CURRENT ISSUES FOR TRUSTEE LEGISLATION

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Trustee legislation is in the doldrums. There has been timid legislative activity concerning the investment of trust funds but no legislature in England, Australia or Canada has undertaken a general reform of its trustee legislation, although Canadian trustee legislation has not been obfuscated by the adoption of common law regime of settled land. In 1984, the Ontario Law Reform Commission produced its comprehensive *Report on the Law of Trusts*,[1] but there has been as yet no legislative activity. In Queensland, the Trusts Act 1973 made considerable changes to the law of trusts in the context of the assimilation of settled land with trusts of personalty, although most of that legislation now looks very conservative. In 1982, the Great Britain Law Reform Committee published its report entitled the *Powers and Duties of Trustees*,[2] but that report recommended minimal changes and effect has not as yet been given to it.

More recently in Australia an extensive private research project, undertaken by a small team of eminent academics and practitioners in the

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1. Ontario Law Reform Commission *Report on the Law of Trusts* (1984).
2. Law Reform Committee *Twenty-Third Report: The Powers and Duties of Trustees* (1982) Cmnd 8733.

trusts area,[3] produced in April 1989 a work entitled Model Trustee Code for Australian States and Territories ("Australian Model Code"). The final work did not turn out to be a code in the technical sense. It emerged as 99 clauses which together would constitute, in the team's view, an up-to-date Trustee Act suitable for the Australian States. Inevitably, the clauses bear the hallmark of the particular legislative provisions which they are intended to replace, if adopted by an Australian State legislature. Moreover, the work has been compiled so that a legislature minded to update any part of its trustee legislation may utilise the experts' work on a clause by clause basis.

One of the purposes of this article is to draw attention to that work, but its main purpose is to raise issues which to the author seem to be fundamental issues for consideration for the reform of trustee legislation. Some of these issues are novel and arise from the great change in the economic environment which has overtaken the world in the last sixty years, the consequences of which are now bearing inescapably upon those who have to administer trusts. Some derive from the fact that English property law has failed to adapt itself to post-1945 social and economic conditions; and some derive from mistakes made by English legislators, mistakes which have sometimes been uncritically received into legislation elsewhere. This article is a call to legislatures to produce trustee legislation fit for the twenty-first century.

I. THE ABOLITION OF SETTLED LAND

The common law regime of settled land still exists in England, Australia and Canada, although in Canada it is regarded as a remnant. In Australia it is still used in family settlements where it is desired to ensure that land may not be sold by trustees. In England[4] and some Australian States legislation designed to ensure the commercial viability of settled land gave tenants for life power to sell the fee simple, even although there was vested in them only a life interest. Moreover, major powers of

3. The members of the team were: The Hon Mr Justice Meagher of the NSW Supreme Court; the Hon Mr Justice Gummow of the Federal Court of Australia; Professor Emeritus H A J Ford of the University of Melbourne; Doctor I J Hardingham of the Victorian Bar; Professor P D Finn of the Research School of Social Sciences at the Australian National University; Mr N Crago Senior Lecturer in Law at the University of WA; Mr B T Ball formerly General Manager of Queensland Trustees Limited; and Mr W A Lee (Convenor and Secretary).

4. In particular, the (UK) Settled Land Act 1882 (45 and 46 Vict c 38).

management were vested in tenants for life which overrode provisions contained in the trust instrument: for instance, provisions which might prevent sale or leasing. The English legislation of 1882[5] has been adopted in some Australian States, but was not adopted in Canada.

But the regime of settled land, as well as the statutes which perhaps have prolonged its existence, may fairly be described as anomalous. They are the products of the obsolete system of primogeniture, and the overriding powers of management, including a power to sell, conferred upon the tenant for life reflecting his social position as eldest son of a perhaps noble family.

The regime of settled land has as its counterpart in the law of trusts the trust for sale. If a settlor wished to avoid creating a common law settlement, the land might be vested in trustees for sale. He had no third alternative. In either event the land could be sold under the overriding powers conferred by statute on the tenant for life, or by the trustees for sale. Moreover, the trust for sale has been seen as useful and has been extended by statute to meet other needs: for instance, in some States to describe the tenure of joint tenants and administrators of intestate estates.

Nevertheless, the trust for sale is an artifice with elements of legal fiction embedded in it. Those who create trusts for sale frequently have no desire at all that the land should be sold. Even more fictional is the metamorphosis effected once a trust for sale of land is created, since what was realty becomes personalty. Equity deems to be done that which ought to be done; the trustee for sale *ought* to sell and convert the land into money - personalty - and so by the equitable doctrine of conversion the land is deemed, from the moment the trust for sale comes into being, to be personalty.

So, taking a synoptic view, we still have in relation to land:

(a) the settlement of the legal estates; and
(b) the trust for sale;

and in relation to property other than land:

(c) the trust for sale; and
(d) the simple trust with or without a power of sale.

5. Ibid.

If settled land were to be abolished, the trust for sale would lose its principal and original function as a vehicle for the avoidance of that regime. It is submitted that the continued existence of the obsolete regime of settled land and its symbiont the trust for sale is a hindrance to orderly thinking in property law in general and in the law of trusts in particular.

Might the abolition of settled land and the trust for sale have adverse consequences? It is submitted that the answer is in the negative. After all, these regimes related originally only to land law - they need never affect personalty. The ordinary law of trusts has always sufficiently protected its beneficiaries. But abolition would mean the settlors could prevent, for the first time in England since 1882, the sale of settled land, as they may the sale of settled personalty. Would that be unacceptable?

The Queensland Trusts Act 1973 addressed itself to this question when it abolished settled land, and resolved it by conferring *overriding* management powers upon trustees, including a power of sale, taking the concept of overriding power from settled land precedents. So in that State, trustees exercise certain management powers, including a power of sale, whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

The authors of the Australian Model Code rejected the Queensland approach. The Code follows the usual rule of the law of trusts and makes most powers conferred on trustees, including the power of sale, subject to any contrary intention appearing in the instrument (if any) creating the trust. The difference in practice is perhaps not all that great. Trustees without a power of sale must apply to the court and demonstrate that it is expedient that the property be sold.

There is another objection to the abolition of settled land and that is that it is sometimes desirable to restrain trustees from exercising certain powers. Although overriding powers were conferred upon the tenant for life under the regime of settled land, the tenant was the person least likely to use them irresponsibly because he was the eldest son, whose social position depended upon his retention of the family landed estates. Under a simple trust regime, less constraint is placed on the trustees. There is, however, a simple answer to this objection. If the settlor considers that certain powers which are to be invested in trustees should be exercised sensitively, those powers can be made to be subject to the consents of others.

To conclude, it is submitted that it is time for trustee legislation to abolish the common law regime of settled land; to abolish statutory trusts for sale; and, to scrutinise every power conferred upon trustees and delineate clearly which (if any) should be exercisable, whether or not a contrary intention appears in the instrument (if any) creating the trust.

