

## CHAPTER 1

### DEFINITION AND CLASSIFICATION

"And being always surrounded by a great number of nieces and nevys, as was always a-quarrelling and fighting among themselves for the property, he makes me his executor and leaves the rest to me in trust, to divide it among 'em as the will provided."

"Wot do you mean by leavin' it on trust?" inquired Sam, waking up a little. "If it ain't ready money, where's the use on it?"

"It's a law term, that's all," said the cobbler.

"I don't think that," said Sam, shaking his head. "There's very little trust at that shop."

Charles Dickens, *The Pickwick Papers*, Chapter 44

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#### 1. DEFINITION OF A TRUST

##### Definitions and descriptions

The typical case of a trust is one in which the legal owner of property is constrained by a court of equity so to deal with it as to give effect to the equitable rights of another,<sup>1</sup> but there is no really satisfactory definition. Various definitions have been proposed but they contain large (though incomplete) elements of mere description. The first is from an international convention,<sup>2</sup> and despite its introductory words it is helpful generally. It runs:

"For the purposes of this Convention, the term "trust" refers to the legal relationship created—*inter vivos* or on death—by a person, the settlor, when

<sup>1</sup> *Re Astor's Settlement Trusts* [1952] Ch. 534 at 541, per Roxburgh J.; *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669 at 705, 709, per Lord Browne-Wilkinson.

<sup>2</sup> Art. 2 of the Convention on the Law Applicable to Trusts and on Their Recognition, enacted as part of English law (apart from some Articles) and extended by the Recognition of Trusts Act 1987, printed in its Schedule and ratified in several other jurisdictions. See Chap. 11. The definition has been enacted as part of the general law of Bermuda: Trusts (Special Provisions) Act 1989, s.2, and the British Virgin Islands: Trustee Ordinance 1961, s.2(2)-(4) inserted by the Trustee (Amendment) Act 1993. (Note the extension in s.2(5).) Contrast the very wide definition in Trusts (Guernsey) Law 1989, s.1.

assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.<sup>3</sup>

A trust has the following characteristics—

- (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.<sup>4</sup>

Instead of transferring assets under the control of someone else as trustee, the settlor can declare himself to be a trustee.<sup>4</sup> With that addition, all trusts are within this definition. By a deliberate decision,<sup>5</sup> however, it was made wide enough also to include analogous institutions of foreign law.<sup>6</sup> These are not included in the usual meaning of "trusts" in the law of England and Wales, which does not include analogous common law or statutory institutions of that law.<sup>7</sup>

#### A general judicial definition

- 1-02 An Australian judge, Mayo J. gave<sup>8</sup> a general definition which also applies in England and Wales. He said:

"No definition of a "trust" seems to have been accepted as comprehensive and exact<sup>9</sup> . . . Strictly it refers, I think, to the duty or aggregate accumula-

<sup>3</sup> The purpose will usually be a charitable purpose, but trusts for a narrow class of other purposes may be valid, see §§ 4-45 to 4-52. Charitable trusts are not dealt with in this work, see § 1-35.

<sup>4</sup> See §§ 3-04 *et seq.*, and on this aspect of the convention § 11-53.

<sup>5</sup> Explanatory Report by Alfred E. von Overbeck, para.26.

<sup>6</sup> Harris, *The Hague Trusts Convention*, puzzles over these institutions at pp.103 *et seq.*

<sup>7</sup> See for example *Re Deans* [1954] 1 W.L.R. 332 (President of Probate Division was not a trustee of estates vested in him by statute); *Tito v Waddell (No.2)* [1977] Ch. 106 at 122 *et seq.* (statutory arrangement a trust in higher sense only); and consider the case of bailment, see § 1-11.

<sup>8</sup> *Re Scott* [1948] S.A.S.R. 193 at 196. For other judicial definitions see *Wilson v Lord Bury* (1880) 5 Q.B.D. 518 at 530-531, *per Brett L.J.* (trust or contract); *Smith v Anderson* (1880) 15 Ch.D. 247 at 275, CA, *per James L.J.* (meaning of trustee); *Re Williams* [1897] 2 Ch. 12 at 19; CA, *per Lindley L.J.* ("a confidence . . . enforceable in a court of equity"); *Hardoon v Belilios* [1901] A.C. 118 at 123, PC, *per Lord Lindley* (a very wide definition quoted in n.13, but see n.14); *Re Marshall's Will Trusts* [1945] Ch. 217 at 219 and *Green v Russell* [1959] 2 Q.B. 226 at 241 (Sir Arthur Underhill's definition). On the distinction between trusts and powers, see § 1-33.

<sup>9</sup> See *Allen v Distillers Co. (Biochemicals) Ltd* [1974] Q.B. 384 at 394, *per Eveleigh J.* Mr Lewin slightly adapted Coke's definition of a use (Co. Litt. 276b) as follows: "A confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land . . . for which *cestui que trust* has no remedy but by *subpoena* in Chancery." For a commentary, see the 15th edition of this work, pp.11-13, and for the history of uses and trusts see Holdsworth, *History of English Law*, Vol.IV, pp.407-480; Vol.V, pp.304-309; Vol.VI, pp.543-545, 641-644; Vol.VII, pp.171-176.

tion of obligations<sup>10</sup> that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called *cestuis que trust*,<sup>11</sup> or beneficiaries, if there be any, if not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest."

#### Keeton and Sheridan's definition

The most satisfactory textbook definition is similar. Keeton and Sheridan<sup>12</sup> 1-03 say:

"A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust."

That definition is preferable in describing a trust as a relationship rather than an obligation, which could be misleading. But its breadth, though supported by Lord Lindley,<sup>13</sup> is nonetheless excessive.<sup>14</sup>

#### Sir Arthur Underhill's definition

Another definition, which has been judicially adopted, is that of Sir Arthur Underhill:<sup>15</sup> 1-04

<sup>10</sup> Trusts, however, are not mere personal obligations: the beneficiary takes a proprietary interest in the trust property. See § 1-06. And a trust is not a contract, but see § 1-15.

<sup>11</sup> The singular is *cestui que trust*. *Cestuis que trusts* is a possible plural, but *cestuis que trustent* "is hopelessly wrong": (1910) 26 L.Q.R. 196 (C.S.). The word "beneficiaries" is generally used in this edition.

<sup>12</sup> *Law of Trusts* (12th edn), p.3.

<sup>13</sup> Part of his *ratio* in *Hardoon v Belilios* [1901] A.C. 118, PC runs at 123: "All that is necessary to establish the relation of trustee and *cestui que trust* is to prove that the legal title was in the plaintiff and the equitable title in the defendant." Cf. § 1-12.

<sup>14</sup> Cf. § 1-12, the limited liabilities of innocent recipients of trust property considered at §§ 41-42, 42-02; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669, HL, especially at 706-707 *per Lord Browne-Wilkinson*.

<sup>15</sup> Underhill and Hayton, *Law Relating to Trusts and Trustees* (15th edn), p.3 (the last edition containing Sir Arthur's definition without change). The definition was taken by Cohen J. as being adequate for his purpose in *Re Marshall's Will Trusts* [1945] Ch. 217 at 219 and was used by Romer L.J. in *Green v Russell* [1959] 2 Q.B. 226 at 241, CA.

