

Powers of trustee for absolute beneficiary	1-040
Express powers conferred on trustee for absolute beneficiary	1-041
Absolute trust for minor	1-042
Trustee's own interest—unsatisfied rights of indemnity	1-043
Custodian trustee	1-044
Two or more persons absolutely entitled	1-045
Sub-trusts of absolute trusts	1-046
Liability for knowing receipt	1-047
Vested interests	1-048
Indefeasible and defeasible vested interests	1-049
Vested interest defeasible by prior or concurrent interest	1-050
Vested interest defeasible by exercise of overriding power of appointment	1-051
Terminable vested interests	1-052
Fine distinctions between contingent and vested defeasible interests	1-053
Practical significance of the distinction between contingent and vested defeasible interests	1-054
Contingent interests	1-055
Trusts for children	1-056
Gift to a class upon a contingency and a gift to a contingent class	1-057
Unascertained interests	1-058
Practical importance of the distinction between contingent and unascertained interests	1-059
Endurance of the distinction between contingent and unascertained interests	1-060
Discretionary interests	1-061
Employee Benefit Trusts	1-063
Interests in possession	1-065
Reversionary interests	1-069

1. DEFINITION OF A TRUST

Definitions and descriptions

1-001 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,¹ 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.²

“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 assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.³

A trust has the following characteristics—

¹ *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.

² 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 2007, s.1.

³ The purpose will usually be a charitable purpose, but trusts for a narrow class of other purposes may be valid, see §§ 4-042 to 4-057. Charitable trusts are not dealt with in this work, see § 1-031.

- (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.”

Instead of transferring assets under the control of someone else as trustee, the settlor can declare himself to be a trustee.⁴ With that addition, all trusts are within this definition. By a deliberate decision,⁵ however, it was made wide enough also to include analogous institutions of foreign law.⁶ 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.⁷

A general judicial definition

An Australian judge, Mayo J. gave⁸ a general definition which also applies in England and Wales. He said: 1-002

“No definition of a ‘trust’ seems to have been accepted as comprehensive and exact⁹ . . . Strictly it refers, I think, to the duty or aggregate accumulation of obligations¹⁰ 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

⁴ See §§ 3-004 *et seq.*, and on this aspect of the convention § 11-194.

⁵ Explanatory Report by Alfred E. von Overbeck, para.26.

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

⁷ 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 § 1-011.

⁸ *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 fn.13, but see fn.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 § 1-029.

⁹ 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 edn 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.71-176.

¹⁰ Trusts, however, are not mere personal obligations: the beneficiary takes a proprietary interest in the trust property. See § 1-006. And a trust is not a contract, but see § 1-019.

A proprietary relationship

- 1-006** 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,²⁷ so he has a proprietary right or interest in a broader sense of the term.²⁸ 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),²⁹ 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.³⁰
- 1-007** 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 owner from the date of the contract of sale,³¹ a specific devisee or legatee under a will is the equitable owner of the specific property from the testator's death,³² 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.³³ It is the same even if an annuity has first to be paid out of the income.³⁴ (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

²⁷ See §§ 41–117 *et seq.*

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

²⁹ *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 A.C. 709; see generally §§ 23–015 *et seq.*

³⁰ On the proprietary remedy of beneficiaries and vindication of property rights, see Chap. 41. STAR trusts and foreign non-charitable purpose trusts (see § 1-005) 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.

³¹ *Lysaght v Edwards* (1876) 2 Ch.D. 499, especially at 505; *Allen v I.R.C.* [1914] 1 K.B. 327; *affid.* [1914] 2 K.B. 327; see §§ 10–003 *et seq.* The Supreme Court has cast doubt on these cases in *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52. The court held that a purchase under a contract for sale of land did not have a proprietary interest in the land capable of supporting the creation of proprietary interests by the purchaser prior to completion: see especially [57]–[66] per Lord Collins and Lord Sumption; [110] and [122] per Lady Hale.

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

³³ *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* (33rd edn), § 21–016 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.

³⁴ *Nelson v Adamson* [1941] 2 K.B. 12.

themselves in any such case.³⁵ 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.³⁶

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,³⁷ 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.³⁸ They are nonetheless entitled to enforce due administration of the assets, and so are interested in a wider sense,³⁹ and the personal representatives cannot be said to have “beneficial ownership” of any of the assets.⁴⁰

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.⁴¹ 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 whole⁴² beneficial interest meet in the same person, the equitable

³⁵ 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).

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

³⁷ *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 §§ 29–127 *et seq.* and § 30–032.

³⁸ 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 Livingstone* [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 § 1–012); *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).

³⁹ *Commissioner of Stamp Duties (Queensland) v Livingstone* [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.

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

⁴¹ 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.

⁴² *Phillips v Brydges* (1796) 3 Ves. Jr. 120 at 125–127; *Merest v James* (1821) 6 Madd. 118.

1-008

1-009

obligation is swallowed up in the ownership.⁴³ That person thenceforth simply holds as absolute beneficial owner, and the property is sometimes said to be “at home”.

Types of trust property

- 1-010** 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,⁴⁴ an equity of redemption and a beneficial interest under another trust.⁴⁵ This topic is further considered elsewhere.⁴⁶

Trusts enforceable in equity

- 1-011** 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,⁴⁷ 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 law, the rules of equity prevail.⁴⁸ All causes and matters in the High Court for the execution of trusts are assigned to the Chancery Division.⁴⁹ The county court has concurrent jurisdiction with the High Court in proceedings for the execution of any trust or for a declaration that a trust subsists or proceedings under the Variation of Trusts Act 1958 where the trust fund does not exceed £350,000 in amount or value.⁵⁰

Personal representatives

- 1-012** Personal representatives often hold property upon trust within the above definitions. For instance, on an intestacy the administrators hold on express trust,⁵¹ and a will often imposes express trusts upon the executors. Many of the duties of

⁴³ *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).

⁴⁴ See §§ 2-034, 4-013 to 4-019.

⁴⁵ See § 2-034.

⁴⁶ See §§ 2-034, 2-035.

⁴⁷ For an historical note, see 12th and previous editions, and Holdsworth, *History of English Law*, especially the passages mentioned in § 1-002. 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.

⁴⁸ Senior Courts Act 1981, s.49. The House of Lords has deprecated references to the division between law and equity: *United Scientific Holdings Ltd v Burnley B.C.* [1978] A.C. 904, HL, especially at 924-925, 944-945, 957 but the very existence of trusts depends on equitable rights prevailing over legal titles under s.49, replacing the “common injunction”. (Incidentally, without the distinction where stands Law of Property Act 1925, s.1?).

⁴⁹ Senior Courts 1981, s.61(1) and Sch. 1, para.1(c).

⁵⁰ County Courts Act 1984, s.23(b), as amended by Crime and Courts Act 2013, s.17(5) and Sch.9, Pt. 1, paras 1 and 10(1)(a); County Court Jurisdiction Order 2014 (SI 2014/503), art.3. The parties can confer greater jurisdiction by agreement under s.24, except for proceedings under the Variation of Trusts Act 1958: s.24(3). In the case of applications under statutory provisions referred to in Trustee Act 1925, s.63A(1) as inserted by County Courts Act 1984, s.148(1) and Sch.2, Pt.1, para.1, the county court limit is £30,000, see Trustee Act 1925, s.63A(6) and County Court Jurisdiction Order 2014 (SI 2014/503), art.3. There is no provision for increase of the jurisdiction under s.63A(1) and (6) by agreement.

⁵¹ Administration of Estates Act 1925, ss.33(1), 46(1).

personal representatives can be described as trusts.⁵² Moreover, most of the provisions of the Trustee Act 1925 apply to personal representatives,⁵³ as do the provisions of the Trusts of Land and Appointment of Trustees Act 1996 concerning land⁵⁴ and the provisions of the Trustee Act 2000.⁵⁵ In a stricter sense of the word “trustee”, however, it does not apply to personal representatives, and the administration of deceased estates is not dealt with in this work.⁵⁶

Settled Land Act Trustees

Trustees for the purpose of the Settled Land Act 1925 are trustees within the meaning of the Judicial Trustees Act 1896, even though the settled land is not vested in them.⁵⁷ **1-013**

Settlement and will

A document that looks like a settlement may be a will in disguise. “It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary.”⁵⁸ If that was the intention of the settlor, then the settlement is a testamentary document, and therefore void under the Wills Act 1837 unless it was executed in the presence of two witnesses, and otherwise as required by that Act. The reservation by the settlor of large beneficial powers and interests may leave the lifetime trusts declared in favour of others so squalid as to be considered illusory. If a power of revocation is also reserved, this can turn a settlement into a will. There are a number of judicial decisions to this effect in Canada⁵⁹ and New York,⁶⁰ and the principle has been recognised by the Privy Council.⁶¹ **1-014**

Often, however, declarations of trust that might otherwise run the risk of being held testamentary documents contain some provision that is plainly intended to take effect during the lifetime of the settlor. An example is a power for the trustees to apply capital of the trust fund for the benefit of the settlor while he is alive but under disability. Any such provision is enough to show that the **1-015**

⁵² *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] A.C. 694 at 707, PC.

⁵³ Trustee Act, 1925, s.68(1)(17); but not the statutory power of appointing new trustees.

⁵⁴ Trusts of Land and Appointment of Trustees Act 1996, s.18.

⁵⁵ Trustee Act 2000, s.35.

⁵⁶ The reader is referred to Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (20th edn).

⁵⁷ *Re Marshall's Will Trusts* [1945] Ch. 217.

⁵⁸ *Cock v Cooke* (1866) L.R. 1 P. & D. 241 at 243, per Sir John Wilde (later Lord Chelmsford), see Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (19th edn), §§ 12-02 and 12-03, and see §§ 1-014 (at end), §§ 9-091 et seq. Principle applied in *Re AQ Revocable Trust* [2010] SC (Bda) 40 Civ; (2010-11) 13 I.T.E.L.R. 260 where the statement of the law in this paragraph and § 1-015, § 1-016 was approved at [9] and [17].

⁵⁹ *Re MacInnes* [1935] 1 D.L.R. 401, Can. SC (nomination under employment savings fund) distinguished but approved in *Baird v Baird* [1990] 2 A.C. 548, PC; *Re Pfrimmer Estate* [1936] 2 D.L.R. 123, Man. CA; followed in the cases noted in Waters, *The Law of Trusts in Canada* (3rd edn), pp.209-210; and applied *Western Smallwear & Stationery Co. Ltd v Bell* (1966) 55 D.L.R. (2d) 193, Man. CA.

⁶⁰ *Scott and Ascher on Trusts* (5th edn), Vol.1, § 8.2.2.

⁶¹ *Baird v Baird*, above.

declaration is intended to take effect during the settlor's lifetime, does not depend on his death for its vigour and effect and so is not a testamentary document that needs to be executed as such. Moreover, even without such a clear indication that the trust is intended to take immediate effect, it is not thought that the reservation even of very considerable rights and powers would make the trusts illusory during the settlor's lifetime unless the settlor was virtually the equitable owner of the trust property during his life.⁶²

1-016 It has been held that retained powers do not make the settlement into a testamentary document if they are subject to the trustees' consent,⁶³ that a settlement reserving a life interest and a power of revocation (though of the same economic effect as a will) is not a will,⁶⁴ and (in the United States, but it would be the same in England) that it is not enough that the object was to avoid the expense of a will and the need for probate.⁶⁵ Of course if there is no beneficiary at all other than the settlor then the whole beneficial interest falls into the settlor's estate (requiring probate) and is available to his creditors. The exercise of a general power of appointment by will also makes the appointed property available to creditors.⁶⁶

1-017 A gift into a joint bank account made by the donor with the intention that the donor should retain control during his lifetime, and that the donee should become entitled only to the balance remaining in the account at the donor's death, if the donee survives the donor, is a valid gift, not a testamentary disposition that fails for lack of compliance with the Wills Act 1837.⁶⁷

1-018 In some jurisdictions there are express statutory provisions to the effect that various kinds of powers or interests reserved by the settlor neither invalidate a lifetime trust, or delay or prevent it taking effect as a lifetime trust rather than a testamentary disposition.⁶⁸ Such provisions may go no further than give effect to what is the position without statutory intervention in England and Wales, but have the advantage of eliminating doubt as to the scope of the common law rules

⁶² As in *Re MacInnes*, above.

⁶³ *Baird v Baird*, above.

⁶⁴ *Tampson v Browne* (1835) My. & K. 32, especially at 35–36 *per* Pepys M.R. On *Att.-Gen. v Jones* (1817) 3 Pr. 368 there referred to see *Jefferies v Alexander* (1860) 8 H.L.C. 594 at 611.

⁶⁵ *National Shawmut Bank of Boston v Joy* 315 Mass. 457, 53 NE 2d 113 (1944).

⁶⁶ Administration of Estates Act 1925, s.32(1). See §§ 30–014, 30–015.

