfied.⁴²

In the absence of express powers, trustees do not currently have power to trade, nor do they have power to incorporate a company. We recommend that the power to incorporate, etc a trading (and any other type of)

⁴¹ The Trust Law Committee has made a provisional recommendation that legislation should be introduced to confer on all trustees power to create any type of charge over trust assets or the trust fund as a fluctuating fund to secure liabilities incurred in the proper administration of the trust, see the paper 'Rights of Creditors against Trusts and Trustees', para 4.15. However, it will be necessary to consider whether or not the creation or discharge of such a charge may be a disposal or acquisition for capital gains tax purposes

⁴²A similar power exists in the following provisions: the Belize Trusts Act 1992, Sch 2 para 3, the Bermudan Trusts (Special Provisions) Act 1989, Sch para 4(5), the Florida Statutes, s737.402(2)(d) and STEP Standard Provision 3(8)

company should be included in Schedule A, the power to trade through a company being useful for protecting the trustees from personal liability. We do not believe that trustees should be given the power to trade in their own right, especially if the trustees are trustees of a charitable trust.

Registration may be refused to a new organisation seeking charitable status if the Charity Commission takes the view that trading is substantial or dominant. If it reaches the point where the trading activities are actually greater than the charitable work, then the organisation cannot be said to be established for exclusively charitable purposes and so will not comply with the definition of a charity in the Charities Act 1993⁴³.

The Taxes Acts provide for a limited exemption from tax for the profits of trades carried on by charities. To qualify for exemption the profits must be used solely for the purposes of the charity. In addition, the trade must either be exercised in the course of the actual carrying out of a primary purpose of the charity (a 'primary purpose trade'⁴⁴), or the work in connection with the trade must be mainly carried out by the beneficiaries of the charity⁴⁵.

If the trade does not satisfy these conditions tax will generally be payable on the profits, regardless of whether or not they are used for the purpose of the charity. There are, however, statutory exemptions from this strict rule for the profits of exhibitions or shows held by agricultural societies, and for the profits of 'society' and 'small' lotteries which are promoted by charities or by subsidiary companies on their behalf⁴⁶. In addition, by concession, the Inland Revenue do not seek to tax the profits of some small scale events arranged to raise funds for the charity⁴⁷.

Charities carrying on trades outside the statutory and concessional exemptions usually arrange for the trade to be carried on by a wholly owned trading company. Such companies are liable to pay tax on trading profits in the same way as other companies, but, like other companies, they can get tax relief for donations to charity. Thus, by donating all of its taxable profits to charity, the company can get a tax deduction equal to the amount of the profits, so that no tax will be payable. In the hands of the charity the donation will not

⁴³ See also the dicta of Cohen LJ in *Tennant Plays v IRC* [1948] 1 All ER 506

⁴⁴ A primary purpose trade is one that is exercised in the course of the actual carrying out of a primary purpose of the charity. A charity's primary purpose can be identified from its trust deed or constitution. For further, see the Inland Revenue booklet 'Trading by Charities' CS2, paras 4.2-4.5

⁴⁵ For further, see the Inland Revenue booklet 'Trading by Charities' CS2, Chapter 5

⁴⁶ See the Inland Revenue booklet 'Trading by Charities' CS2, paras 3.3-3.9

⁴⁷ For further, see the Inland Revenue booklet 'Trading by Charities' CS2, Chapter 6 and Income and Corporation Taxes Act 1988, s832

be regarded as trading income so that it will be exempted from tax (provided, of course, that it is used for charitable purposes).

It is thus useful for charity trustees, like other trustees, to be given a statutory power to trade through a company.

(12) The Trustees shall in exercising their administrative and managerial functions have power to appropriate or to apply the capital or income of the Trust Property in securing the payment of money owed by them or by any company controlled by the Trustees or the performance of any of their obligations or of the obligations of any such company and to give any guarantee, indemnity or warranty and for these purposes to hypothecate, mortgage or charge any of the Trust Property or to deposit or transfer any of the Trust Property with or to any person, firm or company on trust or by way of security.

(13) For the purposes of sub-paragraph (13), a company shall be controlled by the Trustees if the Trustees acting together as trustees

(a) hold a majority of the voting rights in it; or

(b) are a member of it and have the right to appoint or remove a majority of its board of directors; or

(c) are a member of it and control alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it,

or if, under the conditions of section 736 of the Companies Act 1985 the company is a subsidiary of a company which is itself controlled by the Trustees.

*(14) In interpreting sub-paragraphs (13) and (14) the provisions of section 736A(1) to (4) and (7) to (12) of the Companies Act 1985 shall apply PROVIDED THAT references in that section to the holding company shall be read as references to the Trustees and references in that section to the subsidiary shall be read as references to the controlled company AND PROVIDED THAT section 736A(5) shall not apply AND PROVIDED THAT section 736A(6) shall apply only if the Trustees hold as bare nominee for another.*⁴⁸

The uncertainty of the extent to which there may be necessarily implied powers for trustees to give guarantees, indemnities or warranties either for administrative purposes (for example where a share certificate has been lost and the trustees are required to provide an indemnity to the bank), or for managerial purposes (for example, where a company is being sold by trustees and a better price can be obtained for the company if the trustees grant indemnities) leads us to recommend that the power for trustees to grant

⁴⁸ A similar power exists in the following provisions: the Belize Trusts Act 1992, Sch 2 para 4, the Bermudan Trusts (Special Provisions) Act 1989, Sch para 4(15), the Florida Statutes, s737.402 (2)(x) and STEP Standard Provision 3(19)

guarantees, indemnities and warranties in the administration and management of the fund should be spelled out separately from the broad new administrative power.

4. Provisions ensuring that a third person dealing with the trust is allowed to assume without enquiry that proper powers exist to allow the trustees to deal with him and that the trustees have exercised those powers properly⁴⁹

The current position is that, unless trustees specifically contract out of personal liability, they are personally liable to the extent of their own assets to satisfy fully any liabilities incurred on behalf of the trust. Normally, the personal liability will actually be discharged out of the trust assets through the trustees' right of indemnity (or exoneration) which arises if the contract was properly made by them in the administration of the trust, though only to the extent that they are not indebted to the trust. In a rare case it may even be possible for a creditor to take advantage of any right of the trustees to obtain an indemnity from the settlor or some beneficiaries personally⁵⁰.