"A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation."

In the latest edition of Sir Arthur's work,<sup>16</sup> the definition has been changed to read:

"A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation."

Sir Arthur's wording was perhaps preferable, as covering cases in which the trust property is owned by a nominee of the trustee, as most shares in quoted companies are nowadays, though such a case could be treated (somewhat awkwardly) as a trust of the trustee's equitable ownership.<sup>17</sup>

#### Enforceable by beneficiaries

- 1-05 The last words of Sir Arthur Underhill's definition emphasise that, a trust being the equitable equivalent of a common law gift, the creator of the trust cannot enforce it, but the beneficiaries can, even though they were not ascertainable in existence at the time it was created. If the beneficiaries have no rights enforceable against the trustees there are no trusts.<sup>18</sup> Even so, the proposition that any one of the beneficiaries may enforce rights against the trustees is an oversimplification, since the rights of beneficiaries and their standing to obtain relief vary according to the nature of their interests or eligibility to benefit under the trust, and the nature of the relief sought.<sup>19</sup> The need for beneficiaries with enforceable rights does not, of course, apply to charitable trusts, which are enforceable at the instance of the Attorney-General.<sup>20</sup> Some jurisdictions have made provision by statute for non-charitable "trusts" which are not enforceable by beneficiaries. A notable example of this is in the Cayman Islands which make statutory provision for legal relationships commonly known as STAR trusts where the persons described as beneficiaries have no rights of enforcement as such, and rights that would otherwise have been enforceable by beneficiaries are instead enforceable by persons described as enforcers who may but need not be

<sup>16</sup> Underhill and Hayton, *Law of Trusts and Trustees* (17th edn), § 1.1. The wording of the 17th edition, differs slightly from that of the 16th edition, p.3. For the editors' explanation of the change in the definition, see 17th edition, § 1.2.

<sup>17</sup> See §§ 1-07, 1-10.

<sup>18</sup> *Armitage v Nurse* [1998] Ch. 241 at 253, CA, per Millett L.J.

<sup>19</sup> See §§ 23-68 *et seq* and 39-67 *et seq*.

<sup>20</sup> On enforcement of charitable trusts, see generally *Picarda, The Law and Practice Relating to Charities* (3rd edn), Chap.47.

beneficiaries.<sup>21</sup> Non-charitable purpose trusts enforceable by enforcers are also permitted by statute in some jurisdictions,<sup>22</sup> but not, with limited exceptions, in England and Wales.<sup>23</sup> The question whether STAR trusts and foreign non-charitable purpose "trusts" count as trusts arises (otherwise than as a mere academic question) mainly in the context of their recognition and enforcement as trusts in English private international law, and in that context the definition referred to above<sup>24</sup> would seem to be<sup>25</sup> wide enough to cover them.<sup>26</sup>

#### A proprietary relationship

A trust is not a mere obligation. It may confer on a beneficiary the equitable ownership of a trust asset, or a partial equitable interest in the asset. Even if he has neither, a beneficiary can enforce the trust against anyone to whom a trust asset may come, except a *bona fide* purchaser for value without notice,<sup>27</sup> so he has a proprietary right or interest in a broader sense of the term.<sup>28</sup> Though some remedies sought by beneficiaries do not turn upon the existence of a proprietary interest (and certainly not a proprietary interest in the narrow sense of a transmissible interest),<sup>29</sup> the proprietary nature, in the wide sense, of a beneficiary's rights, is at the heart of the proprietary remedy which can be asserted against trustees and others into whose hands trust property can be followed or traced.<sup>30</sup>

A beneficiary can be said to be the equitable owner of a trust asset if the asset is sufficiently ascertained and he is the only beneficiary interested. Thus under the constructive trust that arises in his favour, a purchaser of land is its equitable

<sup>21</sup> Trusts Law (2001 Revision), Pt VIII, replacing Special Trusts (Alternative Regime) Law 1997. On STAR trusts, see Duckworth, *STAR Trusts: the Special Trusts (Alternative Regime) Law 1997 Cayman Islands* (1998); Matthews (1997) 11 Tru.L.I. 67; Duckworth (1998) 12 Tru.L.I. 16; Matthews (1998) 12 Tru.L.I. 98; Duckworth (1999) 13 Tru.L.I. 158; Thomas and Hudson, *The Law of Trusts*, §§ 40.01 *et seq.*; Hayton [2007] P.C.B. 39 at 49. See too Trusts Law (2001 Revision), Pt VI and s.83(3), concerning "exempted trusts", an earlier form of Cayman trust unenforceable by beneficiaries.

<sup>22</sup> See § 4-48.

<sup>23</sup> See §§ 4-37 *et seq.*

<sup>24</sup> See § 1-01.

<sup>25</sup> The need for at least some rights for beneficiaries referred to in *Armitage v Nurse*, above, was spoken of in the context of the permissible scope of provisions limiting trustees' liability for breach of trust, not in the context of the question whether non-charitable legal relationships enforceable by enforcers, rather than by beneficiaries as such, was capable of counting as a trust. What was said in *Armitage v Nurse* should not be taken as being necessarily determinative of the latter question.

<sup>26</sup> See § 11-84.

<sup>27</sup> See §§ 41-114 *et seq.*

<sup>28</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above, at 705, point (iv).

<sup>29</sup> *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 A.C. 709; see generally §§ 23-15 *et seq.*

<sup>30</sup> On the proprietary remedy of beneficiaries and vindication of property rights, see Chap.41. STAR trusts and foreign non-charitable purpose trusts (see § 1-05) do not confer proprietary interests or rights on beneficiaries even in the broadest sense. But that does not mean that the proprietary remedy asserted by enforcers is any different in extent from the proprietary remedy of beneficiaries who have rights in their capacity as such: the trustees do not have the beneficial interest and that is vindicated by the proprietary remedy asserted by enforcers.

1-06

1-07

owner from the date of the contract of sale,<sup>31</sup> a specific devisee or legatee under a will is the equitable owner of the specific property from the testator's death,<sup>32</sup> and the life tenant under a trust of shares in a company is the equitable owner of the dividends as soon as they are paid to the trustee, even though the trustee is entitled to deduct expenses before transmitting them to the life tenant.<sup>33</sup> It is the same even if an annuity has first to be paid out of the income.<sup>34</sup> (The trustee has a lien for the expenses and the annuity payments are a charge on income.) The life tenant has, not ownership, but an equitable proprietary interest in the shares themselves in any such case.<sup>35</sup> So has the remainderman, if in existence and ascertained. So have two or more capital beneficiaries of a trust concurrently interested, but not, it seems, two or more concurrently interested only in income.<sup>36</sup>

- 1-08 The beneficiary has no equitable proprietary interest in the narrower sense, and of course no equitable ownership, if either his rights or the assets in which they are to be enjoyed are not sufficiently ascertained. For instance, a discretionary beneficiary, who is merely a member of a class to whom the trustees have a discretion to apply trust capital or income, has no interest in the narrow sense. He has a mere right to require the trustees to consider from time to time how to exercise their power,<sup>37</sup> but this prevails against the trustees, and against a third party other than a *bona fide* purchaser, and so is a proprietary interest in a broader sense. Likewise, if assets are in course of administration and debts have to be paid out of them before the trust property is ascertained, the beneficiaries have no interest or ownership in a particular asset: it may be needed to pay the debts.<sup>38</sup> They are nonetheless entitled to enforce due administration of the assets, and

<sup>31</sup> *Lysaght v Edwards* (1876) 2 Ch.D. 499, especially at 505; *Allen v I.R.C.* [1914] 1 K.B. 327; affd. [1914] 2 K.B. 327; see §§ 10-03 *et seq.*

<sup>32</sup> *I.R.C. v Hawley* [1928] 1 K.B. 578 at 583. (The reason given in the headnote was not the judge's.)