II. DEGREE OF ABSTRACTION

Perhaps the most difficult and jurisprudentially the most significant issue for trustee legislation is that of the degree of abstraction of language required. The problem is that existing trustee legislation tends to be stamped with the language of the United Kingdom Trustee Act 1925[6] ("1925 Act"), which was itself a consolidating measure and heavily dependent on the language of nineteenth century conveyancers. The language is outmoded and the mentality is barren. Dozens of sections in trustee legislation are concerned with the administrative powers of trustees, such as powers to sell, lease, renew leases, purchase a dwelling as a residence for a beneficiary, charge land to pay debts, raise money by mortgage, insure, repair and improve trust property, carry on a business, convert a business into a corporation, postpone sale, compound claims, issue receipts, dedicate land for highways and so on. Some of these provisions are very lengthy and require the assistance of the court or the advice of valuers. The issue that has to be resolved is that of the degree of regulation which is appropriate to govern the trustees of today. The desire to add to the burden of detail seems to have gripped every legislature: the United Kingdom Variation of Trusts Act 1958[7] and Trustee Investments Act 1961[8] both exemplify tiresome detail, dedication to a very specific issue, and limited utility as a result.

To improve matters, trustee legislation must decide either to increase the regulation of trustees but in language which the ordinary person can comprehend, or to decrease the regulation. The Australian Model Code adopts the latter approach.

6. 15 and 16 Geo 5 c 19.
7. 6 and 7 Eliz 2 c 53.
8. 9 and 10 Eliz 2 c 62.

Some Australian examples of enlarged powers

3.9 - Powers of leasing

(1) A trustee may let or sublet trust property from year to year, or for a weekly, monthly or other like tenancy or at will, and may enter into a sharefarming agreement for any period not exceeding one year.

(2) A trustee may grant a lease or sublease of trust property for any term not exceeding TEN years to take effect in possession within one year next after the date of the grant.

(3) A trustee may grant to a lessee or sublessee a right of renewal for one or more terms at a rent to be fixed or made ascertainable in a manner specified in the original grant but so that the aggregate duration of the original and renewal terms shall not exceed TEN years.

(4) The trustee may grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by the lessee or sublessee in upon or about the property leased or subleased.

3.11 - Power to carry on a business

(1) Where at the commencement of the trust the trust property or any part of it was being used by the settlor in carrying on any business, whether alone or in partnership, the trustee may continue to carry on that business for such reasonable period as may be necessary for the purpose of selling it or any part of it as a going concern, or for the purpose of winding it or any part of it up.

(2) Where any such property is vested in a trustee with a power, conferred by the trust instrument, to postpone sale, the trustee may carry on the business as a going concern notwithstanding any trust for sale or conversion affecting it.

(3) ...

(4) In this section trustee includes personal representative.

3.17 - Repairs, maintenance and improvements

(1) A trustee may, in respect of any trust property, expend money for -

(a) the repair, maintenance, upkeep or renovation of the property;

(b) ...

(c) the improvement or development of the property; and

(d) the construction and maintenance of such roads, streets, access ways, service lanes and footpaths, and such sewerage, water, electricity, drainage and other works as will be beneficial to the property, notwithstanding that they are intended to be constructed wholly or partly on land not subject to the same trusts.

(2) A trustee may dedicate any estate or interest in land subject to the trust for such public purposes as will be beneficial to or constitute an amenity for the property.

(3) Expenditure of capital moneys for any of the purposes mentioned in this section shall not exceed, except with the consent of the Court, one third of the value of the trust estate.

All these provisions greatly increase the powers of trustees, in comparison with powers conferred upon them in these respects in existing legislation. But they still enshrine old language and a regulatory mentality.

Could trustee legislation go much further? It is one thing to expand specific powers as far as seems conceptually possible within the limitations of their specific nature. It is another to transcend those limitations altogether. It is to be doubted whether any law reform commission or legislature would have the conviction to do so, not that it is impossible. Legislation could quite easily confer the powers which absolute beneficial owners have on trustees - *subject to their duties as trustees*. Then all statutory powers of management conferred on trustees could be omitted. As a result, in management questions, it would never be necessary to consider whether the trustees had power to do as they did, or to interpret the exact extent of any statutory power conferred. All that would be necessary would be to decide whether the trustee had acted, in all the circumstances, with care, skill, prudence and diligence. Neither would settlors be concerned with inserting large powers into trust instruments, so as to avoid the limitations of the statutes, although they could impose limitations upon trustees if they wished to do so.

In other words, trustee legislation would confer unlimited powers on trustees but would stress their fiduciary duties and disabilities and perhaps set out matters to which they should give consideration[9]. If that leap of the legislative imagination could take place, trustee legislation could be disencumbered of many hoary provisions.

Similarly, it is arguable that the court should be given plenary powers to make such orders and do such acts as it is expedient to make or do for the due administration of the trust and the protection of beneficiaries - a power they probably have at common law but are reluctant to use because

9. See text at 519.

of the existence of statutory straitjackets - and that the detailed but limited powers given to them by legislation should simply be repealed. An approach of this sort, on the highest level of abstraction, could significantly reduce the length of trustee legislation.

III. SETTING STANDARDS OF FIDUCIARY CONDUCT FOR TRUSTEES

A. General fiduciary duties and disabilities

A stranger reading trustee legislation might be pardoned for thinking it strange that although the legislation allows trustees to do all sorts of things, hedged about by restrictions of widely varying degrees of detail, trustees are rarely if ever reminded of the general nature of their fiduciary role or of the general restrictions which that role places upon them. This omission is historically explicable, but is it desirable that legislation to which all trustees must inevitably refer should remain silent about their general position, leaving them to glean major propositions from the interstices of case law? The authors of the Australian Model Code concluded that it is desirable that the following provisions should be included in trustee legislation.

> *1.10 Fiduciary position of trustee*
>
> (1) Except to the extent expressly authorised by the trust instrument the trustee shall in all respects act in a fiduciary manner and exclusively in the interests of the beneficiaries.
>
> (2) Except to the extent permitted by law or expressly authorised by the trust instrument the trustee shall not -
>
> (a) make any profit or derive any benefit from his connection with the trust whether for himself or for any other person;
>
> (b) allow his own personal interest to conflict with his duty as trustee; or
>
> (c) undertake any duty which conflicts with his duty as trustee.
>
> (3) Subject to this Act no term in a trust instrument is valid insofar as it purports to exonerate or indemnify any trustee ... for any liability arising from a breach of any of the duties set out in subsections (1) and (2) of this section.

These words immediately indicate that the work in which they appear is not intended to be a code in the strict sense, enshrining the law, but a traditional statute: sometimes declaring, sometimes enhancing and some-

times reforming that most sophisticated structure raised by equity, the trust. The words of sub-section (1) can only be declaratory. Although phrased in the most abstract language, they inescapably draw the attention of trustees to their fiduciary position.

Sub-section (2) also underlines, by its opening words, that its object is to draw trustees' attention to the disabilities which the fiduciary office imposes upon them.