Problems arise either (1) because the assets in the trust fund are insufficient to meet the debt, in which case the trustees will have to make up the shortfall personally; or (2) because of some limitations on trustees' rights of indemnity. Such limitations may arise from:

- (a) express limitations on the trustees' indemnity;
- (b) the indebtedness of the trustees to the trust fund before or after the transaction in question (for example, because the trustees have committed a breach of trust, so that they owe money to the trust fund of an amount that equals or exceeds the amount to which they would otherwise be entitled by way of indemnity⁵¹);
- (c) the liability having been incurred in breach of trust, whether because power to enter into the transaction is not present or because any such power has been improperly exercised (although, exceptionally, where the beneficiaries are not, in fact, prejudiced but are benefited where the trustees acted in good faith, then, to prevent unjust enrichment of the beneficiaries, it is equitable for the trustees to be entitled to an indemnity for the amount of the benefit thereby conferred).

⁴⁹ A similar power exists in the following provisions: the Bermudan (Special Provisions) Act 1989, Sch para 6 and the Florida Statutes, s737.405

⁵⁰ See *Balsh v Hyam* (1728) 2 P Wms 453; *Ex p Chippendale, Re German Mining Co* (1854) 4 De GM & G 19, 54; *Jeffray v Webster* (1895) 1 ALR 65; *Wise v Perpetual Trustee Co* [1903] AC 139, 149); *Hardoon v Belilios* [1901] 1 AC 118, 123; *Matthews v Ruggles-Brise* [1911] 1 Ch 194; *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891; (1841) 4 Beav 115

⁵¹ See *Re Johnson* (1880) 15 ChD 548; *Re Frith* [1902] 1 Ch 342; *Re British Power Traction & Lighting Co* [1910] 2 Ch 470. This reflects the principle that a defaulting trustee cannot claim any beneficial interest before making good his default, eg, *Doering v Doering* (1889) 42 ChD 203; *Re Dacre* [1916] 1 Ch 344, 347

Where the trustees are personally liable, the creditor has no problems if the trustees are good for the money, but where they are not good for the money (because of their insolvency or poverty), the creditor can levy judgment against trust assets (as opposed to the trustees' own assets) through its right to be subrogated to the trustees' right of indemnity. The creditor's right is to stand in the trustees' shoes and therefore applies *only to the extent that the trustees' right of indemnity is intact* so that the creditor's right is subject to all the limitations set out above relating to the trustees' right of indemnity.

Therefore, to deal with the problem of a creditor being subrogated to the trustee's right of indemnity so as to be subject to limitations on such right of indemnity we suggest the following provision.

Wording:

Without prejudice to the law applicable to the conveyancing of land, where a trustee exercises powers conferred upon him by the trust instrument or by law any person knowingly dealing with a trustee and who gives full consideration in money or moneys' worth in relation to the act in question shall be entitled to assume without inquiry that the trustee did not act in breach of any equitable duty of care and, unless his conduct amounts to dishonest assistance in a breach of fiduciary duty, shall be entitled to assume without inquiry that the trustee's powers have been properly exercised by the trustee. Any such person entitled to make such assumptions shall be entitled to be paid out of the Trust Property irrespective of the state of accounts between such trustee and the beneficiaries interested in the Trust Property.

5. Power for professional trustees to charge for their trusteeship⁵²

There is no general implied power for trustees to charge for their time and trouble, although limited exceptions are as follows:

- (a) the Public Trustee may charge under section 7 of the Public Trustee Act 1906;
- (b) a body appointed to be custodian trustee may charge fees not exceeding those charged by the Public Trustee;
- (c) an independent trustee of a pension scheme may charge fees on the insolvency of the employer company under section 20 of the Pensions Act 1995;
- (d) a solicitor acting as a trustee may charge for in-court work done in an action or matter charge under the rule in *Cradock v Piper*⁵³, but only where the solicitor works on behalf of both himself and his co-trustee;

(e) where the trust property is abroad and the custom of the local courts is to allow remuneration⁵⁴.

We recommend that a general power be included in Schedule A for professional trustees of all types of trust to charge for work done in respect of the trust. The Pensions Act 1995 already contains a power at section 7 for pension trustees to be paid.

Opinions are sought as to the extent to which the wording should cover non-professional work carried out by the trustees. Should it cover all non-professional work in fact carried out by the trustees or should trustees only be authorised to carry out and charge for such work if it is work which might reasonably be done by a professional person⁵⁵? Work would not be work which might reasonably be done by a professional person if such a person carrying out such work for a non-trustee client would have to make a special bargain with the client before carrying it out and charging for it.

Wording:

Any individual or corporate Trustee being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by such Trustee or his firm in relation to the trust, including work done for a company connected with the Trust Property, and also all reasonable charges in addition to disbursements for all other work and business done and all time spent by such Trustee or his firm in connection with matters arising including matters which might have been attended to in person by a Trustee not being a solicitor or other person so engaged.

[Finalise after Law Commission proposals finalised]

6. Power to act as directors of a company the securities of which are owned by the trust and to keep directors' fees and remuneration and fees earned as associate of another person⁵⁶

⁵² A similar power exists in the following provision: STEP Standard Provision 11

⁵³ (1850) 1 Mac & G 664

⁵⁴ *Chambers v Goldwin* (1804) 9 Ves 254

⁵⁵ The latter approach is adopted in the *Encyclopedia of Forms and Precedents*, Vol 40 (5th ed 1993) paras 1845 and 1846. See also *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA; *Re Chalinder and Herington* [1907] 1 Ch 58 at 63

⁵⁶ A similar power exists in the following provisions: the Belize Trusts Act 1992, Sch 2 paras 12 and 13 and the Bermudan Trusts (Special Provisions) Act 1989, Sch para 7

It is currently the case that where a trustee acquires a position in which he obtains directorship fees or other benefits by virtue of his position as trustee (including where he refrains from using the vote attaching to trust securities to control his appointment to such position) or where he procures his co-trustees to give him or those associated with him remunerative employment, he must account to the trust for any benefits obtained⁵⁷. Where a trustee receives remuneration independently of use of the trust holding he may, however, keep the remuneration⁵⁸. Similarly, trustees receiving commission either through direct dealing with the trust property, from exercise of a trust power or otherwise may have to account to the trust for the benefit received⁵⁹.