<sup>33</sup> *Baker v Archer-Shee* [1927] A.C. 844, HL. This decision did not turn merely on the Income Tax Acts, but on English trust law, see *Archer-Shee v Garland* [1931] A.C. 212, HL, where the opposite result flowed when it was proved that the applicable New York trust law conferred no ownership or interest. See too *Corbett v I.R.C.* [1938] 1 K.B. 567 at 581. The reasoning in *Schalit v Joseph Nadler Ltd* [1933] 2 K.B. 79 at 83 turns on the view that a beneficiary has a mere right to an account, but it seems to misunderstand *Allen v I.R.C.*, above, and the *Archer-Shee* cases were not cited. *Snell's Equity* (31st edn), § 19-03 is more doubtful. The life tenant is the owner of the dividends even though (the trustee being entitled to make deductions) his only remedy is an account.

<sup>34</sup> *Nelson v Adamson* [1941] 2 K.B. 12.

<sup>35</sup> See *Re Neeld* [1962] Ch. 643 at 687-688, CA, *per* Diplock L.J. (tenant for life under specific devise takes an equitable interest on the testator's death).

<sup>36</sup> *Re Young* [1942] V.L.R. 4, Vic. SC, considering the speeches in *Baker v Archer-Shee*, above.

<sup>37</sup> *Gartside v I.R.C.* [1968] A.C. 553, HL; *Sainsbury v I.R.C.* [1970] Ch. 712; *Re Weir's Settlement Trusts* [1971] Ch. 146. And see §§ 29-117 *et seq.* and § 30-24.

<sup>38</sup> The best authorities concern administrations rather than trusts: *Sudeley v Att.-Gen.* [1897] A.C. 11, HL; *Dr. Barnardo's Homes National Incorporated Association v I.R.C.* [1921] 2 A.C. 1, HL (residue); and *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] A.C. 694, PC (share of residue). (*Cf.* Income and Corporation Taxes Act 1988, s.696, which reverses the tax consequences of the two earlier authorities.) The position must be the same for a trust: *Eastbourne Mutual Building Society v Hastings Corporation* [1965] 1 W.L.R. 861 (intestacy, where there is a statutory trust for the next of kin, see § 1-12); *Ayerst v C. & K. (Construction) Ltd* [1976] A.C. 167, HL (company in liquidation a trustee of its assets in the sense that it cannot use or dispose of them for its own benefit, but must do so for the benefit of other persons: see Lord Diplock at 180F).

are interested in a wider sense,<sup>39</sup> and the personal representatives cannot be said to have "beneficial ownership" of any of the assets.<sup>40</sup>

### Trustee may be a beneficiary

A trustee need not, and commonly does not, have any beneficial interest in the trust property. In this case the beneficial enjoyment of the property, which is in the beneficiaries, is entirely separated from its management, which is vested in the trustee.<sup>41</sup> A trustee may hold the trust property on trust for himself and others, but he cannot hold upon trust for himself alone because, once the trust property and the whole<sup>42</sup> beneficial interest meet in the same person, the equitable obligation is swallowed up in the ownership.<sup>43</sup> That person thenceforth simply holds as absolute beneficial owner, and the property is sometimes said to be "at home".

### Types of trust property

Any property may be held upon trust, including for instance the legal estate in land, the legal property in chattels, a chose in action such as the benefit of a contract,<sup>44</sup> an equity of redemption and a beneficial interest under another trust.<sup>45</sup> This topic is further considered elsewhere.<sup>46</sup>

### Trusts enforceable in equity

A trust differs from such relations as contract and bailment in that it is enforceable only in equity. That system was originally administered only in the Court of Chancery,<sup>47</sup> but now law and equity are administered in all courts concurrently. Equitable estates and rights are given effect in all the courts on the basis that where there is any conflict between the rules of equity and the rules of common

<sup>39</sup> *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] A.C. 694 at 713F, PC; *Gartside v I.R.C.* [1968] A.C. 553 at 612, 617 *et seq.*, HL; *Re Leigh's Will Trusts* [1970] Ch. 277.

<sup>40</sup> *Ayerst v C. & K. (Construction) Ltd* [1976] A.C. 167, HL.

<sup>41</sup> This distinguishes a trust from the civil law conception of a usufruct: see Professor Lawson's 1951 Hamlyn Lectures, *The Rational Strength of English Law*, Lecture 3. On the difference between a trust and the Roman-Dutch *fidei commissum*, see *Abdul Hameed Sitti Kadija v De Saram* [1946] A.C. 208, PC.

<sup>42</sup> *Phillips v Brydges* (1796) 3 Ves. Jr. 120 at 125-127; *Merest v James* (1821) 6 Madd. 118.

<sup>43</sup> *Goodright v Wells* (1781) Dougl. 771 at 778; *Selby v Alston* (1797) 3 Ves. jun. 339; *Creagh v Blood* (1845) 3 Jo. & La T. 133; *Re Selous* [1901] 1 Ch. 921; *Re Cook* [1948] Ch. 212 (survivor of legal and beneficial joint tenants of land was absolute beneficial owner in spite of the Law of Property Act, 1925, ss.23, 36(1), as amended).

<sup>44</sup> See §§ 2-35, 4-12 to 4-18.

<sup>45</sup> See § 2-35.

<sup>46</sup> §§ 2-35 to 2-36

<sup>47</sup> For an historical note, see 12th and previous editions, and Holdsworth, *History of English Law*, especially the passages mentioned in § 1-02. Equity was also administered to a certain extent in the Court of Exchequer, see Bryson, *The Equity Side of the Exchequer*. There has long been a developed law of trusts in Scotland though there has never been a separate court of equity there.

Part Four  
ADMINISTRATION OF  
THE TRUST PROPERTY

CHAPTER 34

ADMINISTRATIVE DUTIES OF TRUSTEES

*They then called upon the Almighty Lord to keep the things committed of trust safe and sure for those that had committed them.*

2 Maccabees 3:22

1. Duties of care .....	34-01	5. Insurance .....	34-51
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1. DUTIES OF CARE

Duties of care under the general law and the Trustee Act 2000

The overriding obligation of trustees is ordinarily to preserve and safeguard the trust property. That obligation is the subject of this chapter. Trustees will typically have numerous specific powers and duties for the purpose, considered elsewhere,<sup>1</sup> but in exercising them they have a general duty to exercise care, except to the extent that the terms of the trust or statute relieves them of such a duty. The sources of the duty of care are as follows:

34-01

- (1) Until the Trustee Act 2000 came into force,<sup>2</sup> the duty of care arose under the general law or by virtue of the terms of the trust.<sup>3</sup>
- (2) The 2000 Act introduced a statutory duty of care<sup>4</sup> applying to the exercise of powers and performance of duties conferred or imposed by that Act, and also to certain powers conferred by other statutes and powers conferred by the terms of the trust.
- (3) The statutory duty of care is not, however, of general application and so the duty under the general law continues to apply to administrative duties and powers that are not covered by the 2000 Act.