Sub-section (3) ensures that a trust instrument cannot abrogate the law by providing, in general terms, that a trustee may be exonerated from or indemnified in respect of any liability arising from a breach of any of the duties set out in the section. This is not inconsistent with the provision contained in sub-section (2) which refers to the trust instrument's expressly authorising a trustee to do something which would otherwise be a breach of trust, because such an authorisation is particular and expressly given in advance, whereas a provision relieving a trustee in advance from any future, unspecified liability for breach of the duties referred to would undermine the entire concept of fiduciary duty. This is a topic which receives further consideration below.

B. Duties of management

Section 1.11 of the Australian Model Code reads as follows:

> *1.11 - Duties of management*
>
> In the management and administration of the trust including the exercise of his powers authorities and discretions the trustee shall act with care, skill, prudence and diligence having regard to -
>
> (a) the nature, composition and purposes of the trust; and
>
> (b) the skills which the trustee possesses or ought, by reason of his business or calling, to possess.

The most significant feature of this provision is that it does not set a rigid standard of conduct for trustees. It does not set a "prudent man of business" standard, or the standard of "a person of ordinary prudence".[10] Nor is it captivated by the uninhibited verbiage of the new Californian rule,[11] which is admittedly preoccupied with the duties of trustees when

10. See the Ontario Law Reform Commissions approach: supra n 1 vol I, 26-27, 219-222.
11. Cal Civ Code § 2261 (West 1984) (effective 1 Jan 1985).

investing. The Californian rule refers to the care, skill, prudence and diligence "that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims",[12] so the Californian trustee has to be "familiar" with the trust. The use of the word "prudent" twice, once as an adjectival noun qualifying "shall act" and later as an adjective qualifying "person" inevitably involves ambiguity.

The Australian Model Code reflects the fact, admitted by the Great Britain Law Reform Committee,[13] that there are different types of trustees and that different standards are required of them. But the Committee takes the view that there is no need to change the prudent man of business test for voluntary trustees, although a higher standard must be imposed on paid trustees. This view could result in attempts to define these higher duties, an exercise which could only result in a greater degree of rigidity. The dilemma to which that would lead has been articulated by the present Chief Justice of the High Court of Australia, Sir Anthony Mason.

> In one sense the section [s 52A of the Trade Practices Act] is an illustration of the dilemma which faces the draftsman of a statute who seeks to introduce an equitable concept in the Elysian fields of commerce. Striving for that degree of certainty which commercial men constantly demand from others but rarely provide in their own arrangements for themselves, the draftsman endeavours to spell out all the relevant considerations, depriving the court of important areas of choice by interpretation of the statute, instead of allowing the court to identify and evaluate for itself the relevant factors.[14]

The strictures of these observations lead to the conclusion that it should be for the judge to decide whether, in all the circumstances of a case, a certain trustee should or should not be held liable for a breach of trust. Legislation, whether parliamentary or judicial, is inappropriate. Further, it may be asked, if a legislative standard is set, what effect that might have on the power given to the court by statute to excuse a trustee who has acted honestly and reasonably and ought fairly to be excused.

12. Ibid, § 2261(a)(1).
13. Supra n 2, paras 2.12-2.16.
14. A Mason "Themes and Prospects" in P D Finn (ed) *Essays in Equity* (Sydney: Law Book Co, 1985) 242, 243-244.

There is yet another objection. Some trustees are more skilled than others. The courts should and do require more of trustees with greater skills than those with lesser skills. The court's power to excuse trustees who have acted honestly and reasonably and ought fairly to be excused is used to relieve them.[15] It is proper to expect higher standards of skilled trustees, particularly those who charge for their services, than of friends or relatives of the settlor.

2. Exoneration of trustee from liability for breach of trust conferred by trust instrument

Occasionally, a trust instrument contains a provision exonerating or indemnifying a trustee from liability for failing to act with care, skill, prudence or diligence. The extent of the relief given by the settlor can vary, but such terms are construed strictly by the courts and will not be allowed to include breaches of trust committed "in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if [the trustee] has personally profited through a breach of trust".[16] The trouble with exemption clauses is that they are sometimes justifiable even although expressed in the broadest of terms, as *Hayim v Citibank*[17] demonstrates. There, the trust instrument provided that the trustees should have "no responsibility or duty" with respect to certain property, a dwelling house in Hong Kong worth millions of dollars. The object of the provision was to enable the trustees to allow certain close relatives to live in the dwelling house but without making them beneficiaries under the trust, which would have had tax disadvantages. The Privy Council gave effect to the provision, where the trustees had, in fact, done what was expected of them, although strictly speaking in breach of trust. It is submitted, however, that the law cannot allow trustees armed with the exoneration clause to behave just as they please. When settlors arm trustees with exoneration or exemption clauses there is presumably a reason for it. That reason may not necessarily appear from the terms of the trust and the terms may well exceed what is required from the circumstances which impelled the inclusion of the provision. It is there-

15. *Fales v Canada Permanent Trust Co* (1976) 70 DLR (3d) 257.
16. W F Fratcher *Scott's The Law of Trusts* 4th edn (Boston: Little Brown and Co, 1988) § 222.3.
17. [1987] AC 730.

fore submitted that before a trustee in breach should be permitted to rely on an exoneration provision, it should be shown that the conduct complained of was the conduct envisaged by the settlor: that is, that an exoneration or exemption clause should be given effect to the extent that it meets the considerations which affect the mind of the settlor in conferring it. However, the Australian Model Code approaches the matter as follows:

> *6.23 - Power to relieve trustees from personal liability*
>
> (1) Where a trustee is or may be personally liable for any breach of trust or fiduciary duty, the Court may relieve the trustee either wholly or partly from personal liability for that breach if it appears to the Court that the trustee ought fairly to be excused.
>
> (2) Where there is a term in a trust instrument exonerating or indemnifying a trustee for failing to act with care, skill, prudence or diligence, the Court may give such effect to that term as it considers to be fair in all the circumstances of the case before it.

Whether sub-section (2) would quite cover the facts in *Hayim v Citibank*[18] is perhaps debatable because in that case no duty at all was cast upon the trustees with respect to the particular property.

IV. THE INVESTMENT OF TRUST FUNDS

At the end of the eighteenth century, judges began to insist that trustees invest trust funds only in certain government securities. They were not permitted to invest even in first mortgages of the legal estate. Since then, trustee legislation has regularly concerned itself with enlarging trustees' investment powers and a list of authorised investments is found in many trustee Acts. However, both the original restrictive rule and the legislative attempts to alleviate it were set in a social and economic context which is no longer even remotely relevant to the needs of the modern trust, so much so that it can now fairly be said that traditional wisdom concerning the investment of trust funds is likely to bring disaster rather than prosperity to trusts. The existing wisdom is appropriate only for a trust in which capital and income are required to be kept in separate accounts, *and* where the trust is of brief duration.