⁶⁷ *Re Pattinson* (1885) 1 T.L.R. 216; *Russell v Scott* (1936) 55 C.L.R. 440, Aus. HC; *Young v Sealey* [1949] Ch. 278; *Re Figgis* [1969] 1 Ch. 123; *Lynch v Burke and Allied Irish Bank* (1995) unreported, Ir. SC, reversing the decision below reported [1990] I.R. 1 and overruling *Owens v Greene* [1932] I.R. 225, Ir. SC. See *Aroso v Coutts & Co.* [2001] EWHC 443 (Ch); [2002] 1 All ER (Comm) 241 at [26] *et seq.* on the application of the principle to a case where the joint account includes securities as well as cash.

⁶⁸ Examples are: THE BAHAMAS: Trustee Act 1998, s.3; BERMUDA: Trusts (Special Provisions) Act 1989, s.2(3) (on which see *Re AQ Revocable Trust*, above, at [17]); BRITISH VIRGIN ISLANDS: Trustee Ordinance 1961, s.86(2); GUERNSEY: Trusts (Guernsey) Law 2007, s.15; CAYMAN ISLANDS: Trusts Law (2011 Revision), ss.13 and 14; JERSEY: Trusts (Jersey) Law 1984 (revised edn 2007), art.9A.

and are no doubt a comfort to settlors who wish to establish lifetime trusts in those jurisdiction reserving wide powers to themselves.

Trust and contract

Trust or contract debt

It is not always easy to say whether there is a trust or a mere contract debt. For instance, if A hands a cheque for £100 to B on terms that B is later to pay £100 to A, B may be a trustee of the cheque and its proceeds for A, or he may merely be a contract debtor of A. To know which he is may be vital, for instance where B has become insolvent⁶⁹ or the limitation period for recovering contract debts has expired.⁷⁰ It depends on whether the parties intend B to keep the money separate, or whether he is to be free to use it as his own.⁷¹ "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor."⁷² The payment of interest for the use of the money tends to indicate that its recipient is entitled to use it as his own, and accordingly is a mere debtor.⁷³ Similar considerations apply to debts constituted under statute.⁷⁴

Trusts in commercial transactions

The deposit of money in a bank does not of itself⁷⁵ create a trust in favour of the depositor, whether or not any interest is paid, and indeed creates no fiduciary relation at all between bank and customer.⁷⁶ "The whole system of banking is based on that conception."⁷⁷ The bank can use the money as it pleases and the

⁶⁹ Trust property is not available for the creditors in a trustee's bankruptcy or winding-up, see §§ 20–010 *et seq.*

⁷⁰ There would be no period of limitation for enforcing the trust: see §§ 44–004, 44–012 and 44–013, subject to difficult questions in the case of constructive trusts, see §§ 44–049 *et seq.*

⁷¹ *Re Nanwa Gold Mines* [1955] 1 W.L.R. 1080.

⁷² *Henry v Hammond* [1913] 2 K.B. 515 at 521, *per* Channell J.; applied by Slade J. in *Re Bond Worth Ltd* [1980] Ch. 228. See too *Neste Oy v Lloyds Bank Ltd* [1983] 2 Lloyd's Rep. 658; *Triffitt Nurseries v Salads Etcetera Ltd* [2000] 1 All E.R. (Comm) 737, CA; §§ 1–020, 1–022. As to modification of the duty to keep trust property separate from other property, see § 34–040.

⁷³ *Re Broad, ex p. Neck* (1884) 13 Q.B.D. 740, CA. Otherwise if he merely accounts for interest which it earns when deposited or invested elsewhere. The payment of interest did not prevent the creation of a trust in *Merritt v Klijn* [2002] ABQB 729; (2002–03) 5 I.T.E.L.R. 461, Alberta QBD.

⁷⁴ *Duggan v Governor HMP Full Sutton* [2004] EWCA Civ 78; *The Times*, February 13, 2004 (no trust of prisoner's money held in prison account pursuant to Prison Rules 1999 (SI 1999/728), r. 43(3)).

⁷⁵ *Ex p. Plitt* (1889) 60 L.T. 397 (cheque handed to banker expressly "in trust").

⁷⁶ *Foley v Hill* (1848) 2 H.L.C. 28; *R. v Davenport* [1954] 1 W.L.R. 569, CCA.

⁷⁷ *Dunmore v McGowan* [1976] 1 W.L.R. 1086 at 1089, *per* Brightman J (affirmed [1978] 1 W.L.R. 617, CA).

1-019

1-020

customer acquires no interest in or charge over any asset of the bank.⁷⁸ Generally the courts have been reluctant to introduce the intricacies and doctrines of trusts into ordinary commercial affairs.⁷⁹ On contracts that create trusts see Chapter 10. On the trust that sometimes arises in favour of the creditors when a loan is made for the purpose of paying debts, and the *Quistclose* trust that results to the lender if that purpose fails, co-existing with the contractual right to repayment, see §§ 8–040 *et seq.* On trusts of the benefit of contracts see §§ 4–013 *et seq.*

Trust and agency

1–021 A trustee is not the agent of the settlor (or creator) of the trust, or of the beneficiaries. The trustee acts as principal. He is not under the direction of the settlor or of the beneficiaries in administering the trust, unless there is an express provision to that effect,⁸⁰ or he is a bare trustee,⁸¹ and even a bare trustee is not the beneficiary's agent—nor is he the settlor's agent.⁸²

1–022 Agency differs from trust in that (though it may be a fiduciary relation) it is recognised by the common law and no property is necessarily involved. An agent may also be a trustee for his principal of property received as agent, but he is more often a mere bailee⁸³ of chattels so received. Whether he is an express trustee of money received as agent depends on the true construction of the agency agreement in the light of the surrounding circumstances including the intentions of the parties expressed or inferred, and in particular upon whether the agent is intended to keep the money separate from his own, when he is normally⁸⁴ but not always⁸⁵ a trustee, or whether he is not, when he is a mere contract debtor.⁸⁶ Ever

⁷⁸ *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd* [1986] 1 W.L.R. 1072 at 1073, PC (not questioned on this point in *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 at 108–110, PC).

⁷⁹ *New Zealand and Australian Land Co. v Watson* (1881) 7 Q.B.D. 374 at 382, CA, *per* Bramwell L.J., *Henry v Hammond* [1913] 2 K.B. 515 at 521, DC; *Scandinavian Trading v Flota Petrolera Ecuatoriana* [1983] Q.B. 529 at 540–541, *per* Robert Goff L.J. delivering the judgment of CA, approved by Lord Diplock with whose reasons the rest of HL agreed [1983] 2 A.C. 694 at 703–704; *Polly Peck International plc v Nadir (No.2)* [1992] 4 All E.R. 769 at 782, CA, *per* Scott L.J., see further § 42–064; but note that constructive trusts often have been raised in commercial contexts, see for instance §§ 8–040 *et seq.*, §§ 10–003 *et seq.* §§ 20–084 *et seq.*, and it is mainly the old equitable rules of constructive notice that are out of place in a commercial context, see *Manchester Trust v Furness* [1895] 2 Q.B. 539 at 545.

⁸⁰ Usually in the trust instrument, or the corresponding oral declaration if the trust is created by word of mouth; but Law of Property Act 1925, s.26(3) required trustees of a statutory trust for sale of land to give effect (within limits) to the wishes of the adult income beneficiaries, or the majority of them, and Trusts of Land and Appointment of Trustees Act 1996, s.11, is a similar provision applying to all “trusts of land”, as to which see § 37–055.

⁸¹ On what is a bare trust, see §§ 1–028 *et seq.*

⁸² *Ingram v I.R.C.* [2000] 1 A.C. 293 at 305D–H, 310G, HL, approving dissenting judgment of Millett L.J. in CA [1997] 4 All E.R. 395 at 419 *et seq.*

⁸³ See § 1–023.

⁸⁴ *Burdick v Garrick* (1870) 5 Ch. App. 233, *Re Fleet Disposal Service Ltd* [1995] 1 B.C.L.C. 345. And see *Brown v I.R.C.* [1965] A.C. 244, HL and § 1–019.

⁸⁵ *Re Japan Leasing (Europe) plc* [2000] W.T.L.R. 301 (express trust negated by terms of contract).

⁸⁶ *Wilsons and Furness-Leyland Line Ltd v British and Continental Shipping Co. Ltd* (1907) 23 T.L.R. 397; *Henry v Hammond* [1913] 2 K.B. 515, DC; *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep. 658 at 663–665; *Walker v Corboy* (1990) 19 N.S.W.L.R. 382; *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* (2001–02) 4 I.T.E.L.R. 301, Sing CA.

though the agent is not an express trustee he may sometimes hold the money received on a constructive trust for his principal⁸⁷ or a *Quistclose* trust.⁸⁸

Trust and bailment

A bailee is not a trustee⁸⁹ of the chattels bailed to him. His primary duties are enforced by the common law rather than equity, though he is in a fiduciary position, and the owner of the goods may also have the equitable remedy of tracing the proceeds of the goods.⁹⁰ The feature which distinguishes a bailment from a trust is that a bailee takes mere possession of the goods bailed, but a trustee takes the title to the trust property. From this it follows that a trustee selling in breach of trust can pass a good title to a *bona fide* purchaser for value and without notice, whereas (statute apart)⁹¹ a bailee generally⁹² cannot.⁹³

1–023

Trust and foundation

The private foundation is a civil law institution which has become increasingly common in offshore common law jurisdictions in the last 15 years⁹⁴ following the introduction of legislation generally designed to emulate the provisions of the Liechtenstein Law on Persons and Companies which first created the civil law private foundation.⁹⁵ A private foundation is a creature of the statutory provisions of the country in which the foundation is formed: to that extent the requirements for the creation of a valid private foundation vary between jurisdictions.⁹⁶ Broadly, a private foundation is a separate legal entity created by incorporation or registration, governed by constitutional documents and a council or body. The

1–024

⁸⁷ See § 7–040.

⁸⁸ See §§ 8–040 *et seq.*

⁸⁹ *i.e.* in the normal modern sense of the word, but when equity was young bailment was commonly spoken of as a trust though enforced in the common law courts. In *Rosenthal v Alderton & Sons Ltd* [1946] 1 All E.R. 583 at 584, the CA referred to a bailment as a delivery of goods in trust but they apparently had second thoughts on correcting the judgment: see [1946] K.B. 374.

⁹⁰ *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, CA. *Cf. Borden (U.K.) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, CA, where there was no bailment and the goods lost their identity in the manufacturing process, *Re Peachdart Ltd* [1984] Ch. 131, where the goods had ceased to be bailed, and had been subjected instead to a charge registrable under the Companies Act 1948, s.95, now Companies Act 1985, s.395, and *E. Pfeiffer Weinkellerei-Weineinkauf G.m.b.H. & Co. v Arbutnot Factors Ltd* [1988] 1 W.L.R. 150, where there was never any bailment or fiduciary arrangement, but an equitable assignment of the proceeds of sub-sales.

⁹¹ For instance under Factors Act 1889 and Torts (Interference with Goods) Act 1977.

⁹² Exceptions include sales by pledgees, cases where title is acquired by estoppel, *etc.*

⁹³ *MCC Proceeds Inc. v Lehman Bros International (Europe)* [1998] 4 All E.R. 675, CA.

⁹⁴ Private foundation legislation has been enacted in, *inter alia*, Panama (Law No.25 on Private Foundations 1995) and in a number of Commonwealth and British Islands countries; ST KITT'S AND NEVIS: Foundations Act 2003; THE BAHAMAS: Foundations Act 2004; ANTIGUA AND BARBUDA: International Foundations Act 2007; ANGUILLA: Foundation Act 2008; SEYCHELLES: Foundations Act 2009; JERSEY: Foundations (Jersey) Law 2009; BELIZE: International Foundations Act 2010; ISLE OF MAN: Foundations Act 2011; COOK ISLANDS: Foundations Act 2012; MAURITIUS: Foundations Act 2012; GUERNSEY: Foundations (Guernsey) Law 2012.

⁹⁵ *Personen und Gesellschaftsrecht*, first enacted in 1926 and substantially amended in 2009.

⁹⁶ See R. Goldsmith, *Private Foundations: Law and Practice* (1st edn, 2011), Chaps 5–9; P. Panico, *Private Foundations: Law and Practice* (1st edn, 2014).

of the law concerning bare or absolute trusts and bare trustees, and the distinction between such trusts and special trusts.¹⁰⁵

Fixed and discretionary trusts and powers

- 1-029** Special trusts may be subdivided into fixed¹⁰⁶ trusts, where the objects are identified, and discretionary trusts, where their choice is left to the trustee. A trust for A for life with remainder to his children, or to B, is a fixed trust. A trust to divide the income among such of A's children and in such shares as the trustees think fit is a discretionary trust.¹⁰⁷ To be distinguished is a power, where the trustees are authorised, but not directed, to distribute.¹⁰⁸ What at first sight appears a power may impose a duty to distribute, requiring the trustees to choose the recipients. The distinction between mere powers and powers which must be exercised is considered elsewhere.¹⁰⁹

Lawful and unlawful trusts

- 1-030** Again, trusts may be divided, with reference to the object in view, into lawful and unlawful. The former are directed to some honest purpose and will be administered by the court. The latter are trusts created for the attainment of some end contravening the policy of the law, and therefore not to be sanctioned in a forum professing not only justice but equity, for example a trust to defraud creditors or to defeat a statute.¹¹⁰

Public and private trusts

- 1-031** Another division of trusts is that between public and private. Public trusts are trusts constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. Charitable trusts are not dealt with in this edition. The reader is referred to the leading works on the subject.¹¹¹ In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is, or within the allowed period will be, competent to determine the trust. The duration of trusts of this kind cannot be extended beyond the period allowed by the rule against perpetuities.¹¹² A public or charitable trust, on the other hand, has

¹⁰⁵ See § 1-036 *et seq.*

¹⁰⁶ Or "ministerial" or "instrumental".