<sup>1</sup> Investment by trustees is considered in Chap.35, the administrative powers of trustees in Chap.36 and the powers and duties of trustees of land in Chap.37.

<sup>2</sup> It did so on February 1, 2001: see Trustee Act 2000 (Commencement) Order 2001 (SI 2001/49).

<sup>3</sup> Certain duties as to the exercise of powers of investment were imposed by Trustee Investments Act 1961, s.6 (repealed by Trustee Act 2000, s.40(3), Sch.2, Pt 1, para.1, Sch.4, Pt 1).

<sup>4</sup> Trustee Act 2000, s.1.

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The duty of care of trustees in the administration of trusts should be distinguished from their fiduciary duties. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and which have special legal consequences, most notably the duty of loyalty, which is the basis of special rules about conflicts of interest and unauthorised profits,<sup>5</sup> considered in Chapter 20. The duty of care imposed on trustees, though developed by courts of equity, and now put on a statutory basis for many cases, is not a fiduciary duty; though not in all respects the same as the duty of care developed by the common law, it is essentially similar in character to the common law duty and each duty of care has been influenced by the other.<sup>6</sup> Since the duty of care imposed on trustees under the general law continues to govern the administration of trusts apart from the specific statutory powers and duties to which the new statutory duty of care applies, we begin with the former.

### Duty of care under the general law

**34-02** In administering the trust property, and in dealing with it, a trustee is required to use the same degree of diligence and care in the execution of his office that a man of ordinary prudence would exercise in the management of his own affairs. The general principle was expressed in *Speight v Gaunt*<sup>7</sup> as follows:

"... [As] a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own."<sup>8</sup>

Thus a trustee who employed a broker to purchase municipal securities authorised by the trust instrument and who then paid the purchase money to the broker upon the representation that it was due the next day, both steps being in accordance with the course usually adopted by prudent men of business, was held not liable for the loss when the broker misappropriated the money and became insolvent.<sup>9</sup> There is much other authority to the same effect.<sup>10</sup> The standard is that of the ordinary prudent man of business and not, of course, the standard actually adopted by the particular trustee in the conduct of his own affairs;<sup>11</sup> and

<sup>5</sup> *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 16-17, CA and cases there considered.

<sup>6</sup> *ibid.*

<sup>7</sup> (1883) 9 App. Cas. 1, HL.

<sup>8</sup> (1883) 9 App. Cas. 1 at 19, HL, *per* Lord Blackburn, approving Jessel M.R. (1882) 22 Ch.D. 727 at 739-740, CA.

<sup>9</sup> *Speight v Gaunt*, above. Formerly the employment of an agent raised special questions: see §§ 36-43 *et seq.*

<sup>10</sup> *Morley v Morley* (1678) 2 Ch. Cas. 2, *per* Lord Nottingham; *Jones v Lewis* (1750-51) 2 Ves. Sen. 240, *per* Lord Hardwicke; *Ex p. Belchier* (1754) Amb. 218; *Massey v Banner* (1820) 1 Jac. & W. 241; *Re Godfrey* (1883) 23 Ch.D. 483 at 493; *Bullock v Bullock* (1886) 56 L.J.Ch. 221; *Leayard v Whiteley* (1887) 12 App. Cas. 727, HL; *Austin v Austin* (1906) 3 C.L.R. 516, Aus. HC; *Re Lucking's Will Trusts* [1968] 1 W.L.R. 866 at 874; *Bartlett v Barclays Bank Trust Co. Ltd* [1980] Ch. 515 at 531; and see *Knox v MacKinnon* (1888) 13 App. Cas. 753, HL Sc.; *Rae v Meek* (1889) 14 App. Cas. 558, HL Sc. As to the application of the principle to cases of investment, see § 35-64.

<sup>11</sup> *Rae v Meek* (1889) 14 App. Cas. 558 at 569, HL; *Re Lord De Clifford's Estate* [1900] 2 Ch. 707 at 716.

a higher standard of care may apply to a trustee such as a trust corporation carrying on a specialised business of trust management.<sup>12</sup> The dictum of Lord Northington<sup>13</sup> that "no man can require or with reason expect a trustee to manage his property with the same care and discretion that he would his own" has always met with disapproval. The duty of care under the general law broadly continues to apply in relation to the duties of trustees concerning custody of the trust property and its management, which are considered in sections 3 and 4 of this chapter. That duty of care under the general law may be excluded or restricted by the terms of the trust.<sup>14</sup> The duty was also formerly ousted by the terms of certain statutory powers conferred on trustees, most notably the power to employ agents under section 23 of the Trustee Act 1925,<sup>15</sup> though since the Trustee Act 2000 came into force such powers have been either replaced by new powers which are subject to the statutory duty of care or modified so that they are subject to the statutory duty.<sup>16</sup>

### Application of the duty of care under the general law to particular kinds of trustees

#### Trustees of bare or simple trusts

The duty of care under the general law is primarily of importance in relation to special trusts.<sup>17</sup> A bare trustee, holding property for a single beneficiary who is absolutely and indefeasibly entitled, has traditionally been said to be a mere passive repository, owing a duty only to transfer the property to the beneficiary or at his direction.<sup>18</sup> But it is clear that certain trustees holding property in that way owe active duties to manage the trust property, with corresponding powers, notably a trustee of land, a trustee for a minor solely entitled and a trustee with an unsatisfied right of indemnity;<sup>19</sup> and other such trustees also may have powers of management, with an associated duty of care.<sup>20</sup> The point is fully considered elsewhere.<sup>21</sup>

#### Custodian trustees

Custodian trustees are not bare trustees.<sup>22</sup> They plainly have duties of care in relation to safeguarding the trust property, and in attending to and obeying the directions of the managing trustees.

<sup>12</sup> *Bartlett v Barclays Bank Trust Co. Ltd*, above, at 534; *Australian Securities Commission v AS Nominees Ltd* [1996] P.L.R. 297 at 308, Aus. FC; and for United States authority see *Scott and Ascher on Trusts* (5th edn), Vol.3, § 17.6 (pp.1210 *et seq.*).

<sup>13</sup> *Harden v Parsons* (1758) 1 Eden 148.

<sup>14</sup> *Armitage v Nurse* [1998] Ch. 241 at 253-254; and see §§ 39-77 *et seq.*

<sup>15</sup> Now repealed, see §§ 36-34 *et seq.*; s.23 required merely that the trustees should have acted in good faith. Other powers subject only to a duty of good faith were conferred by Trustee Act 1925, s.15 (compounding liabilities) and s.22 (reversionary interests), both now amended, see § 36-76 and § 34-16 respectively.

<sup>16</sup> See § 34-07.

<sup>17</sup> As to what is a special trust see § 1-21.