18. Ibid.

The social context in which the lists of authorised trustee investments were compiled was the context of successive beneficial interests, usually those of life tenants and remaindermen - the life tenant often being the widow of the settlor and remaindermen the children. The economic context was that of a stable currency and low taxation rates. But today's trusts are rarely for life tenants and remaindermen and currency is unstable, as manifest by decades of chronic inflation. As for taxation, it may fairly be said that not only taxation itself but increasing taxation is as inescapable as death itself. In case the phenomenon of inflation proves (after how long?) to be transitory, trustee law should not assume that current investment practices are any more appropriate than those embedded in the minds of trustee lawyers. But to abandon lists to which recent additions have been made, some of which in part make room for changed circumstances, goes against the conservative grain.

The Australian Model Code compromises. It retains the lists of authorised trustee investments but relocates them into schedules, and it provides an executive mechanism for adding to and subtracting from the lists. The justification for retaining the lists is that they give guidance to trustees of insignificant trusts where the settlor has failed to give appropriate investment powers.

However, a more positive provision has been inserted in the Code as follows:

> *2.2 - Matters for consideration in the investment of trust funds*
>
> In the exercise of his powers of investment the trustee shall consider -
>
> (a) the trust fund as a whole, the nature, composition and purposes of the trust and its anticipated duration;
>
> (b) the needs and circumstances of the beneficiaries;
>
> (c) the suitability of the investments held and of investments proposed;
>
> (d) the need for diversification of investments;
>
> (e) the administrative costs, including commission, fees, charges and duties payable, of making or varying any investment;
>
> (f) the taxation consequences of making or varying any investment; and
>
> (g) the possible impact of inflation or deflation.

The ideas embedded in these paragraphs come from a variety of sources, including existing trustee legislation and the Ontario Law Reform Commission's report.[19] The main reason for including provisions of this kind is to undermine any view that trustees can invest at random within the investment power conferred upon them, whether by legislation or the trust instrument. The provision departs from the notion that trust investments must be considered on an individual basis and embraces a whole portfolio approach, recently referred to by Justice Hoffman in *Nestle v National Westminster Bank Plc*.[20] That is, a trustee should not concern himself merely with the question of whether an investment about to be undertaken is in itself prudent, but whether it is appropriate in all the circumstances of the trust.

Another view of the Australian experts is not as manifest. There is no requirement in the Australian Model Code that trustees consult a financial adviser, as there is in trustee legislation in England, Canada and Australia. The view taken was that while trustees should no doubt be empowered to employ financial advisers, they should not be bound to do so. Whether trustees should obtain the advice of financial experts should be a matter of prudence rather than compulsion, and will vary according to the degree of expertise of the trustees and the nature of the investment proposed. To insist upon trustees obtaining such advice may be costly because it may force unnecessary consultations on trustees, and misleading in so far as it might suggest that trustees are not otherwise required to seek such advice. In any case there always remains the more basic question: Who is a good investment adviser?

V. CAPITAL AND INCOME ACCOUNTING

The reform, indeed the abolition, of all the rules (if rules they are) relating to capital and income accounting is an urgent task for trustee legislation. The rules were created by equity, and in some States embellished by statute, at a time when most trusts were for successive beneficiaries, and so required that accounts of capital be kept separate from accounts of income. Capital and income accounting is, after all, the mechanism by which future interests in property are protected. This is not

19. Supra n 1.
20. (Unreported) English High Court, Chancery division, 1988, No N1897 of 1984.

the place to go over the many rules created by equity in the nineteenth century to ensure correct capital and income accounting within the economic perspectives of that era, but the rules all reflect two assumptions which are no longer at all tenable. One is that there is no such thing as inflation and the other is that investments all produce similar returns. The latter was of course true of authorised trustee securities listed by trustee legislation in, say, 1925, but it cannot even be pretended to be an assumption underlying trustee legislation allowing investment in shares.

The only solution is for trustee legislation to dissociate itself from the old rules and adopt a more abstract position. The Australian Model Code provides as follows:

> *3.18 - Capital and Income*
>
> (1) Where a trustee is required to maintain separate accounts of capital and income the trustee shall in maintaining those accounts act fairly as between beneficiaries entitled to income and beneficiaries entitled to capital.
>
> (2) Where under the provisions of a will a trustee is under a duty to convert property of a wasting, hazardous, reversionary or unauthorised nature he may, unless the will otherwise expressly directs -
>
> (a) pending any sale, calling in or conversion of such property, apply the whole of the net income of the property to income without apportioning any part thereof to capital; and
>
> (b) on any sale, calling in, or conversion of the property, or on the falling in of any reversionary property, apply the whole of the proceeds of sale, calling-in, conversion or falling in to capital without apportioning any part thereof to income.
>
> (3) Where a trustee expends capital moneys for any purpose of the trust he may recoup the capital expended from the income of the trust in such manner as is fair as between beneficiaries entitled to income and beneficiaries entitled to capital.

Sub-section (1) sets out in general terms the trustee's duty to ensure fairness as between the capital and income accounts. Sub-section (2) abolishes the most tiresome application of the rule in *Howe v Earl of Dartmouth*[21] and the rule in *In re Earl of Chesterfield's Trusts*.[22] This is not the place to go into the details of these rules. The point of these

21. (1802) 7 Ves 137; 32 ER 56.
22. (1883) 24 Ch D 643.

provisions is that the trustees are expected to exercise a proper discretion, rather than to follow mechanistic rules, in ensuring fairness as between successive beneficiaries. The provisions are consonant with the Great Britain Law Reform Committee's report.[23]

It is also significant that the Australian Model Code otherwise dissociates itself from some particular statutory provisions relating to capital and income accounting, found in some Australian statutes and resting on the former assumptions, by recommending that those statutory provisions be omitted from future legislation.

VI. DELEGATES, AGENTS AND POWERS OF ATTORNEY

The law concerning the extent of trustees' powers to employ agents and to appoint delegates is in a state of confusion. The prime source of that confusion is terminological but there is also misconception in the statutory power of delegation given by section 25 of the 1925 Act,[24] copied in other jurisdictions, a misconception that has been fortified by the United Kingdom Powers of Attorney Act 1971.[25]

The terminological confusion is chronic. Most writers use the word delegation freely when referring to the employment of agents by trustees. If the two words mean the same thing then only one should be used. If they mean different things, they should not be confused. It is submitted that the agent of a trustee is in an entirely different position from the delegate of a trustee and that this is, indeed, well known. Equity always gave trustees power to employ agents and trustee legislation - for instance, section 23 of the 1925 Act - confirmed and probably extended that power. But equity also insisted that a trustee must act personally and might not delegate trusts. That rule was changed by section 25(1) of the 1925 Act,[26] which now provides:

> Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

23. Supra n 2, para 3.26.
24. Supra n 6.
25. 1971 c 27.
26. As amended by the (UK) Powers of Attorney Act 1971 ibid, s 9(2), which substituted new sub-ss (1) - (5) for the original sub-ss (1) - (8) in s 25 of the 1925 Act. See also text accompanying n 33.