¹⁰⁷ See, for instance, *Att.-Gen. v Scott* (1749) 1 Ves. Sen. 413 (trust to select preacher); *Gartside v I.R.C.* [1968] A.C. 553, HL.

¹⁰⁸ See *McPhail v Doulton (Baden No.1)* [1971] A.C. 424, HL. On the release of a possibility of benefiting under such a power, see *Re Gulbenkian's Settlements (No.2)* [1970] Ch. 408 and § 29-327.

¹⁰⁹ See §§ 29-004 *et seq.* and §§ 30-026 *et seq.*

¹¹⁰ Bac. on Uses, 9. See, as to unlawful trusts, Chaps 5 and 22.

¹¹¹ *Tudor on Charities* (9th edn); Picarda, *The Law and Practice Relating to Charities* (3rd edn).

¹¹² See §§ 5-037 *et seq.*

abstract, impersonal objects, and the trust itself may be of a permanent and indefinite character, and is not confined within the limits of the rule against perpetuities. These trusts may be said to have as their object some purpose recognised by the law rather than human beneficiaries.

Completely and incompletely constituted trusts

Where the settlor's intention is to constitute another person as trustee of his property the trust is not effective until the settlor has done everything he needs to do to vest the property in the trustee. When that has been done the trust is said to be completely constituted; until it is done the trust is incompletely constituted.¹¹³

Express trusts and trusts arising by operation of law

A distinction may be drawn between express trusts and trusts arising by operation of law.¹¹⁴ Generally speaking an express trust may be said to arise from the intention of a person to create a trust declared directly or indirectly. Inferred or so-called precatory trusts, that is trusts created by expressions of wish or desire which on their true construction amount to declarations of trust, are express trusts, because in such cases the court finds as a matter of construction that the settlor expressed, indirectly, an intention to create a trust. Trusts arising by operation of law are trusts that are not express trusts.

Resulting, implied and constructive trusts

Trusts arising by operation of law comprise resulting, implied and constructive trusts. These trusts differ in many respects from express trusts and arise in widely varying sets of circumstances, which are described elsewhere.¹¹⁵

Executed and executory trusts

This distinction refers to the method of drafting the trust instrument, which naturally affects its interpretation. An executed trust in this sense is one where the limitations of the equitable interests have been set out in complete and final form, whereas in an executory trust they are intended merely to serve as minutes or instructions for perfecting the settlement at a later date.¹¹⁶

3. CLASSIFICATION OF EQUITABLE INTERESTS UNDER TRUSTS

Absolute indefeasible interest in possession under a bare or simple trust

The greatest interest that a beneficiary can have is an absolute indefeasible interest in possession under a bare or simple trust. We now turn to consider

¹¹³ See §§ 3-021 and 3-034 *et seq.*

¹¹⁴ Material in connection with limitation of actions, see §§ 44-049 *et seq.*

¹¹⁵ Mainly in Chaps 7-9 (see the definitions in §§ 7-002, 7-004), 20 and 40 to 42; and see §§ 3-037 *et seq.*, §§ 10-003 to 10-010, 10-035 *et seq.*

¹¹⁶ See § 6-002.

under the rule in *Saunders v Vautier*¹⁷⁷ by requiring an assignment from B, and if C wishes to obtain a transfer of the property itself, he may obtain an order for a transfer in proceedings against A to which B is party, and the court may not, since B is before the court and bound by the order made, require B to be a party to the transfer.¹⁷⁸

Liability for knowing receipt

- 1-047 Distinctions may be drawn between the liability of beneficiaries for knowing receipt by their trustees, according to whether the trust is a nominee arrangement or a special trust.¹⁷⁹

Vested interests

- 1-048 A vested interest¹⁸⁰ is an interest which is not subject to any condition precedent.¹⁸¹ Thus a beneficiary may have a vested interest in trust assets even though he is not entitled to immediate enjoyment of those assets under the terms of the trust. An interest may be vested in interest or vested in possession. An interest vested in possession confers an immediate right to present enjoyment of the property while an interest that is merely vested in interest confers a present right to future enjoyment. Both are distinct from a contingent interest which will not vest unless and until some requirement (other than merely the determination of a prior interest) is satisfied, for instance attainment of some specified age, or survival to a particular time, or the occurrence of some external event. Where property is held on trust for "A for life, then to B absolutely" both A and B have a vested interest in the property albeit A has the immediate right to enjoy the property. A's interest is vested in possession and B's interest is vested in interest. By contrast, a beneficiary with a contingent interest has no vested right until the contingency occurs.¹⁸² A vested interest is transmissible and may be assigned by the beneficiary, and will form part of the beneficiary's estate upon his death.

Indefeasible and defeasible vested interests

- 1-049 A vested interest, whether vested in possession or vested in interest, may be either indefeasible or defeasible. An interest is indefeasible if there is no prior or concurrent interest or power which is capable of defeating it in whole or in part. To take the simple case of a trust for A for life and then to B absolutely, the existence of A's life interest operates to postpone the vesting in possession of B's interest, but it cannot defeat it, and so B has an indefeasible interest.

Vested interest defeasible by prior or concurrent interest

- 1-050 A vested interest may be wholly or partially defeasible by a prior interest or partially defeasible by a concurrent interest. For example, if there is a trust for A

¹⁷⁷ (1841) Cr. & Ph. 240. See §§ 24-009 *et seq.*

¹⁷⁸ *Head v Lord Teynham*, above; *Grainge v Wilberforce*, above.

¹⁷⁹ See §§ 42-053 and 42-061, §§ 42-713 and 42-080.

¹⁸⁰ For a history of vested interests see Hawkins, *Construction of Wills* (5th edn), §§ 20-01 *et seq.*

¹⁸¹ *Skelton v Younghouse* [1942] A.C. 571 at 575, HL.

¹⁸² See § 1-055.

for life, then for such of A's children as attain the age of 18 years, and then for B absolutely, B's interest is defeasible since it will be destroyed if A has children who attain that age and who have an interest which takes priority over B's interest. If a fund is held in trust for such of A's children whenever born who attain the age of 18 years, and it is clear from the wording used that the class of beneficiaries does not close when the eldest child reaches the age of 18 years,¹⁸³ then during A's lifetime any child of A who is over the age of 18 years has an interest which is vested but liable to be partially divested by the birth of another child to A.

Vested interest defeasible by exercise of overriding power of appointment

Where a power of appointment over capital and income of trust property is exercisable in favour of a class of beneficiaries, and subject to and until and in default of appointment, the property is held on trust for A for life and then to B absolutely, both A and B have defeasible vested interests since their interests are capable of being brought to an end in whole or in part by an exercise of the power of appointment. The effect of such an exercise of the power is to defeat wholly or pro tanto the interests which up to then were vested in the persons entitled in default of appointment and to create new estates in those persons in whose favour the appointment had been made.¹⁸⁴ And so a beneficiary with a vested interest may lose some or all of that interest if the trustees choose to exercise a power of appointment in favour of a different beneficiary.¹⁸⁵ Alternatively, a trust may provide for a beneficiary to take in default of the trustees exercising a power of appointment, in which case the default beneficiary will take a vested but defeasible interest.¹⁸⁶ A vested interest in remainder which is liable to be divested by the exercise of a power to appoint the capital of the trust in favour of the life tenant may be treated as a financial resource of the remainderman under section 25(2)(a) of the Matrimonial Causes Act 1973, and thereby brought into ancillary relief proceedings.¹⁸⁷

Terminable vested interests

Closely similar to a defeasible vested interest is a terminable vested interest. A terminable vested interest is one that is subject to a condition subsequent (rather than precedent) which, if it occurs, has the effect of bringing the interest to an end before the time of its natural termination, as for example where a testator leaves his estate upon trust for his widow for life or until her remarriage. A feature of a terminable interest is that it may sometimes be created so as to achieve some objective which is not permitted by law if sought to be achieved by direct prohibition. For instance, it is not permissible in English law to prohibit the assignment of interests under trusts, but it is permissible to create an interest

¹⁸³ See §§ 5-088 *et seq.* on closing of a class of beneficiaries.

¹⁸⁴ *Re Brook's Settlement Trusts* [1939] Ch. 993 at 997D-E.

¹⁸⁵ *Howell v Lees-Millias* [2009] EWHC 1754 (Ch); [2009] W.L.T.R. 1163.

¹⁸⁶ *Re Ware* (1890) 45 Ch. D. 269 at 279; *Re Peel* [1964] 1 W.L.R. 1232.

¹⁸⁷ *C v C (Ancillary Relief: Trust Fund)* [2009] EWHC 1491 (Fam) [2010] W.T.L.R. 1419 at [64].

and perhaps restatement by the Supreme Court (though not any lower English court) or the Privy Council; and that the approach adopted by the Privy Council in *Schmidt v Rosewood Trust Ltd* to the question whether the distinction between a discretionary trust and a mere fiduciary power justified a totally different treatment of the rights of objects of them, might be influential to a re-consideration of the question whether the distinction between a future contingent interest and an unascertained interest justifies the totally different treatment in trust law of the persons who stand to take under them.

Discretionary interests²¹⁶

1-061 The term 'discretionary interest' is convenient to describe the interests of the object of a discretionary trust. An object of a discretionary trust has no proprietary interest in the trust assets or capital²¹⁷ and no right to a definable part of the trust income.²¹⁸ In general, a discretionary trust has no one in whom the beneficial interest in the trust property can be said to be vested because vesting is contingent upon the selection of an object from a nominated class.²¹⁹ However, an object of a discretionary trust:

"... has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion "fairly" or "reasonably" or "properly" that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes."²²⁰

A discretionary interest includes a right to be considered for the exercise of the trustees' discretion;²²¹ a right to compel the due administration of the trust;²²² a *prima facie* right to obtain information and accounts from the trustees;²²³ and a right to bring a claim for breach of trust, including a right to compel a third party recipient of trust assets to restore them to the trustees.²²⁴ It has been suggested that an object of a discretionary trust may have a legitimate expectation of being consulted before a regular payment is stopped, or at least given the opportunity to persuade the trustees to continue the payments.²²⁵

²¹⁶ For further discussion of discretionary trusts, see §§ 29–024 *et seq.*

²¹⁷ *Gartside v I.R.C.* [1968] A.C. 553, HL at 617.

²¹⁸ *Sainsbury v I.R.C.* [1970] Ch. 712 at 723H.

²¹⁹ *Murphy v Murphy* [1999] 1 W.L.R. 282, 290.

²²⁰ *Gartside v I.R.C.* [1968] A.C. 553 at 605–606, HL *per* Lord Reid, at 617H–618B, *per* Lord Wilberforce; *Re Munro's Settlement Trusts* [1963] 1 W.L.R. 145 at 149A; *I.R.C. v Eversden* [2002] EWHC 1360 (Ch); [2002] W.T.L.R. 1013 at [13]–[14] (*affd* [2003] EWCA Civ 668; [2003] W.T.L.R. 893).

²²¹ *Re Hay's Settlement Trusts* [1982] 1 W.L.R. 202 at 209A–C. See § 29–127.

²²² *Whaley v Whaley* [2011] EWCA Civ 617; [2012] 1 F.L.R. 735 at [112].

²²³ *Schmidt v Rosewood Trust Ltd* [2003] 2 A.C. 709 at [51], [66]–[67], PC. See §§ 23–019, 23–075 *et seq.*

²²⁴ See § 39–073.

²²⁵ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All E.R. 705 at 718C–H *per* Robert Walker J; cited with approval in *Maciejewski v Telstra Super Pty Ltd* (1998) 44 NSWLR 601 at 605; doubted in *Re Y Trust* [2011] JRC 135; (2011–12) 14 I.T.E.L.R. 687.

A discretionary interest can be surrendered²²⁶ or assigned for value.²²⁷ In certain circumstances all the objects of a closed class of discretionary beneficiaries may act together to bring the trust to an end.²²⁸ However, the objects of a discretionary trust have no interest in possession in the trust fund, and that is the case whether the trust is exhaustive²²⁹ or non-exhaustive.²³⁰

Employee Benefit Trusts

An employee benefit trust ("EBT") is a species of discretionary trust established for the benefit of a company's employees, and will often include as objects the relatives and dependants of the employees. EBTs are often established to save tax by taking advantage of section 86 of the Inheritance Tax Act 1984 (trusts for the benefit of employees) or section 1166 of the Companies Act 2006 (employee share schemes). It should be noted that an attempt to use EBTs to avoid national insurance contributions or income tax is likely to be caught by the disguised remuneration provisions of Part 7A of the Income Tax (Earnings and Pensions) Act 2003. Generally, the trustee of the EBT is entirely separate from the company, which usually acts as the settlor, and from the senior management. It was a breach of trust for the trustees of an EBT established for the benefit of employees to transfer shares in the company to a second EBT established for the benefit of the company's senior management, and the director who instigated the transfer was liable for assisting in the breach of trust.²³¹ The trustees owe fiduciary duties in the same way as other trustees of discretionary trusts,²³² and the beneficiaries have the same rights, including the right to compel the due administration of the trust; to be considered by the trustees; and if necessary to bring an action for breach of trust.