<sup>18</sup> See § 1-21.

<sup>19</sup> See §§ 1-25 (trustee of land), 1-27 (trustee for minor), 1-28 (trustee with right of indemnity).

<sup>20</sup> See §§ 1-25, 1-26.

<sup>21</sup> See §§ 1-21 *et seq.*

<sup>22</sup> See § 1-29.

*Constructive trustees*

34-05 As we saw in Chapter 7, there are many kinds of constructive trusts and as regards some constructive trusts one cannot sensibly say that there is any duty of care on the so-called trustees of such trusts. That is generally so with what we call remedial constructive trusts,<sup>23</sup> especially compensatory remedial constructive trusts,<sup>24</sup> where the imposition of constructive trusteeship is a formula for personal equitable relief and there is no real trust at all; but there are some trusts which we describe as remedial constructive trusts where there is, at least, a qualified duty of care, notably the case of a vendor under a specifically enforceable contract.<sup>25</sup> In the case of what we call institutional constructive trusts, however, the trustee is in a similar position to an express trustee and so subject to similar duty of care. A notable example of a constructive trustee under an institutional constructive trust who is subject to the duty of care is a trustee *de son tort*.<sup>26</sup> Other constructive trustees of a constructive trust of that type are also subject to a duty of care. For example, a trustee who renews a lease in his own favour could hardly say that he had a duty of care in relation to the original lease which was held on an express trust but none in relation to the new lease which he holds on a constructive trust under the rule in *Keech v Sandford*;<sup>27</sup> nor can it make any difference that the trustee wrongly seeks to keep the new lease for himself in contravention of the rule.

**The statutory duty of care**

34-06 The Trustee Act 2000 imposes a duty of care<sup>28</sup> by section 1 of the Act, which provides:

“(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

- (a) to any special knowledge or experience that he has or holds himself out as having, and
- (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called ‘the duty of care’.”

<sup>23</sup> See § 7-11.

<sup>24</sup> See § 7-13.

<sup>25</sup> See § 7-19. See too §§ 10-03 *et seq.*

<sup>26</sup> See §§ 7-15 and 42-60 *et seq.*

<sup>27</sup> See §§ 7-17 and 21-02 *et seq.*

<sup>28</sup> Pursuant to proposals in Law Commission Report on Trustees’ Powers and Duties, Law Com. No.260 (1999), Pt III.

There is no provision providing for retrospective effect, so the statutory duty of care applies only to acts or omissions after the 2000 Act came into force on February 1, 2001,<sup>29</sup> but it applies to trusts in existence at that time.<sup>30</sup>

**When the statutory duty of care applies**

The cases when the statutory duty of care applies to trustees are as follows:

34-07

- (1) When trustees exercise the general power of investment conferred by section 3 of the 2000 Act<sup>31</sup> or any other investment power however conferred, and when they carry out any duty under sections 4 or 5 of the 2000 Act<sup>32</sup> concerning the mode of exercise of the general power of investment and other investment powers and review of investments.<sup>33</sup>
- (2) When trustees exercise the power under section 8 of the 2000 Act<sup>34</sup> or any other power however conferred to acquire land;<sup>35</sup> when they exercise any powers in relation to land acquired under any such power<sup>36</sup> and when as trustees of land, however acquired, they exercise the powers conferred by section 6 of the Trusts of Land and Appointment of Trustees Act 1996<sup>37</sup> and by section 9 of that Act.<sup>38</sup>
- (3) When trustees enter into arrangements concerning the appointment of agents, nominees or custodians under sections 11,<sup>39</sup> 16,<sup>40</sup> 17<sup>41</sup> or 18 of the 2000 Act or under any other powers however conferred, and when they carry out their duty under section 22 of the 2000 Act<sup>42</sup> to review such arrangements.<sup>43</sup>
- (4) When trustees exercise powers of compromise and other powers conferred by section 15 of the Trustee Act 1925<sup>44</sup> or any corresponding powers however conferred.<sup>45</sup>

<sup>29</sup> Trustee Act 2000 (Commencement) Order 2001 (SI 2001/49).

<sup>30</sup> Because the statutory duty of care is an adjunct to powers already possessed by trustees of existing trusts (being powers conferred by the trust instrument or existing legislation) or to new powers expressly conferred on trustees of existing trusts by Trustee Act 2000 itself: see ss.7(1), 10(2), 27, 34(3).

<sup>31</sup> Printed in § 35-02.

<sup>32</sup> Printed in §§ 35-58, 35-66, 35-68, 35-69 and 35-77.

<sup>33</sup> Trustee Act 2000, s.2, Sch.1, para.1. For exercising powers of investment and reviewing investments, see generally §§ 35-57 *et seq.*

<sup>34</sup> Printed in § 35-124.

<sup>35</sup> Trustee Act 2000, s.2, Sch.1, para.2(a) and (b).

<sup>36</sup> *ibid.*, s.2, Sch.1, para.2(c).

<sup>37</sup> Trusts of Land and Appointment of Trustees Act 1996, s.6(9), inserted by Trustee Act 2000, s.40, Sch.2, Pt II, para.45(3). See § 37-21.

<sup>38</sup> Trusts of Land and Appointment of Trustees Act 1996, s.9A, inserted by Trustee Act 2000, s.40, Sch.2, Pt II, para.47. See § 37-28.

<sup>39</sup> Printed (so far as material) at § 36-13.

<sup>40</sup> Printed in § 34-72.

<sup>41</sup> Printed in § 34-35.

<sup>42</sup> Printed in § 34-38.

<sup>43</sup> Trustee Act 2000, s.2, Sch.1, para.3. See §§ 36-30 and 36-31.

<sup>44</sup> See § 36-76.

<sup>45</sup> Trustee Act 2000, s.2, Sch.1, para.4.

- (5) When trustees exercise the power conferred by section 19 of the Trustee Act 1925<sup>46</sup> to insure property or any corresponding power, however conferred.<sup>47</sup>
- (6) When trustees exercise the powers conferred by section 22(1) (concerning reversionary interests)<sup>48</sup> or section 22(3) (concerning valuation) of the Trustee Act 1925 or any corresponding powers however conferred.<sup>49</sup>

The statutory duty of care is for the most part expressed to apply to trustees "when exercising" the particular power. That form of words is unsuited to apply it when the trustees are considering whether they should exercise the power. In some cases that prior stage is brought within the statutory duty by other wording, so that, for example, it applies when the trustees are exercising their duty to review the investments of the trust and not only when exercising the power of investment in consequence of the review.<sup>50</sup> But in other cases there is no such corresponding provision, so that, for example, the statutory duty seems not to apply to the trustees when they are considering whether to insure trust property but only when effecting the insurance after deciding to do so;<sup>51</sup> that indeed is what the Law Commission intended.<sup>52</sup> Even so, it will be a rare case which turns on the differences between the statutory duty and the duty under the general law.<sup>53</sup>

#### Exclusion and restriction of the statutory duty of care

34-08 Paragraph 7 of Schedule 1 to the 2000 Act provides:

"The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply."