It therefore becomes essential to understand what sorts of decisions cannot be taken by trustees' agents which can be taken by trustees' delegates. As to this, Professor Waters says:

> However, it is not easy to say when a duty will be held to be of the non-delegable variety. The court will determine this issue both in the light of the nature *per se* of the duty, and of the settlor's intent as proved by the wording of the trust document or the will in which the trust is contained. Hence, it is largely a question of construction.[27]

An entirely different approach is adopted, however, by Ford and Lee in their Australian work *Principles of the Law of Trusts*.[28] After comparing the statutory power to employ agents with the power to appoint delegates, they say:

> The trustee must act personally in the execution of the trust and in the exercise of her or his powers and discretions; but the trustee may employ agents to implement or carry into effect decisions taken relative to the execution of the trust or to the exercise of her or his powers and discretions. As to what decisions are decisions in the execution of the trust or the exercise of the trustee's powers and discretions, it is submitted that a decision relates to the execution of the trust or to the exercise of the trustee's powers and discretions *where, in taking it, considerations relative to the trust as such ought to be borne in mind*.[29]

There are some decisions which clearly come within this formula and give credence to it. Thus, a decision to appoint a new trustee or to discharge an unfit trustee could obviously not be entrusted to an agent. Neither can agents be employed to take decisions about what payments should be made to discretionary beneficiaries: that is, which beneficiaries should receive what amounts. Neither can agents be employed to decide what sorts of payments in respect of maintenance, education and advancement should be made to beneficiaries. These are matters going to the very nature and working of the trust. More mundane decisions, such as when trustees should meet and what should be on the agenda for the meeting, are also for the trustees alone. What all such decisions have in common is that in making them, the trustees have to consider issues relative to the nature, purposes and composition of the trust.

Where the management of trust property is involved it may be harder to draw the line, but it is submitted that the Ford and Lee formula can still

27. D M W Waters *Law of Trusts in Canada* 2nd edn (Toronto: Carswell, 1984) 705.
28. H A J Ford and W A Lee *Principles of the Law of Trusts* 2nd edn (Sydney: Law Book Co, 1990) 431.
29. Ibid (emphasis added).

often help. Thus, in the case of a trust which includes a business, it is submitted that only the trustees can decide whether to carry on the business for the purpose of sale or winding up or, if they are so empowered, as a going concern. In taking that decision they must consider a variety of matters including, for instance, the duration of the trust and the ages and needs of the beneficiaries. Commercial considerations are, of course, of great relevance but they are not the only ones. So, trustees cannot employ an agent to take that decision, but having taken it, they may employ an agent to carry on the business accordingly and invest the agent with the appropriate powers to do so. Furthermore, only the trustees can decide whom to employ as agent: they owe a duty of care in employing the agent, and in instructing and in supervising the agent. Those are duties which they cannot delegate.

More difficult is the question of whether the trustees can employ agents to make investment decisions for them. The Great Britain Law Reform Committee's report says that it is "quite clear that trustees cannot delegate their investment decisions under section 23(1) of the 1925 Act,[30] but that they may delegate under the delegation power contained in section 25 for a period not exceeding 12 months. The Committee concluded that this was adequate, except that there was doubt as to whether such delegates could be remunerated, on which matter it was recommended that the law should be changed.

It is clear that the delegation power can be used to confer powers on delegates, for a limited period, which the trustees cannot confer on agents. The Committee observed:

> A general delegation under [section 25] has to be renewed each year and there is, therefore, a reasonably frequent opportunity to review the exercise of the power. Ultimate responsibility for the trust property will always rest with the trustees... No general unrestricted power to delegate is either necessary or desirable unless it is bestowed by the conscious decision of the settlor.[31]

There are, however, great disadvantages in this view. In the first place, the appointment of an investment manager for one year only may be seen as too brief. Many managers would require longer tenure than that in order to make the fund profitable. Some managers take a substan-

30. Supra n 2, para 4.16.
31. Ibid, 4.18.

tial initial commission. If their contract had to be renewed every year that might prove costly. Worse is the rule that trustees are liable for all the acts of their delegates. They are not allowed the defence, as employers of agents are, that they were careful in their employment of the agent and that they were careful in their supervision of the agent. Their only hope is to pursuade the court to excuse them on the grounds that they have acted honestly and reasonably. It is submitted that this is unfair to the trustee and that it emasculates the delegation power. Indeed, it may tempt trustees to "employ" agents where perhaps they should use their delegation power.

If there is a problem about employing agents to make investment decisions it is because in making investment decisions, matters relevant to the trust as such must be taken into consideration, such as the nature, composition and duration of the trust, the needs and circumstances of the beneficiaries and the need for diversification. The Ford and Lee formula seems to preclude the employment of agents for this purpose. However, it is submitted that such employment can come within the formula if the agent is properly instructed, as a delegate would have to be in any case.

The Australian Model Code has this to say of the employment of agents:

> *3.25 - Power to employ advisers and agents*
>
> (1) In the performance of his duties with respect to the management and administration of the trust and in the exercise of his powers authorities and discretions the trustee may seek advice of suitably qualified advisers.
>
> (2) A trustee may, instead of acting personally, employ and pay an agent to transact any business or do any act required by the trustee to be transacted or done in the execution of the trust or the administration of the trust property, including the receipt and payment of money, the selection and making of investments for the trust, the management of any business and the keeping and audit of trust accounts.
>
> (3) A trustee may deliver money or securities of the trust into the hands of an agent.
>
> (4) Where an agent is employed to select and make investments for the trust, the trustee:
>
> (a) shall inform the agent of the terms and circumstances of the trust that may be relevant to enable the agent to select and make investments suitable for that trust;
>
> (b) shall require him to comply with the provisions if any contained in the trust instrument with respect to the investment of trust funds

and otherwise with the law with respect to the investment of trust funds as if the agent were himself a trustee of the trust;

(c) may authorise such agent to select, make and vary investments without prior consultation with the trustee; and

(d) shall require the agent to keep him informed of all investments held, made and varied on behalf of the trustee.

(5) A trustee is not liable for breach of trust in respect of the acts or defaults of his agent unless in employing him or in supervising him he fails to act in accordance with the provisions of this section or section 1.11 of this Act.

Section 1.11 has been set out above.[32] It requires the trustee to act with skill, care, prudence and diligence. It is clear that the Australian research team took the view that trustees should be empowered to confer wide discretions on agents. In such a case, delegation would not often be needed. It may be commented that the provisions of sub-section (4) may be too detailed. Perhaps it would have been better simply to say that a trustee must take care in the instruction they give their agents.

A. Delegation and substitute trustees

The English view, as revealed by the Great Britain Law Reform Committee, appears to be that a major function of the delegation power is to enable trustees to confer powers on agents which they cannot confer on them under the rules of equity. These delegates will be referred to as "super-agents". Historically, however, it is submitted that this was not the purpose for which the delegation power was originally conceived when it was included in section 25 of the 1925 Act. That Act empowered a trustee to delegate trusts, powers and discretions *during the trustee's absence from the jurisdiction*. In other words, it was concerned with the appointment of *temporary substitute* trustees. It could not be used to extend agents' discretions when the trustee was at home. When the 1925 Act was amended in 1971[33] the limitation concerning absence from the jurisdiction was omitted and replaced by a durational limit of 12 months. If the Great Britain Law Reform Committee is correct in its view, the 1971 amendment fundamentally altered the entire purpose of the delegation power as it was originally conceived.