An EBT, as a discretionary trust, must comply with the rule against perpetuities. In certain circumstances an EBT may be drafted sufficiently widely to qualify as a charitable trust, for example for the relief of poverty among members of a class of beneficiaries, and capable of validation under the Charitable Trusts (Validation) Act 1954.²³³

Interests in possession

An interest in possession is a present right to present enjoyment, a vested and indefeasible interest in the net trust income. In *Pearson v I.R.C.*²³⁴ the House of Lords held that no interest in possession arises if the beneficiary's interest is subject to the trustees' power to accumulate the income thus depriving the beneficiary of access to any of the income from the trust assets, and that this is

²²⁶ *Re Gulbenkian's Settlement Trusts (No.2)* [1970] Ch. 408.

²²⁷ See §§ 33–010 and 33–011.

²²⁸ See §§ 24–016.

²²⁹ *Sainsbury v I.R.C.* [1970] Ch. 712; *Re Weir's Settlement Trusts* [1971] Ch. 145.

²³⁰ *Gartside v I.R.C.* [1968] A.C. 553, HL.

²³¹ *Roadchef (Employee Benefit Trustees) Ltd v Hill* [2014] EWHC 109 (Ch).

²³² *Vigeland v Ennismore Fund Management Ltd* [2012] EWHC 3099 (Ch) at [191]–[201].

²³³ *Ulrich v Treasury Solicitor* [2005] EWHC 67 (Ch); [2006] 1 W.L.R. 33.

²³⁴ [1981] A.C. 753, HL.

1-062

1-063

1-064

1-065

claim form must (subject to any directions of the court) be served on every existing trustee and on such of the beneficiaries as the applicant thinks fit.¹⁸

- 19-005 The application must be supported by a witness statement or affidavit by the applicant giving certain particulars concerning the trust.¹⁹ Where an applicant has no nomination for a judicial trustee he may give not less than four days' notice of the hearing to any official of the court who may be appointed judicial trustee²⁰ and an official who receives such a notice is entitled to attend the hearing, though not a party to the proceedings.²¹ Pending the hearing of the summons, the court may grant an injunction restraining dealing with the property of which a judicial trustee is sought,²² and an application for an injunction may be joined with the application for a judicial trustee.²³

Who may be appointed a judicial trustee

- 19-006 Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee.²⁴ It is thought that the persons who might be appointed include an existing trustee of the trust, an existing executor or administrator, or a beneficiary,²⁵ or a solicitor acting in relation to the trust, or a qualified accountant²⁶ or a bank.²⁷ In the absence of nominations, or if the court is not satisfied as to the fitness of the person nominated, an official of the court may be appointed.²⁸ However, if the court is not satisfied of the fitness of the person nominated, there is jurisdiction to appoint a person suggested by the retiring judicial trustee, and the court is not bound to appoint only an official of the court.²⁹ And an official of the court may not be appointed in relation to certain trusts.³⁰ The appointment of an official of the court as judicial trustee is an appointment of the holder of that office for the time being and no further order or appointment is necessary by reason only of the person appointed dying or

¹⁸ *ibid.*, r.4(1)(a) and r.4(2).

¹⁹ *ibid.*, r.3(4). Where the applicant cannot gain the information required on any point, he must mention his inability in the witness statement or affidavit, see r.3(5).

²⁰ *ibid.*, r.4(3). "Official of the Court" includes the Official Solicitor, r.2(1), and it is he who is normally appointed.

²¹ *ibid.*, r.4(4).

²² *ibid.*, r.3(3).

²³ *ibid.*, r.3(2).

²⁴ Judicial Trustees Act 1896, s.1(3).

²⁵ See § 15-008.

²⁶ As in *Bowen-Jones v Bowen-Jones* [1986] 3 All E.R. 163 at 167.

²⁷ This was expressly so provided in Rules which preceded the 1983 Rules, *i.e.* the Judicial Trustee Rules 1972, r.6(1)(a). It is thought that the absence of any such express provision in the 1983 Rules has made no difference to the law or practice. Solicitors and accountants are commonly appointed. For examples of reported cases where banks have been appointed, see *Re Cohen* [1918] W.N. 252 and *Re Ridsdel* [1947] Ch. 597.

²⁸ Judicial Trustees Act 1896, s.1(3). Normally the Official Solicitor is appointed, though the 1983 Rules no longer require (as was required by earlier Rules) that another official should be appointed only if there were special reasons for his appointment. Where it is proposed to appoint the Official Solicitor inquiries should first be made to his office for confirmation that he is prepared to act if appointed: *Chancery Guide* (7th edn, amended September 2014), para.25.33.

²⁹ *Douglas v Bolam* [1900] 2 Ch. 749, CA.

³⁰ Judicial Trustee Rules 1983, r.15.

ceasing to hold office.³¹ The 1896 Act confers jurisdiction for a judicial trustee to be appointed to act jointly with another trustee.³² But the court is reluctant to appoint a judicial trustee to act jointly with a private and gratuitous trustee.³³ Where there are, for example, three trustees and it is desired to dispense with the services of one of them, the court can do so in effect by appointing two of them as joint judicial trustees in the place of the three trustees.

Terms of appointment and remuneration

An order appointing a judicial trustee may, unless the judicial trustee is an official of the court,³⁴ include directions requiring the judicial trustee to give security, by guarantee unless the court otherwise directs, duly to account for what he receives as judicial trustee and to deal with it as the court directs.³⁵ The court should not, except for special reasons, require security to be given when the application is made by an intending settlor.³⁶

The court may give directions concerning vesting of the trust fund in the judicial trustee and custody of documents.³⁷

The court may, upon the examination of a judicial trustee's accounts, allow his disbursements and allow him remuneration by reference to such scales or rates of professional charges as it thinks fit, but the remuneration may not in any year exceed 15 per cent of the capital value of the trust property.³⁸ The court must be satisfied as to the basis on which remuneration is claimed, that the amount is reasonable and proportionate (to what is not stated) and that it is within the limit of 15 per cent.³⁹ The court may, if it thinks fit, indicate to a judicial trustee upon his appointment the scale or rate of professional charges that it considers would be appropriate in relation to the appointment.⁴⁰

Administration by a judicial trustee

There are special rules concerning a judicial trustee's accounts.⁴¹ A judicial trustee or any person interested in the trust may at any time request the court to give directions as to the trust or its administration, or termination of judicial trusteeship, without the need for any formal originating process.⁴² The court may

³¹ *ibid.*, r.16.

³² Judicial Trustees Act 1896, s.1(1).

³³ *Re Martin* [1900] W.N. 129.

³⁴ Judicial Trustee Rules 1983, r.6(1). See too *Chancery Guide* (7th edn, amended September 2014), para.25.33.

³⁵ *ibid.*, r.6.

³⁶ *ibid.*, r.6(3).

³⁷ *ibid.*, r.7.

³⁸ *ibid.*, r.11.

³⁹ *Practice Note* [2003] 1 W.L.R. 1653. A common form of order is provided: *ibid.* See too *Chancery Guide* (7th edn, amended September 2014), para.25.34.

⁴⁰ Judicial Trustee Rules 1983, r.11(2)(b).

⁴¹ *ibid.*, rr.9 to 14.

⁴² Judicial Trustees Act 1896, s.1(4); Judicial Trustee Rules 1983, r.8(1). See too *Chancery Guide* (7th edn, amended September 2014), para.25.32. For an instance, see *Official Solicitor to the Senior Courts v Yemoh* [2010] EWHC 3727 (Ch); [2011] 1 W.L.R. 1450.

require the judicial trustee or any other person to attend the court in private, or may direct an application to be issued in the proceedings or direct any issues to be tried.⁴³ Subject to special rules concerning administration, a judicial trustee, although subject to the control of the court or an officer thereof,⁴⁴ may administer the trust in the same way as an ordinary trustee and may exercise the powers conferred on trustees by law without necessarily requesting the directions of the court, and may, for example, exercise the power conferred upon trustees by section 15 of the Trustee Act 1925 to compromise claims.⁴⁵

2. THE PUBLIC TRUSTEE

The Public Trustee

19-011 The Public Trustee was established by the Public Trustee Act 1906 and is governed by that Act and Rules made under it.⁴⁶ The Public Trustee is a corporation sole under that name, with perpetual succession and an official seal and may sue and be sued under the above name like any other corporation sole, but any instruments sealed by the Public Trustee are not, by reason of use of a seal, to be rendered liable to a higher stamp duty than if the Public Trustee were an individual.⁴⁷

19-012 The appointment and status of the Public Trustee are regulated by section 8 of the 1906 Act. The Public Trustee's central office must be in London but there is provision for establishing branch offices.⁴⁸ The Public Trustee and the Official Solicitor to the Senior Courts have the same office, though they have independent statutory functions and the Public Trustee and the Official Solicitor are presently different persons (but the Public Trustee also heads the Court Funds Office which shares some corporate services with the office of the Public Trustee and Official Solicitor). The Public Trustee now accepts new trusts only on a "last resort" basis, broadly where there is no one else willing and able to act and an injustice to a vulnerable person would be caused if he did not act. In recent years, the Public Trustee has retired from a large number of trusts and the role of the Public Trustee is significantly smaller than was formerly the case. The Ministry of Justice is liable to make good to the beneficiaries any losses which an ordinary trustee would be liable to make good, and this guarantee covers the acts and defaults of the Public Trustee's officers.⁴⁹

⁴³ *ibid.*, r.8(2).

⁴⁴ Judicial Trustees Act 1896, s.1(3).

⁴⁵ *Re Ridsdel* [1947] Ch. 597.

⁴⁶ Public Trustee Act 1906 and Public Trustee Rules 1912 (SI 1912/348) (as amended) are in *Civil Procedure* (2014), Vol.2, section 6D (CD).

⁴⁷ Public Trustee Act 1906, s.1.

⁴⁸ Public Trustee Rules 1912, r.3.

⁴⁹ The liability (falling on the Consolidated Fund) was formerly provided for Public Trustee Act 1906, s.7, which was repealed by the Public Trustee (Liability and Fees) Act 2002. The liability has been transferred to the Ministry of Justice.

The Public Trustee may exercise the functions of a deputy appointed by the Court of Protection.⁵⁰ This topic is outside the scope of this work. If a person dies intestate, or if there is no executor with power to obtain probate of his will, that person's estate vests in the Public Trustee pending the grant of representation or letters of administration.⁵¹ This topic too is outside the scope of this work.⁵²

General powers

Subject to and in accordance with the provisions of the 1906 Act and the Rules, the Public Trustee may⁵³ if he⁵⁴ thinks fit:

- (1) act in the administration of estates of small value;⁵⁵
- (2) act as custodian trustee;⁵⁶
- (3) act as an ordinary trustee;⁵⁷
- (4) be appointed to be a judicial trustee.⁵⁸

The Public Trustee may act either alone or jointly with any person or body of persons and has the same powers, duties, and liabilities and is entitled to the same rights and immunities and is subject to the control and orders of the court as a private trustee acting in the same capacity.⁵⁹

Where the Public Trustee is in the position of having conflicting interests, he has no more power than a private trustee to make bargains with himself, and must therefore apply to the court to sanction such a bargain,⁶⁰ and he cannot act for parties on both sides in legal proceedings.⁶¹

Power to decline trusts

The Public Trustee may decline, either absolutely or except on the prescribed conditions, to accept any trust but he may not decline to accept any trust on the ground only of the small value of the trust property.⁶²

Trusts involving management of a business

The Public Trustee must not accept⁶³ any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised

⁵⁰ Public Trustee and Administration of Funds Act 1986, s.3(1), as substituted by Mental Capacity Act 2005, s.67(1) and Sch.6, para.33.

⁵¹ Administration of Estates Act 1925, s.9 as amended and supplemented by Law of Property (Miscellaneous Provisions) Act 1994, s.14.

⁵² See Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (20th edn), §§ 41-07 and 41-08.

⁵³ Public Trustee Act 1906, s.2(1). Prior to the Criminal Justice Act 1948, the Public Trustee could be appointed administrator of the property of a convict under the Forfeiture Act 1870.

⁵⁴ The present Public Trustee is Mr Eddie Bloomfield.

⁵⁵ See §§ 19-029 *et seq.*

⁵⁶ See §§ 19-059 *et seq.*

⁵⁷ See §§ 19-020 *et seq.*

⁵⁸ See §§ 19-001 *et seq.*

⁵⁹ Public Trustee Act 1906, s.2(2); *Re Leslie's Hassop Estates* [1911] 1 Ch. 611.