Clauses in the trust instrument which abridge specific duties<sup>54</sup> of the trustees by substituting a requirement of good faith for one of due care will operate to exclude the statutory duty of care as regards such duties. But we do not consider that special indemnity clauses<sup>55</sup> will negate the duty of care generally or at all. Such clauses do not limit the duties of trustees but rather protect them from personal liability to pay compensation for breach of trust. They should therefore

<sup>46</sup> As amended by Trustee Act 2000, s.34. See §§ 34-51 *et seq.*

<sup>47</sup> Trustee Act 2000, s.2, Sch.1, para.5.

<sup>48</sup> See § 34-16.

<sup>49</sup> Trustee Act 2000, s.2, Sch.1, para.6. This para. is headed "Reversionary interests, valuations and audit", but the statutory duty of care is not, however, applied to the power in Trustee Act 1925, s.22(4) to have trust accounts audited (see § 36-94). We consider that the duty of care under the general law accordingly applies to the power in s.22(4).

<sup>50</sup> Trustee Act 2000, ss.3, 4(2), Sch.1, para.1.

<sup>51</sup> Trustee Act 1925, s.19 (as amended by Trustee Act 2000, s.34); Trustee Act 2000, Sch.1, para.5.

<sup>52</sup> See Law Commission Report on Trustees' Powers and Duties, Law Com. No.260 (1999), paras 3.12, 6.8 to 6.10.

<sup>53</sup> See § 34-09.

<sup>54</sup> See § 39-79.

<sup>55</sup> See §§ 39-81 *et seq.*

not affect the existence of the statutory duty of care, though they will affect the remedies available to the beneficiaries if breaches of the statutory duty take place or are threatened. Where the statutory duty of care applies but the trustees are protected by a special indemnity clause, the beneficiaries, though unable to seek compensation for the breach of the duty, may seek the removal of trustees from office if the breach is serious or of a persistent character<sup>56</sup> or seek an injunction if the breach is threatened but has not yet taken place.<sup>57</sup>

#### The standard of care under the statutory duty

In lieu of the standard of care that a prudent man of business would exercise in his own affairs, which is the measure of the duty under the general law, the statutory duty substitutes the standard of care and skill which it is reasonable for any particular trustee to exercise in the circumstances, having regard in particular to the specific matters referred to in paragraphs (a) and (b) of section 1(1) of the 2000 Act.<sup>58</sup> Under the general law the same duty of care ordinarily applies to all trustees irrespective of whether they are lay trustees or professional trustees and irrespective of any special knowledge or experience that they may have. There may be an exception in the case of trust corporations,<sup>59</sup> but even that has yet to be firmly established, and it has not been suggested that there is a difference of standard between professional and lay trustees, or between professional trustees who specialise in trust work and those who undertake trust work as part of their general practice. The statutory duty, however, draws distinctions:

- (1) First, it is relevant to have regard to any special knowledge or experience that a trustee, whether or not acting in the course of a profession or business, has or holds himself out as having.<sup>60</sup>
- (2) Secondly, when he does act in the course of a business or profession it is relevant also to have regard to any special knowledge or experience which it is reasonable to expect of a trustee acting in the course of that kind of profession or business.<sup>61</sup>

The first element relates to the trustee personally, while the second element relates to persons engaged in the trustee's profession or business generally. Hence a distinction can be drawn between a trustee who undertakes trust business in course of general practice and a trustee who specialises or holds himself out as specialising in trust work or a particular type of trust work. The former is governed by the general professional standard, while the latter is governed by the

<sup>56</sup> See §§ 13-47 *et seq.*

<sup>57</sup> See Chap.38.

<sup>58</sup> See Law Commission Report on Trustees' Powers and Duties, Law Com. No.260 (1999), para.3.24.

<sup>59</sup> See § 34-02.

<sup>60</sup> Trustee Act 2000, s.1(1)(a).

<sup>61</sup> Trustee Act 2000, s.1(1)(b).

34-09

34-10

34-11

34-12

CHAPTER 46

TRUSTEES INVOLVED WITH CRIMINAL AND TERRORIST PROPERTY

Though your sins be as scarlet, they shall be as white as snow.

Isaiah, 1:18

1. Scope of chapter	46-01	6. Duties of disclosure and non-disclosure	46-49
2. The legislation	46-03	7. Customer due diligence and other systems	46-59
3. Registration and supervision of trustees	46-05	8. Guidance for trustees	46-116
4. Proceeds of crime	46-09	9. Civil recovery of proceeds of crime	46-130
5. Property connected with terrorism	46-36	10. Confiscation and similar orders	46-144

1. SCOPE OF CHAPTER

Until fairly recently, trustees were not generally concerned with the sources of the assets which their settlor was putting into trust, subject only to the possibility that the settlor might turn out not to be the true owner. Nor did they have to explain themselves to third parties with whom they dealt, their legal ownership being a sufficient voucher, or concern themselves with the uses to which distributions from the trust might be put. That has now changed in consequence of legislation designed to strengthen the weapons available to attack serious crime and terrorism. In addition to conventional sanctions for the underlying criminal activity, there are now wide-ranging provisions for inhibiting dealings with the proceeds of crime and for recovering or confiscating the proceeds of crime. The dealings affected include, but are not limited to, money laundering in its original sense, *i.e.* treating the proceeds in such a way as to give them the appearance of having a legitimate origin, and the constraints are all described as measures against money laundering. Trust professionals are now also subject to a requirement of registration and they have to view their clients and others with caution, satisfying themselves of their identity (and those behind them).

In this chapter, after identifying the relevant legislation,<sup>1</sup> we give an account of it in the order in which it may affect a trustee:

<sup>1</sup> At §§ 46-03 *et seq.*

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- (1) First is the new requirement that all in the trust business should be registered with a supervisory body;<sup>2</sup>
- (2) We then turn to the proceeds of crime<sup>3</sup> and terrorist financing<sup>4</sup> and the duties of disclosure and non-disclosure in connection with them;<sup>5</sup>
- (3) We go on to the systems which are now required to be in place, in particular the obligation to apply "customer due diligence measures";<sup>6</sup>
- (4) We then identify the guidance available to trustees and suggest what to do if there is reason to think that trust assets are proceeds of crime or tainted with terrorism;<sup>7</sup> and
- (3) Finally we discuss the civil recovery of proceeds of crime<sup>8</sup> and confiscation and similar orders connected with them.<sup>9</sup>

We assume throughout that the trustees will not themselves be guilty of the underlying criminal conduct or of consciously supporting terrorism.

## 2. THE LEGISLATION

### Principal legislation and regulations

46-03 The present statutory regime is as follows:

- (1) The main legislation is the Proceeds of Crime Act 2002, which came into force on February 24, 2003<sup>10</sup> and has been amended by the Serious Organised Crime and Police Act 2005 with effect from various dates in 2005 and 2006.
- (2) Also important are somewhat similar provisions of the Terrorism Act 2000, as amended by the Anti-terrorism, Crime and Security Act 2001.
- (3) Both the 2002 Act and the Terrorism Act 2000 are supplemented by the Money Laundering Regulations 2007,<sup>11</sup> which give effect to the European Union Third Money Laundering Directive<sup>12</sup> and came into force on December 15, 2007,<sup>13</sup> replacing the Money Laundering Regulations 2003.<sup>14</sup>

<sup>2</sup> At §§ 46-05 *et seq.*

<sup>3</sup> At §§ 46-09 *et seq.*

<sup>4</sup> At §§ 46-36 *et seq.*

<sup>5</sup> At §§ 46-49 *et seq.*

<sup>6</sup> At §§ 46-59 *et seq.*

<sup>7</sup> At §§ 46-116 *et seq.*

<sup>8</sup> At §§ 46-130 *et seq.*

<sup>9</sup> At §§ 46-144 *et seq.*

<sup>10</sup> Proceeds of Crime Act 2002 (Commencement No.4, Transitional Provisions and Savings) Order 2003 (SI 2003/120).