32. See text at 515.
33. See text at 526 and n 26.

That there is a fundamental distinction between the substitute trustee and the super-agent can be appreciated by considering the consequence of the unanimity rule.

B. The unanimity rule

Trustees must act unanimously when they appoint ordinary agents, so it is hard to see how one of several trustees can be permitted to appoint a super-agent. Section 25 of the 1925 Act refers to "a trustee" as having power to appoint a delegate to exercise power "either alone or jointly with any other person or persons" - presumably co-trustees. If so, it is submitted that it is contrary to principle. On the other hand, it is not contrary to principle for a trustee who is about to become incapacitated to appoint, unilaterally, a delegate to act in the trustee's stead: that is, to act as a substitute trustee during the period of inability. The consequence of the unanimity rule in this case is that the delegate *must attend meetings of the trustees*. No-one has ever suggested that agents acting for trustees must attend trustees' meetings, and it is hard to argue that super-agents (for example, fund managers) should. But neither has it ever been suggested that where a temporary substitute trustee has been appointed to stand in the shoes of a trustee who cannot attend trustees' meetings (why else would trustees delegate all their powers, trusts and discretions?) the substitute trustee may not attend meetings. Indeed, the substitute trustee must attend to ensure a full complement. Moreover, without the substitute trustee's vote, unanimity cannot be achieved.[34]

It is because the ambiguous word "delegate" has been used so consistently in this context as a synonym for "agent" that its equally justifiable use, as a synonym for "substitute", has been neglected. But in the law of trusts, these two meanings must be kept separate because of the rule that trustees may employ agents but may not delegate their trusts. Only statute or the settlor can permit trustees to do that.

34. It is assumed here that there is no provision in the trust instrument allowing trustees to act by majority. In that event, it might be unnecessary to appoint a substitute trustee.

Thus, the primary definition of the word "delegate" in the Oxford English Dictionary reads as follows:

> A person sent or deputed to act for or to represent another or others; one entrusted with authority or power to be exercised on behalf of those by whom he is appointed; a deputy, commissioner.[35]

This primary definition is twofold. In its first part, it is concerned with the delegate who acts for the delegate's appointee: that is, the delegate as a substitute. In the second part, it is concerned with a person given authority by another, an authority which can presumably be limited: that is, the delegate as an agent. The Australian Model Code attempts to keep the two meanings of the word entirely separate. It uses the word "delegate" only in the context of a power to appoint substitute trustees:

> *3.26 - Delegation of trustee's discretions and powers*
>
> (1) A trustee may by writing delegate all or any of the powers, authorities and discretions vested in him as trustee, other than the power to appoint new trustees, to another person, or jointly to other persons, in this section called a delegate.
>
> (2) A delegation shall not be made, whether to a co-trustee or to any other person, unless there will be remaining to perform the trust the Public Trustee, a trustee corporation or two other persons whether as trustees or delegates.
>
> (3) A trustee may not appoint to be a delegate any person who may not be appointed to be a trustee of the trust.
>
> (4) A delegation made under this section shall unless sooner terminated, terminate on the expiration of twelve months from the date on which it is made.
>
> (5) Two or more trustees may delegate concurrently.
>
> (6) Before or within fourteen days after the execution of the delegation the trustee shall give written notice thereof to every co-trustee and to every person, if any, who is empowered to appoint new trustees.
>
> (7) A notice under subsection (6) shall specify -
>
> (a) the date on which the delegation comes into operation;
>
> (b) the name and address of the delegate;
>
> (c) the reason for the delegation; and
>
> (d) where some only are delegated, the powers, authorities and discretions which are delegated.

35. J A Simpson and E S C Weiner (eds) *The Oxford English Dictionary* 2nd edn (Oxford: Clarendon Press, 1989).

(8) A delegate shall, in the exercise of the powers, authorities and discretions delegated to him, be regarded and in every respect act as a trustee and every act done by him shall be as valid and effectual as if done by the trustee who executed the delegation.

(9) A trustee who appoints a delegate shall not be liable for the acts and defaults of the delegate unless in appointing him or in continuing his appointment he fails to act in accordance with the provisions of s.1.11.

The general tenor of this provision concerns the internal management of the trust. The other trustees must be informed of the reasons and extent of the delegation and the requirement that there remain a certain number of trustees to act, whether as trustees or as delegates, envisages delegates as substitute trustees and not as super-agents. The delegate is to be "regarded and in every respect act as a trustee". This must mean that the delegate must attend meetings of the trustees. A delegating trustee may limit the powers conferred on a delegate. This will enable a trustee who cannot attend a particular meeting of trustees to appoint a delegate with authority to act only in relation to the matters listed on the agenda of that meeting.

On reflection, however, the Australian suggestion could be improved on. It would be better to call a spade a spade and to provide expressly for the appointment of temporary substitute trustees. This would solve the terminological issues with which this part of this article has been concerned.

C. Powers of Attorney

Existing legislation requires a trustee to delegate by executing a power of attorney. It is not necessary for the statute to require this. There is a measure of mere formalism in it. If the delegate will be required to execute documents on behalf of the delegating trustee then the practice which requires production of a power of attorney justifies the execution of such a power. But not everything a delegate does would require production of such a power. Thus, if the only purpose for which a delegate is appointed is to determine payments of discretionary benefits under the trust, a power or attorney should not be needed. It is an internal decision of the trust. The statutory requirement goes beyond the ordinary circumstances in which a power of attorney is needed. Further than that, it leaves doubt as to whether a trustee can execute a power of attorney in the case of an ordinary agent. Very often, a power of attorney is needed by an agent to perform a simple non-discretionary function on behalf of

the donor of the power. For example, the trustee may have entered into a contract to sell property but cannot personally attend completion. A power of attorney limited to enable an agent to complete will suffice and would be unlikely to cause difficulty. As long as the power is properly expressed, it is submitted that trustee law need demonstrate no particular anxiety about the execution of powers of attorney whenever needed to enable a decision of the trustees to be carried into effect.

The other problem is that existing trustee legislation provides that the trustee donor of a power of attorney remains liable for the defaults of the donee. The Great Britain Law Reform Committee says that it considers that rule should be retained:

> Attorneys are given the power to exercise *all* the trust powers and discretions so it is only reasonable that the trustee should remain liable.[36]

This remark seems to apply in the case where the power is given to a substitute trustee. It should not be argued where a properly limited power is given to an agent out of necessity. Even in the case of a plenary power given to a substitute trustee, it is hard to charge the donor of the power. Such powers are executed because donors cannot act themselves - originally only if the donor were out of the jurisdiction. Why should a trustee who is unable to act for a proper reason be more liable for the acts of a delegate than a trustee usually is for the acts of an agent?