⁶⁰ *Re New Haw Estate Trusts* (1912) 107 L.T. 191.

⁶¹ *Re Phillips* (1931) 101 L.J.Ch. 338, but see *Re Abercrombie's Will Trusts* [1931] W.N. 109.

⁶² Public Trustee Act 1906, s.2(3).

⁶³ *ibid.*, s.2(4).

Direction that Public Trustee not to be appointed

- 19-023** The Public Trustee is not to be appointed as a new or additional trustee where the instrument creating the trust or duty contains a direction to the contrary, unless the court otherwise orders.⁷⁹

Notice of appointment

- 19-024** Notice of any proposed appointment of the Public Trustee, either as a new or additional trustee, must, where practicable, be given in the prescribed manner⁸⁰ to all persons beneficially interested who are resident in the United Kingdom and whose addresses are known to the persons proposing to make the appointment, or, if such beneficiaries are minors, to their guardians.

- 19-025** If any person to whom such notice has been given applies to the court within 21 days from the receipt of the notice, the court may, if it considers it expedient to do so having regard to the interests of all the beneficiaries, make an order prohibiting the appointment; but failure to give notice does not invalidate any appointment made.⁸¹ Upon such an application the onus is on the applicant to show that it will be beneficial to make the order of prohibition. It is doubtful whether an applicant can properly base his application solely on the ground of the expense inherent in the appointment of the Public Trustee.⁸² The application should be made by claim form under Part 8 of the Civil Procedure Rules⁸³ in the Chancery Division of the High Court, where it will be heard by a judge in private.⁸⁴

Consent to act

- 19-026** A testator may appoint the Public Trustee to be trustee or custodian trustee under any testamentary instrument without applying for his previous consent;⁸⁵ but no such appointment has effect, and no appointment of the Public Trustee to be trustee or custodian trustee may be made except by a testator, unless and until (in either case) his consent has been obtained. In the case of an appointment by a testator, the Public Trustee is at liberty to act at any time after his appointment has come to his knowledge.⁸⁶

⁷⁹ Public Trustee Act 1906, s.5(3).

⁸⁰ That is, by notice addressed to the person at his last known place of abode or place of business, and served by post or delivered: see Public Trustee Rules, 1912, r.40(2), (3).

⁸¹ Public Trustee Act 1906, s.5(4).

⁸² *Re Firth (No.1)* [1912] 1 Ch. 806; and see *Re Drake's Settlement* [1926] W.N. 132; cf. *Re Hope Johnstone's Settlement Trusts* (1909) 25 T.L.R. 369.

⁸³ CPR, Pt 8, r.8.1(2)(b) and (6); Practice Direction, Pt 8A—Alternative Procedure for Claims, Section B. Should the application under Public Trustee Act 1906, s.5(4) prove to be of a contentious character, or involve a dispute of fact, so that the Pt 8 procedure is not suitable, the court might order the claim to continue as if it were a Pt 7 claim, and give any directions it considers to be appropriate, see CPR, Pt 8, r.8.1(3).

⁸⁴ CPR, Pt 8, r.8.1(2)(b) and (6); Practice Direction, Pt 8A—Alternative Procedure for Claims, Section B. Since the Public Trustee will not accept appointment except where an injustice to a vulnerable person is involved (see § 19-011), it will be normally be appropriate for the hearing to be in private.

⁸⁵ Public Trustee Rules 1912, r.8(1).

⁸⁶ *ibid.*, r.8(2).

A deed appointing the Public Trustee to be a trustee is not effective until the Public Trustee has executed it. Therefore if the Public Trustee consents to act before he executes the deed the above provisions are satisfied, even though the other parties executed the deed before he gave his consent to act.⁸⁷ In practice, in view of the Public Trustee's present policy of accepting trusteeships only on a last resort basis,⁸⁸ it is essential for any person contemplating the appointment of the Public Trustee as trustee of any trust or proposed trust to contact the Public Trustee's office before attempting to appoint the Public Trustee.

Probate and letters of administration

The Public Trustee may accept, by that name, probates or letters of administration and the court may make grants accordingly and shall consider the Public Trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the Public Trustee is not required for the grant of letters of administration to any other person, and that, as between the Public Trustee and the widower, widow, surviving civil partner or next-of-kin of the deceased, the widower, widow, surviving civil partner or next-of-kin are to be preferred, unless for good cause shown on the contrary.⁸⁹

Appointment of executor or administrator

An executor or administrator, notwithstanding that he may have acted, may with the sanction of the court and after such notice to the persons beneficially interested as the court may direct, transfer the estate to the Public Trustee for administration either solely or jointly with the continuing executors or administrators, if any.⁹⁰

The Public Trustee as administrator of small estates

Any person who, in the opinion of the Public Trustee, would be entitled to apply to the court for an order for the administration by the court of an estate, the gross capital value whereof is proved to the satisfaction of the Public Trustee to be less than £1,000⁹¹ may apply to the Public Trustee to administer the estate, and, where any such application is made, and it appears to the Public Trustee that the persons beneficially entitled are persons of small means, the Public Trustee must administer the estate, unless he sees good reason for refusing to do so.⁹²

⁸⁷ *Re Shaw* (1914) 110 L.T. 924, CA.

⁸⁸ See § 19-012.

⁸⁹ Public Trustee Act 1906, s.6(1) and Public Trustee Rules 1912, r.6(c).

⁹⁰ See Public Trustee Act 1906, s.6(2) which contains ancillary provisions relating to the contents and effect of such order. See generally *Re Woolley* (1911) 55 S.J. 220, and as to the procedure on an application and the form of order made see note to s.6(2) in *Supreme Court Practice* (1999), Vol.2, 12C-33 and *Re Symes* [1918] W.N. 68. The claim would now be commenced by claim form under CPR, Pt 8, for the reasons given in the footnote concerning claim forms in § 19-025.

⁹¹ The relevant date is the date of application to the Public Trustee and not the date of the death: *Re Devereux* [1911] 2 Ch. 545.

⁹² Public Trustee Act 1906, s.3(1).

Payments

19-048 All payments are to be made by cheque drawn on the Bank of England bearing a signature or facsimile signature of an officer of the Public Trustee authorised in writing by him to act in that behalf or a cheque on a bank signed by not less than two persons, namely:

- (1) by the Public Trustee and a co-trustee;
- (2) by the Public Trustee and an officer of the Public Trustee authorised as above or;
- (3) by a co-trustee and one such duly authorised officer; or
- (4) by two such duly authorised officers.

But in a particular case the Public Trustee may authorise the payment of income by the person liable to pay it direct to the person entitled to receive it, or to his bank.¹¹⁹ All payments of money to or from the capital of the trust property are to be through the bank to the trust or estate.¹²⁰ There are provisions as to the permissible modes of paying income to the person entitled to receive it.¹²¹ If the special circumstances of the case appear to him to render it desirable, the Public Trustee may pay to any other trustee or allow him to receive, the income of the trust property or any part of it, on such trustee undertaking to apply it in the manner directed by the trust.¹²²

Power to make advances for administration purposes

19-049 The Public Trustee may make advances for the purposes of any trust or estate in the course of administration or about to be administered by him out of moneys provided by the Treasury, and upon such terms as he may think proper.¹²³

Professional advice and credible information

19-050 Subject as provided, the Public Trustee may take and use professional advice and assistance and may act on credible information (though less than legal evidence) as to matters of fact.¹²⁴

Evidence that beneficiary is alive

19-051 The Public Trustee may require a statutory declaration or other sufficient evidence that a person is alive and is the person to whom money or property is payable or transferable and he has power to withhold payment or transfer until

¹¹⁹ Public Trustee Rules 1912, r.22, as amended by Public Trustee (Amendment) Rules 1983 (SI 1983/1050).

¹²⁰ Public Trustee Rules 1912, r.20.

¹²¹ *ibid.*, r.23.

¹²² *ibid.*, r.24.

¹²³ *ibid.*, r.25.

¹²⁴ *ibid.*, r.26.

such evidence is produced.¹²⁵ Where a person appearing to be beneficially entitled to or interested in any property cannot be found or it is not known whether he is living or dead the Public Trustee may apply to the court for directions as to the course to be taken with reference to such person.¹²⁶ Until an order is made, the Public Trustee must keep any sum payable to such person, and if it is kept for more than six months is required to invest or deposit the same at interest and accumulate the proceeds.¹²⁷

Duty to give information

The Public Trustee is under a statutory duty upon application in writing by or with the authority of a person beneficially interested in the trust property (a) to permit the inspection and taking of copies of any register or book relating to the trust or estate and (so far as the interest of the applicant in the trust property is or may be affected thereby) of any account notice or other document in the Public Trustee's custody; (b) at the expense of the applicant to supply a copy of the documents specified; and (c) to give such information concerning the trust or estate as shall be reasonably requested in the application and shall be within the power of the Public Trustee.¹²⁸

Subject to the above provisions, the Public Trustee must observe strict secrecy in respect of every trust or estate in course of administration by him.¹²⁹

Audit of Public Trustee's accounts

There is provision for the auditing of the Public Trustee's accounts and the verification of the securities held by him from time to time by such person(s) as the Treasury may appoint in accordance with regulations made by the Treasury.¹³⁰

Fees and expenses

The fees to be charged by the Public Trustee are regulated by section 9 of the Public Trustee Act 1906 and the Public Trustee (Fees) Act 1957 and Orders made thereunder.¹³¹

¹²⁵ Public Trustee Rules 1912, r.27. For a case in which the Public Trustee was held to be justified in refusing to pay interest to the sequestrator of a life tenant's property without proof that the life tenant was alive, see *Re Wilson* [1964] 1 W.L.R. 214.

¹²⁶ Public Trustee Rules 1912, r.28.

¹²⁷ *ibid.*

¹²⁸ *ibid.*, r.29(1).

¹²⁹ *ibid.*, r.29(2).

¹³⁰ *ibid.*, r.38.

¹³¹ Public Trustee (Fees) Order 2008 (SI 2008/611). The existence of this subordinate legislation excludes any power to charge under Trustee Act 2000, s.29, see s.29(5)(b). Section 9 of the 1906 Act was amended by the Public Trustee (Liability and Fees) Act 2002, with a consequential amendment to Public Trustee (Fees) Act 1957, s.1, so as to confer the power to fix fees on the Lord Chancellor and remove the requirement for full cost recovery.

4. TRUST CORPORATIONS

Meaning of trust corporation

19-068 For the purposes¹⁵⁸ of the Law of Property Act 1925, the Settled Land Act 1925, the Trustee Act 1925, the Administration of Estates Act 1925, the Supreme Court of Judicature (Consolidation) Act 1925, and Part V of the Senior Courts Act 1981, "trust corporation" means¹⁵⁹ the Public Trustee or a corporation either appointed by the court in any particular case to be a trustee or entitled by rules made under section 4(3) of the Public Trustee Act 1906, to act as custodian trustee.¹⁶⁰

19-069 Section 3 of the Law of Property (Amendment) Act 1926 extended the meaning of "trust corporation", for the purposes of the five above-mentioned Acts of 1925, to include the Treasury Solicitor,¹⁶¹ the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor, and, in relation to the property of a bankrupt, and property subject to a deed of arrangement, to include the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable, ecclesiastical and public trusts, to include any local¹⁶² or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom, or any part thereof, which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable, ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation. No rules have been made by the Lord Chancellor under section 3, but private charitable trust companies are not uncommonly authorised.

19-070 In this work, however, the phrase "trust corporation" is generally used in relation to a trust corporation which undertakes, for profit, the administration of private and other trusts.

Advantages and disadvantages of a trust corporation

19-071 The chief advantages of the appointment of a trust corporation are:

- (1) continuity of administration;

¹⁵⁸ On the capacity of corporations sole and aggregate to be trustees, see §§ 2-016 and 2-017.

¹⁵⁹ Law of Property Act 1925, s.205(1)(xxviii); Settled Land Act 1925, s.117(1)(xxx); Trustee Act 1925, s.68(1)(18); Administration of Estates Act 1925, s.55(1)(xxvi); Supreme Court of Judicature (Consolidation) Act 1925, s.175; all as extended by Law of Property (Amendment) Act 1926, s.3; Senior Courts Act 1981, s.128.

¹⁶⁰ The relevant rule is set out at § 19-061.

¹⁶¹ Defined by s.3(2) to mean the solicitor for the affairs of Her Majesty's Treasury and to include the solicitor for the affairs of the Duchy of Lancaster.

¹⁶² Local authorities are, however, precluded from acting in an ecclesiastical charity or a charity for the relief of poverty by Local Government Act 1972, s.139(3).

- (2) avoidance of changes in trusteeship and the cost
- (3) a large measure of security;
- (4) the keeping of proper accounts;
- (5) the review of investments at regular intervals by members of the staff; and
- (6) the fact that a trust corporation is exempt from the Law of Property Act 1925, the Settled Land Act 1925, which provide that a sole trustee cannot charge for capital moneys.¹⁶³

Against those advantages must be weighed the following disadvantages:

- (1) fees are payable;
- (2) personal touch is lost; and
- (3) a trust corporation may be more reluctant to depart from the strict letter of the trust without the sanction of the court than a private trustee would be.