<sup>11</sup> SI 2007/2157.

<sup>12</sup> Directive 2005/60/EC of the European Parliament and of the Council of October 26, 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

<sup>13</sup> Money Laundering Regulations 2007 (SI 2007/2157), reg.1(1).

<sup>14</sup> SI 2003/3075. The 2003 Regulations replaced Money Laundering Regulations 1993 (SI 1993/1933) and Money Laundering Regulations 2001 (SI 2001/3641).

The current Acts replaced the Criminal Justice Act 1988, which had been amended by the Criminal Justice Act 1993, the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Drug Trafficking Act 1994, successor to the Drug Trafficking Offences Act 1986.<sup>15</sup>

The 2002 Act covers the proceeds of any criminal offence, whether or not indictable, however small the amount involved and however long ago the crime (as distinct from the laundering) was committed. The Terrorism Act 2000 has a similar operation on the proceeds of terrorism, as also on property used or likely to be used for the purposes of terrorism. The 2007 Regulations not only supplement the two Acts, but go wider than money laundering. Among other things, the 2007 Regulations require trustee companies and individuals in similar businesses to be registered and supervised, as well as identifying people with whom they are dealing, keeping records, and following procedures to forestall and prevent the laundering of proceeds of crime and property tainted with terrorism.

46-04

### 3. REGISTRATION AND SUPERVISION OF TRUSTEES

#### All in the trustee business to be registered

Many trustees are already registered with supervisory bodies because they are in the banking sector or are solicitors, accountants or other professional people, but in a new departure all other trust professionals now have to be registered with a body that supervises them and monitors their compliance with the Acts and the 2007 Regulations. The 2007 Regulations require the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to keep a register of "trust or company service providers" for which they are the supervisory authority.<sup>16</sup> They also forbid anyone in respect of whom HMRC are required to maintain a register to act as a trust or company service provider unless included on the register.<sup>17</sup> Only a minority of service providers will in fact be supervised by HMRC.<sup>18</sup>

46-05

Under the 2007 Regulations,<sup>19</sup> "trust or company service provider" means:

46-06

"... a firm<sup>20</sup> or sole practitioner who by way of business provides any of the following services to other persons—

- (d) acting, or arranging for another person to act, as—

<sup>15</sup> For this previous legislation and the 2003 Regulations, which still apply to money laundering that took place before they were revoked, see the previous edition of this work (at §§ 12-32 *et seq.*) and Mitchell, Taylor and Talbot, *Confiscation and the Proceeds of Crime*.

<sup>16</sup> Money Laundering Regulations 2007 (SI 2007/2157), reg.25.

<sup>17</sup> *ibid.*, reg.26.

<sup>18</sup> See § 46-07.

<sup>19</sup> *ibid.*, reg.3(10)

<sup>20</sup> Meaning any entity, whether or not a legal person, that is not an individual, including a body corporate and a partnership or other incorporated association, see Money Laundering Regulations 2007 (SI 2007/2157), reg.2(1).

46-07

- (i) a trustee of an express trust or similar legal arrangement; or  
 (ii) a nominee shareholder for another person other than a company whose securities are listed on a regulated market . . . ”  
 when providing such services.”

In the Government’s view,<sup>21</sup> this definition includes, among others:

- (1) Legal professionals and accountants providing trust services by way of business to a third party;
- (2) Professional trustees who are remunerated as such;
- (3) Firms who provide registered offices and business addresses to trusts; and
- (4) Companies providing professional services as trustees for profit.

But it excludes, among others:

- (5) Members of the public who set up private trusts “not offered to the public”;
- (6) A person carrying on a business or profession the sole or main purpose of which is not trust company business, “when carrying out a service defined as a TCSP”, *i.e.* a trust or company service provider;<sup>22</sup>
- (7) A person who is carrying out TCSP activity, but is not separately remunerated and does not separately hold himself or herself out as providing this business as it is carried out as an incident of the person’s business or profession;
- (8) “Employment agencies that recruits [*sic*] bona fide long-term employees”;
- (9) “Corporate trustees who are not holding out of trustee [*sic*]”;
- (10) Non-professional charity trustees;
- (11) A non-professional executor or administrator of an estate of a deceased person; and
- (12) A connected company.

Though the meaning (if any) of some of that is obscure, it may be important, because according to the Government, “. . . it will be a list that the supervisors will be working towards.”<sup>23</sup> In our view a private trust company set up to operate family trusts, not for profit but merely entitled to its expenses, need not be registered, because it will not be providing services by way of business.

#### HMRC and other supervisory authorities

46-07 We have seen<sup>24</sup> that professional trustees of any trust have to be registered with HMRC before they act in the trust, if HMRC is their supervisory authority.

<sup>21</sup> H.M. Treasury, *Implementing the Third Money Laundering Directive: Draft Money Laundering Regulations 2007*, Chap.2: Accompanying narrative to draft Regulations, paras 2.82, 2.83, referring to a draft in slightly different terms.

<sup>22</sup> The document is not remarkable for the standard of its prose.

<sup>23</sup> H.M. Treasury, *Implementing the Third Money Laundering Directive: Draft Money Laundering Regulations 2007*, Chap.2: Accompanying narrative to draft Regulations, para.2.81.

<sup>24</sup> § 46-05.

HMRC is the supervisory authority of trust service providers not supervised by either the Financial Services Authority (“the FSA”) or one of the bodies listed in Schedule 3 of the 2007 Regulations.<sup>25</sup> Those include the accountants’ and lawyers’ professional bodies in England, Wales, Scotland and Northern Ireland, the Association of Taxation Technicians and the Chartered Institute of Taxation, so professionals regulated by them need not register with HMRC. They are supervised by their own professional bodies, which can prevent them from practising if they prove not to be fit and proper people. Likewise, the FSA regulates banks and other financial institutions; the great majority of companies providing trustee services in the United Kingdom today are regulated by the FSA, and so are not required to register with HMRC, though before acting as a trust service provider or within 28 days of doing so providers regulated by the FSA have to inform it that they intend, or have begun, to act as such.<sup>26</sup> That leaves to be regulated by HMRC only trustee companies not regulated by the FSA and individuals offering trustee services who are not regulated by any of the legal, accountancy or taxation bodies listed in Schedule 3. Since not many service providers are left affected by the succeeding provisions of the 2007 Regulations, we deal with them now in outline only.