We recommend that Schedule A spell out the power for trustees to act as directors of a company the securities of which are owned by the trust and that the power also allow the trustees to receive reasonable remuneration for their directorship (including where such position or remuneration is received by the trustees as a direct or indirect result of the exercise or non-exercise of the voting or other rights attaching to securities). Such a power will be subject to the rule on conflicts of interest set out below⁶⁰. Disputes as to what constitutes reasonable remuneration would ultimately have to be resolved by the courts.

We believe that this power should apply to charity trustees. Whilst it may be easy to find non-trustees available to act on the boards of companies owned by the charitable trust, it would often be appropriate for the trustees to be represented on the board and for a trustee-director to be paid for his services. Opinions are sought, however, on this point.

Wording:

Any Trustee may act as an officer or employee of any company in which the Trust Property may be invested (including but not limited to any company acquired, purchased or promoted by the Trustees) or as an officer or employee of any subsidiary of any such company and may [(unless he be a trustee of a charity trust)] retain for himself any reasonable remuneration or other benefits which he may receive by virtue of his position as such officer or employee notwithstanding that any votes or other rights attached to any such investment may have been instrumental either by themselves or in combination with any other votes or rights whether or not of a similar nature or by reason of the non-exercise of any such votes or rights in procuring or maintaining for himself his position as such officer or employee.

⁵⁷ *Re Macadam* [1946] Ch 73 at 82; *Re Gee* [1948] Ch 284 at 295

⁵⁸ *Re Dover Coalfield Extension Ltd* [1908] 1 Ch 65

⁵⁹ See *Swain v Law Society* [1981] 3 All ER 797 at 823-4

⁶⁰ See para 7* below

7. Power to exercise their powers and retain property despite any personal interest that they might have in the property or in exercising their powers⁶¹

It is currently the case that a trustee will have to account for profits where he uses or deals with trust property or exploits his position for his private advantage⁶² and he will also be personally liable for losses where there is a sensible possibility of conflict between his fiduciary capacity and his self interest⁶³.

Furthermore, a disposition of trust property to the trustee is automatically voidable by a beneficiary *ex debito justitiae*, however fair the transaction may be unless

- (a) under a power in the trust instrument; or
- (b) by leave of a competent court; or
- (c) under a contract or option made before the fiduciary relationship arose; or
- (d) carried out under section 68 of the Settled Land Act; or
- (e) the beneficiary acquiesced in the transaction; or
- (f) very exceptional circumstances exist.

We believe that Schedule A should distinguish between the position (a) where a trustee-dispensee is only interested in a fiduciary capacity (for example, as trustee of a second trust, T2); and (b) where a trustee-dispensee has an interest by virtue of being a beneficiary.

We recommend that there should be a provision in Schedule A stating that a disposition of trust property by the trustees on behalf of the trust (or of a company controlled by the trustees) to a trustee who is interested only in a fiduciary capacity will not be voidable *ex debito justitiae*. The disposition should, however, be voidable if the beneficiaries can show that it was not at market value or was in some other way inconsistent with the interests of the beneficiaries (for example, made just before a significant, predictable rise in price).

Wording:

The disposition of Trust Property by the Trustees thereof or of any asset owned by a company controlled by the Trustees to one or more of the Trustees not acting in his or their personal capacity nor acting as

⁶¹A similar power exists in the following provisions: the Bermudan Trusts (Special Provisions) Act 1989, Sch para 4(18), the Florida Statutes, s737.402 (2)(a) and (4) and s737.403 and STEP Standard Provision 9

⁶² *A-G for Hong Kong v Reid* [1994] 1 AC 324, PC; *Webb v Earl of Shaftesbury* (1802) 7 Ves 480; *Exp Lacey* (1802) 6 Ves 625

⁶³ *Clark Boyce v Mouat* [1994] 1 AC 428; *Nocton v Lord Ashburton* [1914] AC 932; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129; *Glennie v McDongall & Lowans Holdings Ltd* [1935] 2 DLR 561 at 579

nominee or trustee for a person or company mentioned in [paragraph 6(2)(a), (b) or (c)] shall not be voidable by the beneficiaries unless such beneficiaries can show that at the time the disposition was made and to the actual knowledge of the Trustees at that time such disposition was contrary to their interests.

We also recommend that a disposition to or a transaction in favour of a trustee-beneficiary of a trust should be authorised under Schedule A so as long as an independent trustee agrees to this. Thus the position would be similar to that currently in Standard Provision 9 of the powers produced by the Society of Trust and Estate Practitioners ('STEP').

Wording:

(1) A trustee who also has an interest in the Trust Property by virtue of being a beneficiary of the trust (an "Interested Trustee") may:

(a) enter into a transaction with the Trustees acting either in their own names or on behalf of any company acquired, purchased or promoted under the provisions of [paragraph 1(10)];

(b) be interested in an arrangement in which the Trustees or any company acquired, purchased or promoted by them under the provisions of [paragraph 1(10)] are or might have been interested; or

(c) act (or not act) in any other circumstances

even though his fiduciary duty under the trust conflicts with other duties or with his personal interest

PROVIDED that

(i) the Interested Trustee first discloses to the other Trustees the nature and extent of any material interest conflicting with his fiduciary duties; and

(ii) there is an Independent Trustee in respect of whom there is no conflict of interest and the Independent Trustee considers that the transaction, arrangement or action is not contrary to the general interest of the trust.

(2) An 'Independent Trustee' in relation to an Interested Trustee means a Trustee who is not:

(a) a brother, sister, ancestor, [uncle, aunt, nephew, niece], descendant or dependent for the time being of the Interested Trustee;

(b) a spouse of the Interested Trustee or of anyone listed at (a) above; or

(c) a company controlled by one or more of the persons listed at (a) and (b) above.