The Australian Model Code makes the following contribution:

> *3.27 - Powers of Attorney*
>
> (1) Where in the management or administration of the trust documents are required to be executed or acts are required to be done by a trustee and that trustee is or may be unable to execute such documents or do such acts or any of them personally that trustee may execute a power of attorney authorising another person to execute any such documents or do any such acts on his behalf.
>
> (2) A trustee may, in relation to any property vested in him jointly with any other trustee, execute a power of attorney appointing as his attorney a delegate appointed by him under the provisions of section 3.26.
>
> (3) A power of attorney made under subsection (2) shall be expressed to terminate and shall terminate, unless sooner terminated, on a date no later than twelve months from the date of its execution.
>
> (4) The donor of a power of attorney given under this section shall not be liable for the acts or defaults of the donee unless in appointing him or in continuing his appointment he fails to act in accordance with the provisions of section 1.11.

36. Supra n 2, para 4.13 (emphasis in original).

Sub-section (1) makes it clear that a trustee may execute a power of attorney where documents are required to be executed or acts done by the trustee, but the trustee is or may be unable to act personally. It envisages a power of attorney limited to the execution of the document or the doing of the act. Sub-section (2) makes the point that where a general power of attorney is given to a substitute trustee, it should be limited to property vested in the donee jointly with any co-trustee. If the power were expressed in too general terms, it might include the trustee's own property as well as the property vested jointly with a co-trustee. Sub-section (4) places the same liability on a trustee who executes a power of attorney as on a trustee who employs any agent, that is to act with care, skill, prudence and diligence.

D. Enduring powers of attorney

In some jurisdictions the execution of an enduring power of attorney is permitted by statute.[37] An enduring power of attorney is a general power of attorney which comes into effect if the donor becomes incapacitated. There is court supervision. It is clear that it is unsuitable for a trustee to execute such a power. If a trustee becomes incapacitated, the usual rule and practice is that a new trustee is appointed; section 2(8) of the 1925 Act provides that a power or attorney executed by a trustee under the provisions of section 25 of that Act cannot be an enduring power. This is absolutely right. Unfortunately, however, it appears to preclude the execution of an enduring power of attorney by a beneficial joint tenancy where the title to the property the subject of the joint tenancy is vested in the joint tenants as trustees for sale - the usual case.[38] This is unfortunate where the beneficial joint tenants are all adults. It should be possible for such a joint tenant to execute an enduring power of attorney. This is a result of the artificiality of the doctrine of the trust for sale and the failure of the legislature to take appropriate action.

37. For example, the (UK) Enduring Powers of Attorney Act 1985 (1985 c 29).
38. Compare *Walia v Michael Naughton Ltd* [1985] 3 All ER 673.

E. Conclusions

The confusion of the rules which allow the employment of agents but deny, except under specific given powers, the appointment of delegates places trustees in considerable practical difficulties. It is submitted that it is undesirable and contrary to principle to make provision for two kinds of agents, ordinary agents and "super-agents", the latter exercising exceptional powers under powers of attorney of limited duration, and with differing standards of liability attaching to the trustee in each of the two cases. It would be preferable for the law to allow trustees (as it is submitted it in fact does) to employ agents and confer broad discretions on them, according to the necessity of the case. This was always recognised by equity in the case of agents managing overseas plantations. This rule in no way exonerates trustees who fail to take care in employing the agent, in the framing of instructions for the agent, and in the continuing supervision of the agent.

Then there is confusion between super-agents and substitute trustees. Clearer legislation could eliminate that confusion. The Australian Model Code goes a considerable distance in this direction.

VII. CONSTRUCTIVE TRUSTS

The Australian Model Code has concerned itself with some issues relative to constructive trustees and to the problems arising from *In re Diplock*.[39] It may well be that some of these issues are still insufficiently comprehended for the legislature to attempt to resolve them. However, the following provisions should be of interest:

> *5.1 - Indemnity of persons dealing with trustees*
>
> (1) Where a trustee is in breach of trust or fiduciary duty in relation to any matter a person who participates with or deals with the trustee in that matter is not personally liable by reason merely of his so participating or dealing unless he knows or has reason to know that the trustee is in breach of trust or fiduciary duty.
>
> (2) A person shall not be found to have reason to know that a trustee is in breach of trust or fiduciary duty unless the Court is satisfied, having regard to the position of that person, that that person ought, from all the circumstances known to him, to have known or to have inferred or concluded that the trustee was in breach.

39. [1948] Ch 465.

The formula "knows or has reason to know" has been adopted. The person is not required to make enquiries because knowledge is judged "from all the circumstances known to him". The court is enjoined to have regard to "the position of that person". It may therefore charge a person who is more generally knowledgeable, such as a keen business manager, while discharging an innocent.

5.1.2 - Liability of volunteers who have received trust property by reason of a breach of trust

(1) Where a volunteer has received trust property by reason or in consequence of a breach of trust or fiduciary duty committed by a trustee a trustee is entitled:

(a) to recover that property to the extent that it can be traced;

(b) to claim compensation from the volunteer and from any trustee as a result of whose breach of trust or fiduciary duty the volunteer received trust property, of such an amount as the Court considers, having regard to all the circumstances regarding the receipt and application of the property, it is just that the volunteer and such trustee or either of them should pay; and

(c) to require an account of the volunteer, as a bare trustee, in respect of any money or property in his hands from the time when he knew or had reason to know that the trustee was in breach of trust or fiduciary duty.

(2) The provisions of s.5.1.2(2) apply to this section.

(3) For the purposes of this section trust property includes property in the course of administration as part of the estate of a deceased person and trustee includes personal representative.

In the first place, the Australian experts were irreconcilably divided on the issue of the personal liability of innocent recipients of trust property - the rule in *In re Diplock*.[40] Five members of the research team took the view that the rule of automatic personal liability is too harsh and should be abolished. They considered that the liability defined by sub-section (1)(c) - where the recipient knows or has reason to know that the trustee was in breach - together with the other rules of law which impose liability on recipients of property, in particular the law of mistake and subrogation, set fair boundaries of liability; and that the *In re Diplock* rule, which is impliedly retained in paragraph (b), transgresses those boundaries. Four members of the team, however, took the view which finds expression in sub-section (1)(b). This sub-section allows the court to charge both the recipient and the trustee, as it considers to be just, having regard to all the circumstances regarding the receipt and applica-

40. Ibid.

tion of the property; so a defence of change of position is possible within this framework.

VIII. PAYMENT OF DEBTS AND LIABILITIES OUT OF TRUST PROPERTY

5.10 - Payment of debts and liabilities out of trust property

(1) A trustee may pay or discharge directly out of the trust property any debt or liability properly incurred in or about the administration of the trust.

(2) Except to the extent to which a trustee is liable in respect of any breach of trust or fiduciary duty a trustee may reimburse himself directly out of trust property in respect of any debt or liability properly incurred in or about the administration of the trust which he has paid or discharged personally.