#### Registration

The procedure for registration is in the hands of HMRC.<sup>27</sup> They must refuse to register an applicant if satisfied that the applicant, or a person who effectively directs or will direct the service provider, or a beneficial owner<sup>28</sup> of it, or its nominated officer,<sup>29</sup> has convictions of specified (and directly relevant) kinds, or has been subject to other specified events or “is otherwise not a fit and proper person with regard to the risk of money laundering or terrorist financing”.<sup>30</sup> Otherwise, they must register the applicant, unless he has given false information or has failed to pay the charge that meets HMRC’s expenses of registration.<sup>31</sup>

### 4. PROCEEDS OF CRIME

#### Introduction

Unlike the requirement to register just considered, most of the law against money laundering applies not to professional trustees alone but generally. It is contained primarily in Part 7 of the 2002 Act, but also in the Terrorism Act 2000, which

<sup>25</sup> See Money Laundering Regulations 2007 (SI 2007/2157), reg.23(1)(d)(iii) and the definition of “the Authority” in *ibid.*, reg.2(1).

<sup>26</sup> Money Laundering Regulations 2007 (SI 2007/2157), reg.31; the definition of “authorised person” in *ibid.*, reg 2(1); and Financial Services and Markets Act 2000, s.31(2).

<sup>27</sup> Money Laundering Regulations 2007 (SI 2007/2157), reg.27.

<sup>28</sup> For the meaning of “beneficial owners”, see *ibid.*, regs 2(1), 6 and §§ 46-89 *et seq.*

<sup>29</sup> A “nominated officer” is one nominated to receive money laundering disclosures, see *ibid.*, reg.2(1).

<sup>30</sup> Money Laundering Regulations 2007 (SI 2007/2157), reg.28(1), (2).

<sup>31</sup> *ibid.*, reg.29.

46-08

46-09

must be borne in mind; we consider the 2000 Act in the next section.<sup>32</sup> The 2002 Act as amended:

- (1) prohibits the laundering of what it calls "criminal property";
- (2) requires disclosure of such dealings to the authorities; and
- (3) forbids "tipping off" the launderer;

and there are provisions for forfeiture and confiscation of assets.<sup>33</sup> There are three principal money laundering offences, created by sections 327, 328 and 329 of the 2002 Act, concerned respectively with concealment of criminal property, arrangements concerning it and acquiring it. We consider those principal offences in this section.<sup>34</sup>

- 46-10 The 2002 Act defines "criminal property" by reference to "criminal conduct". We begin with the very wide definitions of those phrases for the purpose of Part 7 of the 2002 Act—wider than was required by the relevant Directive.<sup>35</sup>

#### Criminal conduct

- 46-11 The 2002 Act defines "criminal conduct" as conduct which:

- (a) constitutes an offence in any part of the United Kingdom, or
- (b) would constitute an offence in any part of the United Kingdom if it occurred there.<sup>36</sup>

All crimes are included in "criminal conduct," even though triable only summarily, and however minor the crime or the penalty may be. A crime is included whether or not anyone has been convicted of it, tried for it, or even charged with it. It is also irrelevant who carried out the conduct and who benefited from it.<sup>37</sup> Accordingly, they need not be the same people. Conduct is "criminal conduct" whether it was committed before or after the passing of the 2002 Act, though laundering its proceeds is not within the 2002 Act if the laundering was committed before Part 7 was brought into force on February 24, 2003.<sup>38</sup> In such a case one of the predecessor Acts may apply.<sup>39</sup>

#### Tax evasion

- 46-12 Tax legislation creates some criminal offences. Cheating the public revenue is also an offence at common law preserved by section 32(1) of the Theft Act

<sup>32</sup> §§ 46-36 *et seq.*

<sup>33</sup> Considered at §§ 46-121 *et seq.*

<sup>34</sup> At §§ 46-18 *et seq.*, 46-21 *et seq.* and 46-26 *et seq.*

<sup>35</sup> *Bowman v Fels* [2005] EWCA 226; [2005] 1 W.L.R. 3083, especially at [47]-[50].

<sup>36</sup> Proceeds of Crime Act 2002, s.340(2).

<sup>37</sup> Proceeds of Crime Act 2002, s.340(4)(a), (b).

<sup>38</sup> Proceeds of Crime Act 2002 (Commencement No.4, Transitional Provisions and Savings) Order 2003 (SI 2003/120).

<sup>39</sup> See § 46-03.

1968.<sup>40</sup> Dishonest failure to make a tax return required by law constitutes the offence,<sup>41</sup> and the benefit from it is criminal property,<sup>42</sup> even where the tax evaded is tax on the profits of a legitimate trade.<sup>43</sup> Nonetheless, the profits of trading in legitimate goods are not converted into criminal property by failure to declare them to the Revenue, nor does it make the trading unlawful.<sup>44</sup> Evading foreign taxes is considered below.

#### Foreign element

Where the conduct takes place abroad, foreign law is not invoked. Instead the events have to be mentally transferred to the United Kingdom to see whether they would amount to a crime under the law of some part of the United Kingdom.<sup>45</sup> That has some odd consequences; for example, fur trading or hunting (or even driving on the right of the road) in a foreign country where it is lawful (or even obligatory) seem strictly speaking to be within the definition. Those consequences have been mitigated by amendment<sup>46</sup> so as to provide that a person does not commit an offence under the relevant provisions of the 2002 Act<sup>47</sup> if he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and that conduct was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and is not of a description prescribed by an order of the Secretary of State.<sup>48</sup> Within the United Kingdom itself, however, it is still no defence if conduct that is an offence in some part of the United Kingdom is lawful under the criminal law of the other part of the United Kingdom in which it occurred.

The evasion of foreign rather than United Kingdom tax is an awkward case. We do not consider that the legislation<sup>49</sup> requires a foreign revenue authority to be treated as if it were a United Kingdom authority, but only requires the act of cheating it to be treated as if it had occurred in the United Kingdom; and cheating a foreign revenue authority in the United Kingdom is not of itself an offence. But the point will usually be academic, since the conduct in question would usually have constituted some other offence under English (or Scottish) law, such as false accounting,<sup>50</sup> if it had taken place in the United Kingdom.

<sup>40</sup> *R. v Hudson* [1956] 2 Q.B. 252, CCA; *R. v Mavji* [1987] 2 All E.R. 758, CA.

<sup>41</sup> *R. v Mavji*, above.

<sup>42</sup> See § 46-15.

<sup>43</sup> *R. v K(I)* [2007] EWCA Crim 491; [2007] 1 W.L.R. 2262.

<sup>44</sup> *R. v Gabriel* [2006] EWCA Crim 229; [2007] 1 W.L.R. 2272n.

<sup>45</sup> Proceeds of Crime Act 2002, s.340(2)(b).

<sup>46</sup> See Serious Organised Crime and Police Act 2005, s.102, amending Proceeds of Crime Act 2002, ss.327-330, 333, discussed at §§ 46-09 to 46-12, 46-16 and 46-18. The 2005 Act came into force on May 15, 2006: see Serious Organised Crime and Police Act 2005 (Commencement No.6 and Appointed Day) Order 2006 (SI 2006/1085).

<sup>47</sup> See previous footnote.

<sup>48</sup> None has been prescribed.

<sup>49</sup> *i.e.* Proceeds of Crime Act 2002, s.340(2)(b); see § 46-11.

<sup>50</sup> Theft Act 1968, s.17(1).