Popularity of trust corporations

Trust companies, such as banks, insurance companies and trust companies, now appointed as trustees and the appointment of such companies as executors or administrators, as trustees of private trusts and also as trustees for debenture holders, trustees for charities and trustees of pension and provident funds is common.

Trust corporation as co-trustee

A trust corporation may act not only as sole trustee but as a co-trustee with an individual.¹⁶⁴

Remuneration of trust corporation other than the Public Trustee¹⁶⁵

Where a trust corporation is appointed an original trustee of a settlement or is nominated as executor and trustee of a will, the deed or will should include the corporation's remuneration clauses, the usual professional trustees charging clause not being sufficient to empower a trust corporation to charge its scale fees.¹⁶⁶ It is also desirable that a draft document should be submitted to the corporation for its approval and acceptance.

A trust corporation will normally charge an acceptance fee upon its appointment as trustee, an annual administration fee while it acts as trustee, and a withdrawal fee upon its retirement as trustee or upon distribution of the trust fund. Each of

¹⁶³ Trustee Act, s.14(2); Settled Land Act 1925, ss.18(1)(c), 94 and 95; Law of Property Act 1925, s.27(2) as amended by Trusts of Land and Appointment of Trustees Act 1996, s.25(1) and Sch.3, para.4(8).

¹⁶⁴ Bodies Corporate (Joint Tenancy) Act 1899; *Re Thompson Settlement Trusts* [1905] 1 Ch. 229 and *cf.* Trustee Act 1925, s.42.

¹⁶⁵ The Public Trustee has a statutory power to charge: see §§ 19-055 to 19-058.

¹⁶⁶ *Re Cooper* (1939) 160 L.T. 453.

destroying a right of renewal²⁶ or of destroying the subject matter of the settlement;²⁷ or if it was affirmatively proved that the purchase of the reversion had only been obtained by virtue of the purchaser being interested in the leasehold, for example if the landlord was giving all his leaseholders an opportunity to enfranchise their holding.²⁸ But in other cases²⁹ the rule in *Keech v Sandford* was not applied and the purchasing trustee held the reversion free from any trust. The courts treated purchase of the reversion differently from renewal of a lease since the reversion was a different item altogether from the leasehold.³⁰

20-008 Nowadays, however, the courts are not so reluctant to extend the rule in *Keech v Sandford* to the purchase of a reversion by a trustee. It has been held that the rule applies to the purchase of a reversion in the same way that the rule applies to the renewal of a lease,³¹ subject to the qualification that a trustee can purchase the reversion free from any trust if his beneficiaries refuse to join in the purchase either before or after the purchase by the trustee.³² The modern cases appear to be based on the proposition that the trustee, by reason of being a trustee of a lease, has an especial advantage in purchasing the reversion and so is enabled to purchase by reason of his position as trustee and holding of trust property and thereby profits from the trust property.³³ Whether there is now an irrebuttable presumption that a trustee has an especial advantage in purchasing the reversion so that the rule now applies inflexibly to purchases of the reversion, or whether

²⁶ *Trumper v Trumper* (1872) L.R. 14 Eq. 295 at 309-311; but perhaps not if there was a right distinct from custom) of renewal which would not be prejudiced by the purchase, note *Swain v Owen* [1907] 1 Ch. 195 at 205.

²⁷ *Griffith v Owen*, above.

²⁸ *Griffith v Owen*, above, at 205.

²⁹ *Norris v Le Neve* (1743) 3 Atk. 26; *Randall v Russell* (1817) 3 Mer. 190; *Hardman v Johnson* (1815) 3 Mer. 347; *Longton v Wilsby* (1897) 76 L.T. 770; *Bevan v Webb* [1905] 1 Ch. 620.

³⁰ *Phipps v Boardman* [1964] 1 W.L.R. 993 at 1009.

³¹ *Protheroe v Protheroe* [1968] 1 W.L.R. 519, CA (in which no earlier authorities were cited and the facts of which were somewhat striking). This case was followed in *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 W.L.R. 605 (in which *Phillips v Phillips* (1885) 29 Ch.D. 673, CA as well as *Protheroe v Protheroe*, above, were considered); itself followed in *Papat v Shonchhatra* [1997] 1 W.L.R. 1367, CA. Both of these post-*Protheroe* cases were concerned with a purchase by a former partner of a reversion to a partnership lease. *Brenner v Rose* [1973] 1 W.L.R. 443 was also concerned with such a purchase, but there the purchase was not impeached. *Protheroe* was not cited in *Brenner*, nor was *Brenner* cited in *Thompson* or *Papat*. In *Don King Productions Inc. v Warren* [2000] Ch. 291, CA, it was suggested by counsel that the question whether the rule in *Keech v Sandford* applied to purchase of the reversion was an open one, but Morritt L.J. at 340B did not accept that suggestion. It is thought that modern authority (apart from *Brenner*) is in accord with the wide language used in *Phillips v Phillips*, above. In *Ward v Brunt* [2000] W.T.L.R. 731, Ch, another partnership case, it was held that the purchasing partner was not accountable for a profit made from the purchase of the reversion to a partnership lease because she purchased the reversion under an option granted by the former freeholder's will, not by reason of her fiduciary position as partner nor in the course of execution her fiduciary duties.

³² *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 W.L.R. 605 at 612; *Foreman v King* [2008] EWHC 592 (Ch) at [41]-[44]. But presumably a trustee cannot avail himself of this qualification unless his beneficiaries are all of full age and capacity.

³³ *Protheroe v Protheroe*, above, at 521 ("Being a trustee he had an especial advantage in getting the freehold"); *Thompson's Trustee in Bankruptcy v Heaton*, above, at 612 (in which *Protheroe v Protheroe* was treated as "an application of the broad principle that a trustee must not make a profit out of the trust estate").

there is merely a rebuttable presumption or inference of an especial advantage that is capable of being rebutted by proof that the trustee did not in fact have any advantage, is, perhaps, not clear.³⁴

Undoubtedly, even without recourse to the wider principles under more recent authorities, the rule would apply to any case where a right to acquire the freehold is conferred by the terms of a lease which is trust property since the right to purchase would form part of the trust property. And the position is the same where the right to acquire the freehold is conferred by statute on owners of leaseholds, for the right to acquire the freehold arises only by virtue of the lease, and if the lease is trust property so too must be the product of an exercise of that right.³⁵ That would be so in the case of the exercise by a trustee of the statutory right of first refusal conferred on certain tenants,³⁶ and even more clearly in the case of the acquisition of a freehold reversion of a house by a trustee under the Leasehold Reform Act 1967, where the trustee who as trustee holds a tenancy of a house which qualifies for enfranchisement under that Act is enabled to purchase only by reason of his having held the tenancy for two years.³⁷

It has not been decided whether the rule applies to the assignment of a lease to the trustee of the reversion,³⁸ though if the assignment requires the consent of the trustee in his capacity as landlord, then the assignment may be rendered ineffective by the self-dealing rule considered below.³⁹

Purchase of property associated with trust property

Apart from the case of purchase of the reversion to a lease, there is little authority on the question whether a trustee is able to purchase for his own benefit property associated with the trust property. Plainly, if a trustee is proved to have been enabled to purchase property associated with trust property by reason of opportunity or knowledge derived from the trust, then the property purchased by him will become trust property, as for example where a trustee is enabled in this way to

³⁴ In *Re Thompson's Settlement* [1986] Ch. 99 at 116, the rule in *Keech v Sandford* was not regarded as applying inflexibly to purchases of a reversion, though the modern cases were not referred to.

³⁵ See too § 20-014.

³⁶ Landlord and Tenant Act 1987, Pt 1, as amended and supplemented by Housing Act 1996, ss.89-93 and Sch.6. The constructive trust would attach to the interest of the trustee in the purchase through the nominated person who or which is the actual purchaser, but not so as to prejudice the interest of other tenants unconnected with the trust who participate in the purchase.

³⁷ Leasehold Reform Act 1967, s 1(1)(b) (as amended by Commonhold and Leasehold Reform Act 2002, ss.138(1), 180 and Sch.14, para.1). The trustee would of course become an express trustee in the usual case where he purchased the freehold at the expense of the trust property under the powers conferred by Leasehold Reform Act 1967, s.6(4). It would be necessary to resort to the rule in *Keech v Sandford* only where the trustee sought to purchase for his own benefit, or under some arrangement with the beneficiary in occupation without the consent of all the beneficiaries, otherwise than under the powers conferred by s.6(4) or the trust instrument. As to purchases by a tenant for life, see s.6(2) (as amended by Commonhold and Leasehold Reform Act 2002, s.180 and Sch.14, para.1), from which it is clear that the tenant for life could not purchase the freehold for his own benefit.

³⁸ *Re Thompson's Settlement* [1986] Ch. 99 at 116.

³⁹ See § 20-111.

20-009

20-010

20-011

purchase shares in a private company when other shares are comprised in the trust.⁴⁰ Equally, property purchased by the trustee might become trust property if the purchase destroys or jeopardises the trust property,⁴¹ for example where a trustee purchases property from which a trust business is being carried on, thereby jeopardising the continuance of that business.⁴²

- 20-012** However, apart perhaps from the case of a reversion, it is thought that the court would not be prepared to presume, without any investigation of the circumstances, that a trustee has any especial advantage in purchasing property associated with trust property, and so it is doubtful whether there is any question of associated property purchased by a trustee being automatically subject to a constructive trust. In the United States it has been held that a constructive trust may be imposed on the basis that a trustee, by purchasing property associated with trust property, places himself in a position where his personal interest conflicts or may conflict with his duty to consider a purchase on behalf of the trust, as where a trustee of a reversionary interest in property purchases the life interest for himself rather than for the trust,⁴³ or where a trustee of an undivided share in land purchases another undivided share for himself rather than for the trust.⁴⁴ It is to be noted that the rule in *Keech v Sandford* does not apply to impose a trust upon additional land comprised in the new lease, the ambit of the rule being limited to the land comprised in the original lease in favour of the trust.⁴⁵

Extension of the rule to other transactions

Money received by trustee for not renewing

- 20-013** If a trustee receives money from a competitor for a new lease so as to induce him not to apply to the landlord, then the money so received will be subject to a constructive trust in favour of the beneficiaries; for if a trustee cannot appropriate the renewal to himself, the court will not suffer him to sell it for his own benefit.⁴⁶

Grant to trustee by virtue of ownership of trust land

- 20-014** If a trustee by virtue of his legal ownership of trust land obtains a grant of further property then that further property is held upon a constructive trust for the beneficiaries. Thus where trust land adjoined the sea, and the trustee obtained a grant of salmon fishings in the sea opposite the trust land from the Crown, which

⁴⁰ See *Phipps v Boardman* [1967] 2 A.C. 46, HL, see § 20-078.

⁴¹ See *Griffith v Owen* [1907] 1 Ch. 195.

⁴² Note the US case *Wofford v Twin City Brick & Tile Co* (1931) 41 S.W. 2d. 1079.

⁴³ *Turner v Fryberger* 103 N.W. 217 (1905).

⁴⁴ *Pine v White* 56 N.E. 967 (1900) (trustee in fact escaped liability because purchase made by trustee's sister); but cf. *Metcalf v Hecker* 274 Pac. 2d. 188 (1954).

⁴⁵ *Giddings v Giddings* (1826-27) 3 Russ. 241; *Re Morgan* (1881) 18 Ch.D. 93, CA. The rent must be apportioned: *Acheson v Fair* (1843) 3 Dr. & War. 512 at 524-525; *O'Brien v Egan* (1880) L.R. Ir. 633 at 640.

⁴⁶ *Owen v Williams* (1773) Amb. 734; note *Att.-Gen. for Hong Kong v Reid* [1994] 1 A.C. 324, PC and see further §§ 20-054 *et seq.*

was accustomed to make such a grant in favour of the riparian owners, the salmon fishings were held in trust for the beneficiaries.⁴⁷

Purchase of mortgage for less than is due

- If a trustee purchases a mortgage on trust property and pays less than the amount due under the mortgage, he will not be permitted to recover from the trust estate more than he paid for the mortgage with interest.⁴⁸ **20-015**

Renewals of contracts other than leases

- If a trustee renews a contract held by him on trust the renewed contract will also be held by him upon trust if the renewal agreement was obtained or received either in circumstances where there was a conflict or significant possibility of conflict between the trustee's duty and his personal interest in the pursuit or possible receipt of the renewal agreement, or by use or by reason of his fiduciary position or of any opportunity or knowledge resulting from it.⁴⁹ **20-016**

Application of the rule to other fiduciaries and persons interested in lease

- The rule in *Keech v Sandford* applies to persons other than trustees who stand in a fiduciary relationship to the other persons interested in the leasehold property concerned, such as executors⁵⁰ or an executor *de son tort*.⁵¹ In relation to such persons the rule is absolute and irrebuttable, just as it is in relation to a trustee. Special considerations apply to partners, whose position is considered below.⁵² **20-017**

Tenant for life

- The rule applies to a tenant for life of settled land.⁵³ It is thought that the rule applies to a tenant for life in its absolute form,⁵⁴ especially as a tenant for life has **20-018**

⁴⁷ *Aberdeen Town Council v Aberdeen University* (1877) 2 App. Cas. 544, HL Sc.; and for another example, see *Rowley v Ginnever* [1897] 2 Ch. 503.