(3) The powers of the Trustees may be used to benefit an Interested Trustee (to the same extent as if he were not a Trustee) PROVIDED that there is an Independent Trustee in respect of whom there is no conflict of interest.

(4) For the purposes of sub-paragraph (2)(c), a company shall be controlled by one or more of the persons listed at (a) and (b) above if such persons acting together

(a) hold a majority of the voting rights in it; or

(b) are a member of it and have the right to appoint or remove a majority of its board of directors; or

(c) are a member of it and control alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it.

or if, under the conditions of section 736 of the Companies Act 1985 the company is a subsidiary of a company which is itself controlled by such persons.

8 Exclusion of section 11, Trusts of Land and Appointment of Trustees Act 1996

Section 11 of the Trusts of Land and Appointment of Trustees Act 1996 imposes duties of consultation of the beneficiaries unless excluded by the trust instrument. The revised STEP Standard Provisions expressly exclude the application of section 11 as inappropriate to ordinary trusts where the settlor does not seek to favour particular beneficiaries but expects the trustees to manage things themselves.

Wording:

Section 11 of the Trusts of Land and Appointment of Trustees Act 1996 (duty of consultation with beneficiaries) shall not apply.

9. Power to appropriate assets and distribute property to a beneficiary in satisfaction of his interest⁶⁴

Where a testamentary trust is a trust of specific sums (for example, £100,000 to be held upon trust for A for life with remainder to his children and £50,000 to be held upon trust for B for life with remainder to his children) an appropriation is not only legitimate, but ought to be made⁶⁵.

Where property is left on trust for sale or on trust with power to sell and there is nothing in the trust instrument indicating that an appropriation between the beneficiaries is not to be made until some specified event (for example, the death of a life tenant interested in one quarter of the fund) then it seems an appropriation can be made⁶⁶. After all, the property could be sold to the beneficiary so he can have the property appropriated to him, being credited with its value at the time although stamp duty will then be payable⁶⁷. It also seems that infant beneficiaries incapable of consenting to the appropriation could be bound to an appropriation in their favour if done fairly upon a proper valuation⁶⁸.

⁶⁴ A similar power exists in the following provisions: the Belize Trusts Act 1992, Sch 2 para 4, the Bermudan Trusts (Special Provisions) Act 1989, Sch para 4(15), the Florida Statutes, s737.402 (2)(x) and STEP Standard Provision 3(19)

⁶⁵ *Fraser v Murdoch* (1881) 6 App Cas 855; *Re Walker* (1890) 62 LT 449

⁶⁶ *Re Nickels* [1898] 1 Ch 630; *Re Brooks* (1897) 76 LT 771

⁶⁷ *Re Beverly* [1901] 1 Ch 681; *Re Craven* [1914] 1 Ch 358

⁶⁸ *Re Ruddock* (1910) 102 LT 89, CA. Trustee Act, s22(3)

Doubts now exist in the case of income interests since it has been held that 'an interest in half the income of an undivided fund is quite different from the whole income of a divided half of that fund' ⁶⁹ so that an appropriation varies the beneficial interests necessitating an application under the Variation of Trusts Act ⁷⁰ if the statutory power conferred on personal representatives (but not trustees) by section 41 of the Administration of Estates Act is not available. Thus, many well-drafted trust instruments will contain an express power of appropriation. Stamp duty is also saved if an appropriation can be made without the consent of the benefiting beneficiary.

Where the appropriation is made, the beneficiary absolutely entitled can call for a transfer of the appropriated securities ⁷¹.

We recommend that a similar power be included in Schedule A so that trustees are able to appropriate assets and distribute property in specie without consent in these circumstances.

In its report 'The powers and duties of Trustees' ⁷², the Law Reform Committee raised a problem which arises in connection with distributions to beneficiaries. The position is that a beneficiary entitled to an undivided share in a trust fund and receiving, for example, a cash sum by way of advance or appropriation of part of his share must bring into account when the final division takes place the value of the cash sum at the time of its advancement and not the value of the sum at the time of the division. In inflationary times, the bringing into hotchpot of the value at the time of its advancement will mean that the beneficiary who received part of his share in advance will receive a larger proportion of the whole fund than would be expected given the value of his initial undivided share. Such a problem will not arise if the beneficiary is given the whole of his share in advance.

The Law Reform Committee considered the possibility of addressing this problem by giving trustees the power to assess advances or appropriations as a fraction of the relevant beneficiary's entitlement rather than as a cash sum brought into hotchpot.

If such an approach is adopted, the question arises how the relative values of the beneficiary's share and the trust fund itself should be assessed: should inflation alone be taken into account, or should currency changes and the different taxation implications of different assets also be considered? It is arguable that the flexible

⁶⁹ *Re Freeston's Charity* [1978] 1 WLR 741 at 751

⁷⁰ *Re Freeston's Charity* [1978] 1 WLR 741 at 752

⁷¹ *Re Marshall* [1914] 1 Ch 192

⁷² Cmnd 8733, paras 4.43-4.47

fractional approach, in attempting to achieve justice for the beneficiaries, would simply lead to a muddle where trustees cannot be sure which factors to take into account.

The Law Reform Committee omitted to consider the problems of currency exchange and taxation and recommended a simpler approach allowing trustees to index advances and appropriations to take account of inflation. They also recommended that the fractional approach could, however, be used.

Opinions are sought as to whether a flexible power should be given to assess advances or appropriations in terms of fractional entitlements or whether the apparent justice of this approach belies the greater injustice involved where trustees are open to criticisms however they act.

Wording:

The Trustees may without the consent of any person appropriate the Trust Property in the actual condition or state of investment of the same at the time of appropriation in or towards the satisfaction of the share or interest of any person or persons in the Trust Property [and where cash or assets received by way of advancement or appropriation are subsequently required to be brought into account the Trustees shall be entitled in their discretion to treat advances and appropriations as fractional distributions of entitlement unless in their opinion the cost of valuation of the remainder of the Trust Property is such as to make the said fractional approach uneconomic where they consider the value of the advance or appropriation is small.]