(3) The court may direct a trustee to pay or discharge directly out of trust property any debt or liability properly incurred in or about the administration of the trust notwithstanding that a trustee has committed a breach of trust and has not settled his account.

(4) The court may, upon the application of a trustee or of a person in relation to whom a trustee has incurred a debt or liability in apparent administration of the trust, direct a trustee to pay or discharge directly out of trust property any debt or liability so incurred, notwithstanding that the debt or liability was incurred in breach of trust unless the person in relation to whom the debt or liability was incurred knew or had reason to know that the debt or liability was incurred in breach of trust.

(5) Except under the direction of the court a trustee is not under an obligation to incur any personal debt or liability in the administration of the trust if trust property in his hands is or may be insufficient to reimburse him.

Trustees have the right to reimburse themselves from trust property in respect of any liability properly incurred in managing the trust. Their creditors may subrogate themselves to that right. A trustee who, in breach of trust, has caused loss to the trust estate loses that right, as do the creditors. The loss must be made good before the trust property can be approached. In Australia, provisions have been seen in settlements denying trustees a right of reimbursement, but the validity of such provisions has never been tested. There is anxiety in Australia that these highly particular rules can be manipulated by unscrupulous trustees to defeat the claims of creditors. Sub-sections (1) and (2) set out the existing law. Sub-section (3) enables the court to direct a trustee to pay debts or liabilities properly incurred in the management of the trust out of trust property, notwithstanding the fact that a trustee has committed a breach of trust and has not settled the account. Sub-section (4) goes further in

allowing the court to direct payment out of trust property even where the debt or liability was incurred in breach of trust, as long as it was incurred in *apparent* administration of the trust. This introduces a kind of ostensible authority rule. A straw trustee might argue that some debts were properly incurred and others not. In the general disorder of a trust fund insufficient to pay creditors and in the context of a possible insolvency of the trustee, it is desirable that the court should be able to allow bona fide creditors' claims without necessarily having to decide, in each case, whether the liability was properly incurred or not. The power is within the court's control and would enable the court to simplify proceedings considerably. Sub-section (5) is an attempt to rewrite provisions contained in section 22 of the 1925 Act, a section which has been adopted in Australian jurisdictions.

XI. THE VARIATION OF TRUSTS

The Australian Model Code recommends that a broad power to vary trusts be conferred on the court. It is coupled by a power enabling the court to order distribution of the trust fund early in certain circumstances.

6.17 - The Court's power to vary trusts

(1) Where there is a provision in a trust, including a condition precedent or subsequent, which affects or may affect adversely an interest or right of a beneficiary, being a provision which, by reason of changed or changing circumstances, is no longer for the benefit, including non-financial benefit, of the beneficiaries as a whole or a majority of them, the court may by order, upon application by or on behalf of the beneficiary whose interest or right is or may be affected adversely, vary or strike out that provision.

(2) Where the interest or right of any beneficiary would or might be affected adversely by the variation or striking out of any provision under the power contained in sub-section (1):

(a) that beneficiary shall be represented separately from the beneficiary by whom or on whose behalf the application is made; and

(b) before making any order the Court shall satisfy itself that the benefit, including non-financial benefit, to the beneficiaries as a whole or a majority of them, whose interests will not be affected adversely outweighs the detriment to the beneficiary whose interest or right would or might be affected adversely by the making of the order.

There seem to be two circumstances justifying the variation or striking out of a provision contained in a trust. One is that the provision

is causing or may cause disharmony amongst members of the family and their spouses. This would include a case like *In re Remnant's Settlement Trusts*,[41] where there was a provision that any beneficiary who married a Roman Catholic would forfeit their benefit. The provision was struck out. The other is where there has been a change of circumstance. One example might be a provision requiring a beneficiary to reside in the family home. A change of circumstances might well make that provision oppressive to everybody. Nothing is said to exclude a change of fiscal policy as a reason for making an application, so the provision may be used to respond to a change in the tax laws. That was the purpose of the United Kingdom Variation of Trusts Act 1958. The concept of non-financial benefit comes from *In re Weston's Settlements*.[42]

X. COURT'S POWER TO ORDER EARLY DISTRIBUTION OF TRUST FUND

The final distribution of a trust fund can be held up because it is not known whether a beneficiary may marry a spouse who would become a beneficiary under the trust - the "spectral spouse" - or whether a beneficiary might adopt a child who would then become a beneficiary under the trust. In given cases, these sorts of events might be most unlikely to occur. The Australian research team saw this phenomenon as different from the phenomenon of an undesirable provision contained in a trust, and so have suggested the following:

> *6.18 - Court's jurisdiction to order distribution of trust fund*
>
> (1) Where the manner of the distribution of a trust fund or a share of it depends upon whether or not in the future an event may occur and the Court is satisfied that that event is unlikely to occur the Court may order the distribution of the trust fund or a share of it on the basis that that event will not occur.
>
> (2) A distribution of a trust fund or a share of it made in pursuance of a court order under this section shall,unless the Court otherwise orders, be final.
>
> (3) Application to the Court for the making of an order under this section may be made by a trustee who is desirous of distributing the trust fund or a share of it or by a beneficiary who would be entitled to receive a distribution of the trust fund or a share of it if an order were made under this section.

41. [1970] Ch 560.
42. [1969] 1 Ch 223.

XI. THE REMUNERATION OF TRUSTEES

There is a great deal of litigation about trustees' remuneration and whether the court can vary or ignore the provisions of the trust instrument. The Australian Model Code includes a comprehensive provision, as follows:

> *6.20 - Remuneration of Trustees and Managers*
>
> (1) The Court may authorise trustees and managers to charge such remuneration for their services as is just and reasonable.
>
> (2) In the absence of a direction to the contrary contained in a trust instrument a trustee or a manager being a person engaged in any profession or business for whom no benefit or remuneration is provided in a trust instrument, is entitled to charge and be paid out of the trust property just and reasonable professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally.
>
> (3) Where a provision with respect to the remuneration of a trustee or manager contained in a trust instrument is not or is no longer, in the opinion of the Court, having regard to the circumstances of the case before it, just and reasonable the Court may:
>
> (a) upon application by the trustee or manager vary the provision contained in the trust instrument by an order increasing the remuneration payable and providing for such remuneration as is just and reasonable; or
>
> (b) upon application by or on behalf of a beneficiary vary the provision contained in the trust instrument by an order decreasing the remuneration payable and providing for such remuneration as is just and reasonable.
>
> (4) Where a trustee or manager has received remuneration in respect of acts done in or about the administration of the trust and in the opinion of the Court his performance as trustee or manager does not justify the remuneration which he has received the Court may order the trustee or manager to repay some or all of the remuneration he has received, but so that, after repayment of the sum ordered, the remuneration he has received is just and reasonable.

XII. CONCLUSION

This article has raised a number of fundamental issues for consideration for the reform of trustee legislation. Its purpose will be served if it moves legislators to consider those fundamental issues, and to produce trustee legislation fit for the twenty-first century.