⁴⁸ *Anon* (1707) 1 Salk. 155; note *Hamilton v Wright* (1842) 9 Cl. & Fin. 111.

⁴⁹ *Don King Productions Inc. v Warren* [2000] Ch. 291, CA (renewal of boxing promotion agreements).

⁵⁰ *Holt v Holt* (1670) 1 Ch. Cas. 190; *Walley v Walley* (1687) 1 Vern. 484; *Killick v Flexney* (1792) 4 Bro. C.C. 161; *Fosbrooke v Baiguy* (1833) 1 Myl. & K. 226; *Kelly v Kelly* (1833) 8 Ir.R.Eq. 403; *Re Morgan* (1881) 18 Ch.D. 93, CA.

⁵¹ *Mulvany v Dillon* (1810) 1 B. & B. 409.

⁵² See § 20-020.

⁵³ *Taster v Marriott* (1768) Amb. 668; *Rawe v Chichester* (1773) Amb. 715; *Owen v Williams* (1773) Amb. 734; *Pickering v Vowles* (1783) 1 Bro.C.C. 198; *Eyre v Dolphin* (1813) 2 B. & B. 290; and see *James v Dean* (1805) 11 Ves. Jr. 383; (1808) 15 Ves. Jr. 236; *Giddings v Giddings* (1826-27) 3 Russ. 241; *Nesbitt v Tredennick* (1808) 1 B. & B. 29 at 46, *per Lord Manners*; *Randall v Russell* (1817) 3 Mer. 190 at 196; *Tanner v Elworthy* (1841) 4 Beav. 487; *Yem v Edwards* (1857) 3 K. & J. 564; 1 De G. & J. 598; *Stratton v Murphy* (1867) 1 Ir.Rep.Eq. 345; and other cases cited 2 W. & T.L.C. (9th edn), 659, in the note to *Keech v Sandford*. See too *Hill v Hill* (1874) 8 Ir. R. Eq. 140 and 622; *Re Lord Ranelagh's Will* (1884) 26 Ch.D. 590; and see *Griffith v Owen* [1907] 1 Ch. 195, where the husband of a tenant for life, having purchased from mortgagees of the settled property, was held to be a trustee of the benefit of the purchase for his children, who were beneficiaries; *Lloyd-Jones v Clark-Lloyd* [1919] 1 Ch. 424 at 456, CA; *Brenner v Rose* [1973] 1 W.L.R. 443.

⁵⁴ *Re Biss* [1903] 2 Ch. 40 at 56, 61, CA.

since 1925 been an express trustee of his powers⁵⁵ and is accountable as such for any profits he makes by exercising them.

Persons with partial equitable interest

- 20-019** The rule does not apply in its absolute form to persons who have a partial equitable interest in a lease but do not stand in a fiduciary relationship to the other persons interested, such as a mortgagee,⁵⁶ a mortgagor⁵⁷ or tenant in common.⁵⁸ In relation to such a person there is no irrebuttable presumption of law, but at the most a rebuttable presumption that the renewed lease is held upon a constructive trust for the other persons interested, and such a person may rebut the presumption by evidence that he did not in fact abuse his position or in any sense intercept an advantage coming by way of accretion to the estate.⁵⁹ The modified version of the rule may not, in the absence of a fiduciary relationship, apply at all to the case of purchase of a reversion as distinct from renewal of a lease.⁶⁰

Partners⁶¹

- 20-020** The rule applies to partners,⁶² and to former partners before final winding up of the affairs of the partnership,⁶³ but even though there is a fiduciary relationship between the parties,⁶⁴ probably⁶⁵ in the modified form which applies to persons with partial equitable interests,⁶⁶ rather than the strict form applicable to trustees. In view of the existence of the fiduciary relationship, however, the rule applies to a purchase of the reversion by a partner or former partner,⁶⁷ and it applies in its strict form where the partner or former partner who takes the new lease held the old lease in trust for the partnership.⁶⁸
- 20-021** Where a tenancy is partnership property and is the subject of statutory protection conferring a right of succession when the tenant dies on a person who fulfils the

⁵⁵ Settled Land Act 1925, s.107(1), see §§ 37-126 *et seq.*

⁵⁶ *Rushworth's Case* (1676) Freem. Ch. 13; *Nesbitt v Tredemick* (1808) 1 B. & B. 29; *Re Biss* [1903] 2 Ch. 40 at 56, CA; *Nelson v Hannam* [1943] Ch. 59; *Chelsea Estates Investment Co v March* [1955] Ch. 328.

⁵⁷ *Leigh v Burnett* (1885) 29 Ch.D. 231.

⁵⁸ *Re Biss* [1903] 2 Ch. 40, CA; *Hunter v Allen* [1907] 1 I.R. 212; note *Palmer v Young* (1684) [1903] 2 Ch. 65n (joint tenant before 1926).

⁵⁹ *Re Biss* [1903] 2 Ch. 40, CA.

⁶⁰ *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 W.L.R. 605 at 614.

⁶¹ See further *Lindley and Banks on Partnership* (18th edn), §§ 16-18 to 16-24.

⁶² *Featherstonhaugh v Fenwick* (1810) 17 Ves. Jr. 298; *Re Biss* [1903] 2 Ch. 40 at 56, 62, CA; *Foreman v King* [2008] EWHC 592 (Ch).

⁶³ *Clegg v Fishwick* (1849) 1 Mac. & G. 294; *Clegg v Edmondson* (1857) 8 De G.M. & G. 787; *Clements v Hall* (1858) 2 De G. & J. 173 at 186; *Re Biss* [1903] 2 Ch. 40 at 56, 62, CA; *Thompson's Trustee in Bankruptcy v Heaton*, above; *Chan v Zacharia* (1984) 53 A.L.R. 417, Aus HC; *Don King Productions Inc. v Warren* [2000] Ch. 291, CA; *Barber v Rasco International Ltd* [2012] EWHC 269 (QB).

⁶⁴ *Helmores v Smith* (1886) 35 Ch.D. 436 at 444.

⁶⁵ See *Re Biss*, above, at 56; *Chan v Zacharia* (1984) 53 A.L.R. 417 at 419-420, 435-438, Aus HC.

⁶⁶ See § 20-019.

⁶⁷ *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 W.L.R. 605.

⁶⁸ *Don King Productions Inc. v Warren*, above, at 340-342; and see *Chan v Zacharia*, above, at 182, 203.

statutory criteria for succession only by virtue of being a partner, then that person will hold the tenancy on trust for the partnership.⁶⁹

Settlor

Where a lessee had assigned the original lease by way of settlement and, subsequently, without disclosing the settlement, took a new lease for a longer term in consideration of a premium and the surrender of the former lease which was erroneously stated to be vested in him, the new lease was held to be bound by the settlement.⁷⁰

Person connected with trustee

The rule has been held to apply where the renewal is in favour of a spouse of the trustee⁷¹ or of a company owned by the trustee or his spouse.⁷²

The remedy

Where the rule applies, the person who has renewed the lease or purchased the reversion holds it upon a constructive trust for the other persons interested. If the persons interested are absolutely entitled, the trustee will in consequence be liable to assign the renewed or purchased reversion to them. In other cases, a declaration combined with suitable orders concerning the vesting of property will suffice. If the renewed lease or purchased reversion has been sold, the constructive trust attaches to the net proceeds of sale.⁷³

Trustee's lien for expenses

A trustee or executor who has renewed a lease has a lien upon the estate for the costs and expenses of the renewal, with interest.⁷⁴ The rate of interest that would nowadays be allowed in favour of a trustee is not clear.⁷⁵ Where lands are taken under the new lease which were not comprised in the original lease, the court will apportion the expenses according to the value of the respective lands.⁷⁶ The trustee will also be given an allowance in respect of money subsequently laid out in lasting improvements,⁷⁷ though made during the suit for recovering the lease.⁷⁸

⁶⁹ *Shirt v Shirt* [2012] EWCA Civ 1029; [2013] W.T.L.R. 317 at [43], [72] (agricultural tenancy within Agricultural Holdings Act 1986).

⁷⁰ *Re Lulham* (1883) 32 W.R. 1013; (1885) 53 L.T. 9, CA.

⁷¹ *Ex p. Grace* (1799) 1 Bos & P. 376; as explained in *Re Biss*, above, at 58-59; compare § 20-118 (purchase of trust property by spouse of trustee).

⁷² *Thompson's Trustee in Bankruptcy v Heaton*; above; compare § 20-120 (purchase of trust property by company in which trustee is interested).

⁷³ *Thompson's Trustee in Bankruptcy v Heaton*, above.

⁷⁴ *Lawrence v Maggs* (1759) 1 Eden 453; *Rawe v Chichester* (1773) Amb. 715; *Coppin v Fernyhough* (1788) 2 Bro.C.C. 291; *James v Dean* (1805) 11 Ves. Jr. 383; *Bradford v Brownjohn* (1868) 3 Ch. App. 711; *Isaac v Wall* (1877) 6 Ch.D. 706; *Re Lord Ranelagh's Will* (1884) 26 Ch.D. 590.

⁷⁵ Compare the case of trustee purchasing trust property, where it appears that a purchasing trustee will be allowed interest at least at the rate of 4 per cent per annum, perhaps at a higher rate, see § 20-147.

⁷⁶ *Giddings v Giddings* (1826-27) 3 Russ. 241.

⁷⁷ *Holt v Holt* (1670) 1 Ch.Cas. 190; *Lawrence v Maggs* (1759) 1 Eden 453; *Mill v Hill* (1852) 3 H.L.C. 828 at 869.

⁷⁸ *Walley v Walley* (1687) 1 Vern. 484.

duty.¹⁶⁷ The conduct of the trustee will be taken into account in determining the scale of the allowance. For a trustee whose conduct is blameless, the scale might be liberal¹⁶⁸ and might include a profit element;¹⁶⁹ for a trustee whose conduct is open to criticism, the scale is likely to be less liberal;¹⁷⁰ and for a trustee guilty of dishonesty or surreptitious dealing there might be no award at all.¹⁷¹ If a director of a company in breach of company law fails to disclose to the board of directors his interest in a contract under which he receives unauthorised remuneration from the company, the court will not, in ordering an account, make an allowance for skill and labour in respect of work done under the contract, for that would be tantamount to an exercise of the court's jurisdiction to award remuneration to a trustee for work done,¹⁷² a jurisdiction which will not be exercised in favour of a director of a company.¹⁷³ But in Australia, an allowance for skill and labour has been made in favour of a former director of a company who was made accountable, not for work done for the company under an unauthorised employment contract, but for business profits made after he left the company to which his skill and labour had contributed.¹⁷⁴

20-050 It has been doubted whether an allowance for skill and labour is available where the profit consists of property forming part of the trust property, rather than property obtained from a third party, on the ground that this would involve an impermissible discretionary interference by the court with the property rights of the beneficiaries.¹⁷⁵ We respectfully consider that this doubt should be approached with some caution. The imposition of a constructive trust is not a matter of the exercise of judicial discretion, but it does not follow that the court can have no discretion in relation to the remedies which are consequent upon the imposition of the constructive trust.¹⁷⁶ The court has a discretionary jurisdiction to authorise payment of remuneration out of the trust property for the past services of the trustee, and though that jurisdiction concerns retrospective authorisation of remuneration for authorised work done, rather than allowances for work done in making unauthorised profits, there are elements in that jurisdiction which overlap with the jurisdiction here under consideration.¹⁷⁷ The court also has a discretionary jurisdiction to authorise retention of fees made from a remunerative employment with a third party.¹⁷⁸ The court does not have discretion to determine whether property rights should be conferred or confiscated, but

¹⁶⁷ *Guinness plc v Saunders*, above, per Lord Goff at 701.

¹⁶⁸ *Phipps v Boardman*, above.

¹⁶⁹ *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428 at 468, CA.

¹⁷⁰ *O'Sullivan v Management Agency and Music Ltd*, above; *Badfinger Music v Evans* [2001] W.T.L.R. 1, Ch.

¹⁷¹ *Phipps v Boardman* [1965] Ch. 992 at 1020-1021; *O'Sullivan v Management Agency and Music Ltd*, above, at 468.

¹⁷² See § 20-242.

¹⁷³ *Guinness plc v Saunders* [1990] 2 A.C. 663, HL.

¹⁷⁴ *Warman International Ltd v Dwyer* (1994) 128 A.L.R. 201, Aus HC.

¹⁷⁵ *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1542]-[1545].

¹⁷⁶ See § 20-040, and see § 41-036 (proprietary remedy).

¹⁷⁷ See § 20-242.