10. Power to accept receipts as full discharge for the payment of a beneficiary's share⁷³

There are currently no implied provisions authorising trustees to accept receipts from parents or guardians of minors or from the treasurers, trustees or other officers of charities pension funds, employee share ownership plans ('known as ESOPs') or trusts. We recommend that Schedule A should include such provisions to protect trustees and to further the interests of beneficially entitled persons or bodies. Opinions are sought as to whether there are any other bodies to whom trustees might make payments of this type so that receipts given to the trustees from officers of such bodies should therefore be included in this power.

⁷³ A similar power exists in the following provisions: the Bermudian Trusts (Special Provisions) Act 1989, Sch para 3, the Florida Statutes, s737.402 (2)(w) and STEP Standard Provisions 3(20) and 6

Wording:

(1) The Trustees may pay or transfer to the parent or guardian of any minor or to any minor over the age of 16 years any sum of money being income of the Trust Property intended to be applied for the maintenance, education or benefit of that minor or any sum of money or other capital of the Trust Property which it is intended should be applied for the advancement or benefit of that minor upon receiving from any such parent, guardian or minor over the age of 16 years an undertaking in writing to apply any such sums of money or other property in the manner intended and the receipt of any such parent, guardian or minor over 16 years shall be a complete discharge to the Trustees.

(2) The Trustees may pay or transfer to the treasurer of any body entitled under the trust (including without prejudice to the generality of the foregoing, charities, pension funds, employee share ownership plans and trusts) or any other officer of such a body whom the Trustees reasonably believe to be an appropriate officer any of the Trust Property to which the body is entitled upon receiving from any such treasurer or other officer an undertaking in writing to apply any such Trust Property in the manner intended and the receipt of any such treasurer or other officer shall be a complete discharge to the Trustees.

Appendix

Schedule A

INTERPRETATION

PARAGRAPH 1

In the following provisions the following words shall have the following meanings unless the context otherwise requires:

“the Trustees” shall mean the trustees for the time being of the trust or the personal representatives for the time being of a deceased person;

“the Trust Property” shall mean any property comprised for the time being in the trust or the estate of a deceased person; and

“Income Beneficiary” in relation to Trust Property shall mean a person (including a trustee who is also a beneficiary) to whom income of the Trust Property is or may be payable (as of right or at the discretion of the Trustees).

BROAD MANAGERIAL POWERS

PARAGRAPH 2

(1) For the purposes of exercising their administrative and managerial functions as trustees (and of deciding whether or not to exercise such functions), the Trustees have in relation to the Trust Property all the powers of an absolute beneficial owner including, particularly, power to make an investment (whether or not income-producing) of any kind anywhere in the world except that they have power to acquire derivatives only for the purpose of safeguarding the value of the Trust Property. Without prejudice to the generality of the foregoing the Trustees have the following particular powers:

(2) The Trustees may from time to time in their discretion hold or acquire property jointly or in common with any other person including a person who is a Trustee, except that they may not acquire equitable title to property jointly with any other person.

(3) The Trustees may in their discretion from time to time at the expense of the income or capital of the Trust Property, or partly out of each, take any steps which they may think proper for the insurance of any assets forming the Trust Property (including insuring any such assets at full replacement value) unless directed to the contrary by all the beneficiaries who are of full age and capacity and between them absolutely entitled to the Trust Property.

(4) The Trustees may delegate any of their administrative and managerial powers to any agents advisers managers (whether corporate or not) and any employees whatsoever and in any part of the world whether or not on a discretionary basis and may pay out of the capital or the income of the Trust Property any fees remuneration or other expenses or outgoings whatsoever payable in connection with any such delegation and the Trustees shall not be liable for any loss or damage caused to the Trust Property by the act or default of any such person or corporation if the Trustees delegated their powers in good faith and selected agreed the terms of appointment of and supervised their delegates with reasonable care and PROVIDED that where the Trustees engage or employ a portfolio manager on a discretionary basis they shall draw up provide the portfolio manager with and from time to time revise guidelines governing decisions about the making and retention of investments.

(5) The Trustees may from time to time cause any of the Trust Property to be registered in the name or names of any other persons or corporations whatsoever and wheresoever resident or situated on behalf of the Trustees and may pay any expenses in connection with the same out of the capital or income of the Trust Property as may be proper and the Trustees shall not be liable for any loss or damage to the Trust Property which may be occasioned by the exercise of this power.

(6) The Trustees may in the exercise of the power at sub-paragraph (5) cause any shares in any company to be registered in the name of any one of their number for the purpose of qualifying such Trustee as a director of such company.

(7) The Trustees may deposit any documents held by them relating to the trust or to the Trust Property with any banker or banking company or any other company which or an associated company of which is authorised to undertake the

safe custody of documents whether or not incidental to its main business and whether or not for direct monetary reward though any sum payable in respect of such deposit shall be payable out of the income of the Trust Property and for the purposes of this sub-paragraph and sub-paragraph (8) 'associated company' is one within the same group as the company and a company is in the same group as another company if it is a holding company or subsidiary of that company or a subsidiary of a holding company of that company where 'holding company' and 'subsidiary' have the meanings set out in the Companies Act 1985.

(8) In agreeing the terms of appointment of delegates nominees and custodians the Trustees may accept terms allowing the delegates nominees and custodians to sub-delegate any of the powers delegated to them to any person or company that the Trustees could themselves appoint, to self deal and operate despite a potential conflict of interest and to exclude liability where the Trustees have concluded in good faith that such terms would be in the interests of the beneficiaries and a delegate shall not be liable for any loss or damage caused to the Trust Property by the act or default of any sub-delegate if it selected agreed the terms of appointment of and supervised its sub-delegates with reasonable care and PROVIDED that where it has received from the Trustees guidelines governing decisions about the making and retention of investments which are relevant to the powers to be sub-delegated it has provided the sub-delegate with any such guidelines unless the sub-delegate is an associated company of any portfolio manager delegate in which case the delegate will be liable for all the acts and defaults of the associated company and a nominee or custodian shall not be liable for any loss or damage caused to the Trust Property by the act or default of any sub-delegate if it has sub-delegated its powers in good faith. [Wording to be finalised when the Law Commission's paper is published]

(9) The Trustees may borrow money with or without giving security and on such terms as to interest repayment and otherwise as they may think fit for any purpose connected with the trusts affecting the Trust Property (including the purchase of or subscription for assets to be held as Trust Property) PROVIDED that no lender from whom the Trustees borrow money in purported exercise of this power shall be concerned to enquire as to the propriety amount or purpose of any such borrowing.

(10) The Trustees may acquire, purchase or promote or join in promoting any company wherever situated or resident for the purpose of holding investments or carrying on or taking over a trade and may concur in any scheme or arrangement for the reconstruction of any such company or for its amalgamation with any other company or for its dissolution or to effect any other change in the form of the company or for the transfer of any such trade carried on by such company to another company PROVIDED that any expense incurred by the Trustees in the acquisition, purchase or promotion of any such company or in entering into any such scheme or arrangement as is contemplated above shall be payable out of the capital of the Trust Property.

(11) For the purpose of carrying on any trade mentioned in sub-paragraph (10) above any company acquired, purchased or promoted to carry on or take over such trade may employ in any such business Trust Property and may engage and determine the terms of employment of any managers (whether corporate or not) and other employees of the business and the trustees may delegate to any such person or corporation any power that they may have to be exercised in relation only to Trust Property held by or used in the trade and may otherwise act in relation to such trade as if they were beneficially entitled to any shares of the company held as Trust Property.

(12) All contracts or arrangements made or entered into by any company acquired, purchased or promoted under sub-paragraph (10) above in pursuance of the exercise of any of the powers contained in sub-paragraphs (10) and (11) shall be valid and effectual notwithstanding that the Trustees or any of them shall have acquired, purchased or promoted any such company or be partners or a partner in any such trade or otherwise interested in the same otherwise than as the Trustees or one of them under the trust so long as the conditions of paragraph 6 are satisfied.

(13) The Trustees shall in exercising their administrative and managerial functions have power to appropriate or to apply the capital or income of the Trust Property in securing the payment of money owed by them or by any company controlled by the Trustees or the performance of any of their obligations or of the obligations of any such company and to give any guarantee, indemnity or warranty and for these purposes to hypothecate, mortgage or charge any of the Trust Property or to deposit or transfer any of the Trust Property with or to any person, firm or company on trust or by way of security.

(14) For the purposes of sub-paragraph (13), a company shall be controlled by the Trustees if the Trustees acting together as trustees

- (a) hold a majority of the voting rights in it; or
- (b) are a member of it and have the right to appoint or remove a majority of its board of directors; or
- (c) are a member of it and control alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it,

or if, under the conditions of section 736 of the Companies Act 1985 the company is a subsidiary of a company which is itself controlled by the Trustees.

(15) In interpreting sub-paragraphs (13) and (14) the provisions of section 736A(1) to (4) and (7) to (12) of the Companies Act 1985 shall apply PROVIDED THAT references in that section to the holding company shall be read as references to the Trustees and references in that section to the subsidiary shall be read as references to the controlled company AND PROVIDED THAT section 736A(5) shall not apply AND PROVIDED THAT section 736A(6) shall apply only if the Trustees hold as bare nominee for another.

PROTECTION OF CREDITORS

PARAGRAPH 3

Without prejudice to the law applicable to the conveyancing of land, where a trustee exercises powers conferred upon him by the trust instrument or by law, any person knowingly dealing with a trustee and who gives full consideration in money or moneys' worth in relation to the act in question, shall be entitled to assume without inquiry that the trustee did not act in breach of any equitable duty of care and, unless his conduct amounts to dishonest assistance in a breach of fiduciary duty, shall be entitled to assume without inquiry that the trustee's powers have been properly exercised by the trustee. Any such person entitled to make such assumptions shall be entitled to be paid out of the Trust Property irrespective of the state of accounts between such trustee and those interested in the Trust Property.

REMUNERATION CLAUSE

PARAGRAPH 4

Any individual or corporate Trustee being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all reasonable professional or other charges for business done by such Trustee or his firm in relation to the trust including work done for a company connected with the Trust Property and also all reasonable charges in addition to disbursements for all other work and business done and all time spent by such Trustee or his firm in connection with matters arising, including matters which might have been attended to in person by a Trustee not being a solicitor or other person so engaged.

RETENTION OF BENEFITS

PARAGRAPH 5

Any Trustee may act as an officer or employee of any company in which the Trust Property may be invested (including but not limited to any company acquired, purchased or promoted by the Trustees) or as an officer or employee of any subsidiary of any such company and may retain for himself any reasonable remuneration or other benefits which he may receive by virtue of his position as such officer or employee, notwithstanding that any votes or other rights attached to any such investment may have been instrumental either by themselves or in combination with any other votes or rights whether or not of a similar nature or by reason of the non-exercise of any such votes or rights in procuring or maintaining for himself his position as such officer or employee.

DISPOSITION TO A TRUSTEE AS FIDUCIARY

PARAGRAPH 6

The disposition of Trust Property by the Trustees thereof or of any asset owned by a company controlled by the Trustees to one or more of the Trustees not acting in his or their personal capacity nor acting as nominee or trustee for a person or company mentioned in paragraph 7(2)(a), (b) or (c) shall not be voidable by the beneficiaries unless such beneficiaries can show that at the time the disposition was made and to the actual knowledge of the Trustees at that time such disposition was contrary to their interests.

DEALINGS WITH A TRUSTEE BENEFICIARY

PARAGRAPH 7

(1) A Trustee who also has an interest in the Trust Property by virtue of being a beneficiary of the trust (an "Interested Trustee") may:

(a) enter into a transaction with the Trustees acting either in their own names or on behalf of any company acquired, purchased or promoted under the provisions of paragraph 1(9) or controlled by them as defined in paragraph 1 (13);

(b) be interested in an arrangement in which the Trustees or any company so acquired, purchased or promoted or controlled by them are or might have been interested; or

(c) act (or not act) in any other circumstances

even though his fiduciary duty under the trust conflicts with other duties or with his personal interest

PROVIDED that

(i) the Interested Trustee first discloses to the Trustees the nature and extent of any material interest conflicting with his fiduciary duties; and

(ii) there is an Independent Trustee in respect of whom there is no conflict of interest and the Independent Trustee considers that the transaction, arrangement or action is not contrary to the general interest of the trust.

(2) An 'Independent Trustee' in relation to a Fiduciary means a Trustee who is not:

(a) a brother, sister, ancestor, [uncle, aunt, nephew, niece], descendant or dependent for the time being of the Independent Trustee;

(b) a spouse of the Interested Trustee or of anyone listed at (a) above; or

(c) a company controlled by one or more of the persons listed at (a) and (b) above.

(3) The powers of the Trustees may be used to benefit an Independent Trustee (to the same extent as if he were not a Trustee) PROVIDED that there is an Independent Trustee in respect of whom there is no conflict of interest.

(4) For the purposes of sub-paragraph (2)(c), a company shall be controlled by one or more of the persons listed at (a) and (b) above if such persons acting together

(a) hold a majority of the voting rights in it; or

(b) are a member of it and have the right to appoint or remove a majority of its board of directors; or

(c) are a member of it and control alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it.

EXCLUSION OF s.11 TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

PARAGRAPH 8

Section 11 of the Trusts of Land and Appointment of Trustees Act 1996 (duty of consultation with beneficiaries) shall not apply.

APPROPRIATIONS OF TRUST PROPERTY

PARAGRAPH 9

The Trustees may, without the consent of any person, appropriate the Trust Property in the actual condition or state of investment of the same at the time of appropriation in or towards the satisfaction of the share or interest of any person or persons in the Trust Property [and, where cash or assets received by way of advancement or appropriation are subsequently required to be brought into account, the Trustees shall be entitled in their discretion to treat advances and appropriations as fractional distributions of entitlement unless in their opinion the cost of valuation of the remainder of the Trust Property is such as to make the said fractional approach uneconomic where they consider the value of the advance or appropriation is small.]

VALID RECEIPTS

PARAGRAPH 10

(1) The Trustees may pay or transfer to the parent or guardian of any minor or to any minor over the age of 16 years any sum of money being income of the Trust Property intended to be applied for the maintenance, education or benefit of that minor or any sum of money or other capital of the Trust Property which it is intended should be applied for the advancement or benefit of that minor upon receiving from any such parent, guardian or minor over the age of 16 years an undertaking in writing to apply any such sums of money or other property in the manner intended and the receipt of any such parent, guardian or minor over 16 years shall be a complete discharge to the Trustees.

(2) The Trustees may pay or transfer to the treasurer of any body entitled under the trust (including without prejudice to the generality of the foregoing, charities, pension funds, employee share ownership plans and trusts) or any other officer of such a body whom the Trustees reasonably believe to be an appropriate officer any of the Trust Property to which the body is entitled upon receiving from any such treasurer or other officer an undertaking in writing to apply any such Trust Property in the manner intended and the receipt of any such treasurer or other officer shall be a complete discharge to the Trustees.

Summary of Questions for Responses

1. Should there be no reform of the law because the current position is satisfactory?

There should be no reform / There should be reform

2. Should an attempt be made to codify all trustees' implied powers (including sections 15, 22(1), 31 and 32 of the Trustee Act 1925) in an all-embracing Schedule A where trustees can find all the powers that they may need after the enactment of the proposals contained in Law Commission CP No 146 or should we leave alone sections 15, 22(1), 31 and 32?

An attempt should be made to codify trustees' powers / sections 15, 22(1), 31 and 32 should be left alone

If you think that there should be an attempt to codify trustees' powers, should the opportunity be taken to update and amend sections 15, 22(1), 31 and 32 or any other sections of the Trustee Act?

Yes / No If 'Yes', what amendments do you suggest?

3. Should Schedule A be amended to include a power for trustees to modify or enlarge their own powers?

Yes / No If 'Yes', please set out your reasons

4. Should Schedule A apply to all trusts whether created before or after the coming into force of the legislation (subject to contrary intention)?

Subject to contrary intention, Schedule A should apply to all trusts created before or after it comes into force / The Schedule should apply to new trusts only

If Schedule A is to apply to *all* trusts, subject to contrary intention, then, to deal with old trusts where doubts may exist over the question of contrary intention, would it not be better to provide for Schedule A powers to apply to all old trusts but no old trustee shall be liable for breach of trust for only using the powers available to him before commencement of the new legislation *Yes / No*

or would you prefer the new powers only to apply to old trusts if either the settlor or the trustees (if therein certifying they believe it does not contravene the settlor's intentions) execute a deed incorporating Schedule A *Yes / No*

5. Do you agree that a broad new managerial power giving trustees all the managerial, administrative and investment powers of a beneficial owner should be included in Schedule A (see Schedule A paragraph 2(1)) and should be given a broad, liberal interpretation (see paragraph 2(14))?

Yes / No If 'No', please set out why not

6. Do you agree that such broad power should not extend to allowing trustees to trade other than *via* a company under sub-paragraph (9)?

Yes / No If 'No', please set out why not

7. Do you agree that the wording of the broad power covers those matters sought to be covered by it (as reflected in the commentary in paragraph 3 of Chapter 2)?

Yes / No If 'No', please set out how the wording needs to be changed in order to do so

8. Do you agree that Schedule A should include a power for trustees to hold or acquire property jointly or in common with others (see Schedule A paragraph 2(2))?

Yes / No If 'No', why?

9. Do you agree that Schedule A should include a power for trustees to insure trust property (see paragraph 2(3))?

Yes / No If 'No', why?

10. Should this power allow payment to be allocated between income and capital?

Yes / No Please set out your reasons

11. Do you agree that Schedule A should include a power for trustees to delegate their powers but subject to reviewing any delegation at regular intervals (see paragraph 2(4)-(8))?

Yes / No [NB WORDING TO COINCIDE WITH THE LAW COMMISSION'S WORDING SO THERE IS NO NEED FOR FURTHER CONSULTATION ON THIS UNLESS WE DISAGREE WITH THE LAW COMMISSION'S APPROACH]. If 'No', why?

12. Do you agree that in the special discretionary cases in the proviso to paragraph 2(4), the special protection there mentioned is necessary?

Yes / No If 'No', why?

13. Do you agree that the powers of trustees of a charitable trust should be restricted as in paragraph 2(5) as recommended by the Law Commission Paper No 146, paragraphs 6.62-6.68?

Yes / No If 'No', why?

14. Do you agree that Schedule A should include the proposed powers to use nominees and custodians (see paragraph 2(6))?

Yes / No If 'No', why?

15. Do you agree that reasonable fees only should be payable but that trustees should not have to show that it was reasonable for them to employ the delegate, nominee or custodian?

Yes / No If 'No', why?

16. Do you agree that fees should be allocated between capital and income as the trustees may see fit?

Yes / No If 'No', why?

17. Do you agree that the general standard of care required of trustees in selecting, appointing and supervising delegates, nominees and custodians should be that defined as “reasonable care” (see paragraph 2(7))?

Yes / No If 'No', why?

18. Do you agree that trustees should not be liable by reason of only having agreed terms of appointment that allow delegates, nominees or custodians to self-deal and operate despite any conflict of interest, to exclude liability for negligence and to sub-delegate on similar terms, so long as they considered the risks inherent in such terms and then concluded in good faith that, on the whole, such terms were in the interests of the trust, so that they do not need to show that such terms were reasonably necessary or were in the reasonable opinion of the trustees in the best interest of the trust?

Yes / No If 'No', why?

19. Do you agree that the trustees should be able to delegate their powers to one of themselves but that there should then not be vicarious liability for the acts or defaults of such trustee-delegate, only liability for negligent failure to exhibit reasonable care in the selection, appointment or supervision of such delegate?

Yes / No If 'No', why?

20. Do you agree that Schedule A should include a power for trustees to borrow money with or without security to cover, *inter alia*, borrowing to buy assets for the trust (see Schedule A paragraph 2(8))?

Yes / No If 'No', why?

21. Do you agree that no limit should be set on the percentage value of the fund which may be borrowed so long as this is in the best interests of the beneficiaries and complies with the trustees’ duty of care?

Yes / No If 'No', why?

22. Do you agree that Schedule A should include a power for trustees to set up and use a company and trade through such a company (see Schedule A paragraph 2(9)-(11))?

Yes / No If 'No', why?

23. Do you agree that this power should apply to charity, as to other, trustees?

Yes / No If 'No', why?

24. Do you agree that Schedule A should include a power for trustees to give guarantees, indemnities and warranties (see Schedule A paragraph 2(12)-(13))?

Yes / No If 'No', why?

25. Do you agree that Schedule A should make it possible for creditors knowingly dealing with a trustee to be paid out of a trust fund where a trustee was exercising powers conferred upon him, irrespective of whether such powers were improperly exercised (unless the creditor was dishonestly assisting in a breach of trust) and of whether the trustee acted negligently or is indebted to the trust (see Schedule A paragraph 4)?

Yes / No If 'No', why?

26. Do you agree that Schedule A should include a power for trustees (even if they are trustees of a charitable trust) to charge for their trusteeship (see Schedule A paragraph 4))?

Yes / No If 'No', why?

27. Should the wording of the power cover all non-professional work in fact carried out by the individual or corporate trustees or should trustees only be authorised to carry out and charge for such work if it is work which might reasonably be done by a professional person (in other words, work for which no special bargain with a non-trustee client would have to be made)?

The power should cover all non-professional work the power should cover non-professional work only if it is work which might reasonably be done by a professional person

28. Do you agree that Schedule A should include a power for trustees to act as directors of a company the securities of which are owned by the trust and to receive remuneration (see paragraph 5)?

Yes / No If 'No', why?

29. Should such a power apply to charity, as to other, trusts?

Yes / No If 'No', please set out why not.

30. Do you agree that Schedule A should include a power for trustees to exercise their powers and retain property despite any personal interest that they might have in the property or in exercising their powers

where a trustee-disponee is only interested in a fiduciary capacity (for example, as a trustee of a second trust, T2) (see paragraph 6)?

Yes / No If 'No', why?

31. Do you agree that Schedule A should include a power for trustees to exercise their powers and retain property despite any personal interest that they might have in the property or in exercising their powers where a trustee-disponee has an interest by virtue of being a beneficiary so long as an independent trustee agrees to this (see paragraph 7)?

Yes / No If 'No', why?

32. Do you agree that section 11 of the Trusts of Land and Appointment of Trustees Act 1996 should be excluded (see paragraph 8)?

Yes / No If 'No', why?

33. Do you agree that Schedule A should include a power for trustees to appropriate assets and distribute property *in specie* without consent (see paragraph 9)?

Yes / No If 'No', why?

34. What arrangements on the final division of assets between beneficiaries should be made for the bringing into account of earlier distributions to beneficiaries?

(a) The distributions should simply be brought into hotchpot as a cash sum and with no allowance made for inflation

(b) The distributions should be brought into hotchpot as a cash sum, indexed to take account of inflation

(c) The distributions should be assessed as a fraction of the beneficiary's entitlement at the time

(d) The trustees should be given a flexible power so that they can choose which approach to take

35. Do you agree that Schedule A should include a power for trustees to accept receipts as full discharge for the payment of a beneficiary's share

(a) from parents or guardians of minors (see paragraph 10(1)? **Yes / No**

(b) from the treasurers, trustees or other officers of charities pension funds, employee share ownership plans or trusts (see paragraph 10(2)? **Yes / No**

(c) from the officers on any other similar bodies? **Yes / No**

If 'No', why?

36. Do you agree that the Lord Chancellor should have power by statutory instrument to add or amend powers in Schedule A wherever he deems this expedient?

Yes /No

37. Do you have any further comments on the wording of the powers in Schedule A?

38. Are there any other powers that you would like to see set out in Schedule A? **Yes /No**

If 'Yes', please set these out below

39. Do you have any other comments?