¹⁷⁸ See § 20-074.

that does not mean that the court can have no discretion in relation to the manner in which relief is granted in relation to equitable proprietary rights.^{178a}

Locus standi of beneficiary where profit derived from a company in which the trust is interested

20-051 In a case where the trust fund comprises shares in a company and a trustee who is a director of the company derives a profit from the company, it is necessary to consider whether the beneficiary has *locus standi* to pursue a claim in respect of the profit. The profit may be one which the trustee in his capacity as director is authorised to retain as between himself and the company, yet be one for which the trustee in his capacity as trustee is liable to account to the trust fund, for instance director's fees paid by the company.¹⁷⁹ In such a case there is no doubt that a beneficiary of the trust has *locus standi* to pursue a claim against the trustee in his capacity as such: the beneficiaries are the only persons who have a claim and the company has none. The profit may, however, be one that the trustee is unauthorised to retain, in whole or in part, both as between himself in his capacity as director and the company, and as between himself in his capacity as trustee and the beneficiaries. If so, there are, potentially, claims by both the company and the beneficiaries, and the question arises whether a claim by a beneficiary is precluded by the reflective loss principle that a person interested in a company through a shareholding in the company cannot bring a claim in respect of an injury to the company merely because the value of the shareholding is prejudiced by that injury.¹⁸⁰ A claim by a beneficiary in respect of the profit is not precluded by the reflective loss principle unless it can be shown by the defendant trustee that (i) the whole of the claimed profit reflects what the company has lost and what it has a cause of action to recover and (ii) such a claim is available on the facts.¹⁸¹ Hence, if the profit is one that the trustee is or may be entitled to retain as to part in his capacity as director, but not in his capacity as trustee, a beneficiary may bring a claim in respect of the profit, though his claim will be subject to the company's claim (if brought) to recover the profit so far as due to be restored to the company.¹⁸² Similar considerations apply where the trustee is not a director of the company but has some other capacity in relation to the company which imposes on him fiduciary duties to the company as well as to the beneficiaries.

Limitation of actions

20-052 Limitation of actions is considered elsewhere.¹⁸³ It will be observed from our treatment of limitation that, as the authorities stand, constructive trusts imposed

^{178a} See § 41-036.

¹⁷⁹ See § 20-072.

¹⁸⁰ See *Prudential Assurance Co. Ltd v Newman Industries Ltd (No.2)* [1982] Ch. 204, CA and *Johnson v Gore Wood & Co.* [2002] 2 A.C. 1 at 34-36, 41-42, 42-48, 51-55, 61-67, HL, and cases there cited; and for the effect of the principle on breach of trust claims by beneficiaries, see §§ 39-038 *et seq.*

¹⁸¹ *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452; [2003] Ch. 350 at [83].

¹⁸² *Shaker v Al-Bedrawi*, above.

¹⁸³ See §§ 44-070 *et seq.*

unlawful under the criminal law of any part of the United Kingdom if occurring in any such part.²²² Property is obtained through unlawful conduct if a person obtains it through unlawful conduct (whether his own conduct or another's conduct) by or in return for the conduct.²²³ These requirements will be satisfied where a trustee receives a bribe and comes within section 2(2) or 2(3) of the Bribery Act 2010. If the trustee still holds the bribe or property representing it, then he is the correct defendant and *prima facie* an order can and must be made against him under the 2002 Act.

Exemption under section 281 of the Proceeds of Crime Act 2002

20-062 However, there is an exemption in section 281 of the 2002 Act in favour of victims of crime who claim that the property concerned belongs to them and make an application for a declaration to that effect.²²⁴ If the declaration is made then the property concerned is not recoverable property.²²⁵ Three requirements must all be satisfied:²²⁶

- (1) The applicant was deprived of the property he claims, or of property which it represents, by unlawful conduct.
- (2) The property he was deprived of was not recoverable property immediately before he was deprived of it.
- (3) The property he claims belongs to him.

20-063 There is no difficulty in satisfying the requirements of section 281 of the 2002 Act where the bribe itself comes from the trust property.²²⁷ But if the bribe was paid out of money belonging to the third party who paid the bribe there is greater difficulty in satisfying both the first and the second requirements. For if one considers the moment before the bribe was received by the trustee, though the second requirement is satisfied, there is a difficulty with the first requirement because the beneficiary was not deprived of property when the bribe was taken. But if one considers the moment after the bribe was received by the trustee, though the first requirement is satisfied since the trustee ought to have yielded up the bribe immediately upon receipt, there is a difficulty with the second requirement because by the time that the trustee comes under a duty to yield up the bribe, the property has already *prima facie* become recoverable property.

20-064 It would seem unsatisfactory for the construction and effect of the exemption in section 281 of the 2002 Act to turn just upon arguments about a *scintilla temporis*. Looking at the matter more broadly, it may be contended that a

²²² *ibid.*, s.241(2). Section 241 is printed in § 46-158.

²²³ *ibid.*, s.242(1).

²²⁴ *ibid.*, s.281(1).

²²⁵ *ibid.*, s.281(4).

²²⁶ *ibid.*, s.281(2), (3).

²²⁷ For examples of such cases, see *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17; [2014] Ch. 1 at [25]-[28].

distinction which was eliminated by the Supreme Court²²⁸ in a context where there was no criminal element, should not be revived in a context where there is a criminal element, and accordingly the legislation should be interpreted so as to ensure that the exemption applies in all cases where a constructive trust is imposed and an unauthorised profit is disgorged in favour of those who have suffered from the wrongdoer's breach of fiduciary duty. But the matter is not clear cut because it may also be contended that there is a real distinction between a case where a beneficiary is deprived of property which he already owned before the unlawful conduct occurred, and a case where he was deprived of property which was acquired by reason of and which was the product of the unlawful conduct itself, and in the latter case it is right that there should be disgorgement in favour of the enforcement authority rather than the beneficiary so as to ensure that no-one, not even an innocent beneficiary who has suffered loss by the breach of duty, perhaps grievously so, can benefit from payment of a bribe which should never have been paid and which does not come from the beneficiary's previously owned property.²²⁹

Exemption under section 308(3) of the Proceeds of Crime Act 2002

In a case where the trustee has already yielded up the bribe to the beneficiary, or the trustee or the property representing it is in the hands of new or continuing trustees (other than the wrongdoer) and held by them for the beneficiary, the claim by the enforcement authority will be against the new or continuing trustees or the beneficiary as the holder rather than against the wrongdoer who has ceased to be the holder. The fact that the wrongdoer is not himself the defendant does not in itself preclude a claim because the property has been obtained by unlawful conduct of someone other than the current holder.²³⁰ However, if judgment has been taken against the wrongdoer there is a possible further defence, apart from a defence under section 281 of the 2002 Act, under section 308(3) of the 2002 Act which provides that property ceases to be recoverable property where it is paid to or otherwise obtained by a claimant from the defendant under a judgment in civil proceedings, the claimant's claim is based on the defendant's unlawful conduct and the property obtained would be recoverable property apart from section 308(3). This defence appears to be wider than a defence under section 281 of the 2002 Act in that there is no requirement for the beneficiary to have been deprived of property at a time when the property was not yet recoverable property.

20-065

²²⁸ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2014] 3 W.L.R. 535 (affirming *FHR European Ventures LLP v Mankarious*, above, on grounds which did not depend on the distinctions made in that case.). See § 20-039.

²²⁹ Compare *Director of the Asset Recovery Agency v T* [2004] EWHC 3340 (Admin) at [22] per Collins J.; *Director of the Asset Recovery Agency v Green* [2005] EWHC 3168; *The Times*, February 27, 2006 at [4]; *Serious Organised Crime Agency v London* [2010] EWHC 353 (QB); [2010] W.T.L.R. 875; *Serious Organised Crime Agency v Agidi* [2011] EWHC 175 (QB); [2011] Lloyd's Rep. F.C. 276 at [130]-[146]. Human Rights Act 1998 considerations (as to which note Proceeds of Crime Act 2002, s.266(2)(b)) may be deployed in favour of the beneficiary's argument for a wide interpretation of the exemption in s.281, but those considerations pull less forcefully in favour of the beneficiary where bribe comes from a third party than where the bribe comes from the trust property.

²³⁰ Proceeds of Crime Act 2002, s.242(1).

though there may be a conflict of interest and duty, the trustee has not placed himself in that position by choosing to make an appropriation, but rather has been placed in that position by the terms of the trust which require a mandatory division, and the trustee is merely giving effect to the terms of the trust as he is bound to do.⁴¹⁹ The third is where a trustee who is also a beneficiary has upon becoming entitled to an absolute share in the trust fund become entitled to an *aliquot* part of assets comprised in the trust fund;⁴²⁰ in such a case the trustee has become entitled to the specific part of the assets concerned by operation of law and not in consequence of the exercise of any power or discretion to which the rule can apply, and in taking the assets is merely giving effect to his beneficial rights. Apart from the three above circumstances, it is not safe, in the absence of authority, to assume that the rule can have no application to appropriations by a trustee in or towards satisfaction of his share in a trust fund or perhaps even the share of another beneficiary. For that reason express powers of appropriation conferred on trustees commonly provide that the trustees may make an appropriation in or towards satisfaction of any share or interest, including any share or interest of any of the trustees, in the trust fund, so as to make it clear that the rule, if otherwise applicable, is excluded by the express terms of the trust.⁴²¹ In the absence of such a clause, it would still be possible to obtain the fully informed consent of the beneficiaries interested in the other shares, and this would make the appropriation binding on them.⁴²²

Indirect purchase by trustee and purchase by former trustee

Resale to trustee pursuant to understanding

- 20-115 The rule applies, not only in a case where the trustee purchases trust property in his own name, or through a nominee,⁴²³ but also in a case where the trustee sells trust property to a third party upon a contract or understanding (even if amounting to no more than an expectation) that the third party will resell to the trustee.⁴²⁴

Resale to trustee while contract with third party executory

- 20-116 Even assuming that there is no prior understanding for a resale of trust property to the trustee, nevertheless the rule applies to a purchase made by the trustee from a third party whose contract with the trustees has not yet been completed, for the trustee still has duties to perform in connection with the performance of the

⁴¹⁹ Compare the treatment of trusts for division in the case of estates in *Barclay v Owen*, above, p. 222. As to the distinction between a trustee placing himself in a position of conflict and being involuntarily placed in that position, see § 20-138.

⁴²⁰ As to the circumstances in which a beneficiary becomes so entitled, see §§ 24-003 to 24-005.

⁴²¹ As to exclusion of the rule by the express terms of the trust, see § 20-137.

⁴²² See § 20-140.

⁴²³ Purchases in the trustee's own name or through a nominee may also be caught by the two-part rule or the genuine transaction rule, see §§ 20-099 to 20-104.

⁴²⁴ *Re Postlethwaite* (1888) 59 L.T. 58; reversed on appeal on other grounds (1889) 60 L.T. 514.

contract between the trustees and the third party with which his interest as a purchaser from the third party might conflict.⁴²⁵

Purchase by former trustee

The rule applies if the trustee has made arrangements for the sale of the trust property concerned before his retirement⁴²⁶ or, even if no arrangements have been made, if he retires with a view to purchasing the trust property.⁴²⁷ However, if the purchasing former trustee retired without any idea of purchasing the trust property, and there are no circumstances to show that he was using any information that he acquired while trustee, the rule will have no application.⁴²⁸

Purchase by person connected with trustee

Purchase by spouse or close relative of trustee

The purchase of trust property from the trustees by the spouse of one of them is not absolutely prohibited by the self-dealing rule. In a Scottish case, such a transaction was held to be merely suspect.⁴²⁹ This view has been accepted, not without misgiving,⁴³⁰ in Australia⁴³¹ and has been accepted in England,⁴³² though has been subjected to strong criticism in New Zealand.⁴³³ United States authority is divergent.⁴³⁴ The resolution of the issue lies in putting on the trustee the burden of showing, in a case where the trustee does not have a personal interest, but where on the facts there exists a real risk of conflict between duty and personal loyalties, that the transaction is demonstrably in the interests of the beneficiaries.⁴³⁵ In considering whether a purchase by a spouse should be set aside, the court will have regard to the surrounding circumstances, for example as to whether the spouses are living together or apart and whether the sale is by public auction or private treaty.⁴³⁶ In practice it is prudent for trustees to consider

⁴²⁵ *Williams v Scott* [1900] A.C. 499, PC; *Delves v Gray* [1902] 2 Ch. 606, following *Parker v McKenna* (1875) 10 Ch. App. 96 at 125.

⁴²⁶ *Wright v Morgan* [1926] A.C. 788, PC.

⁴²⁷ *Ex p. James* (1803) 8 Ves. Jr. 337 at 351; *Spring v Pride* (1864) 4 De G. J. & S. 395; *Re Boles and British Land Co.'s Contract* [1902] 1 Ch. 244; cf. *Aberdeen Railway v Blaikie Bros* (1854) 1 Macq. 461 at 463-465, HL. See too *Holder v Holder* [1968] Ch. 353 at 398, CA, per Harman L.J.; *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [56].

⁴²⁸ *Re Boles and British Land Co.'s Contract*, above (trustee retired 12 years before purchase).

⁴²⁹ *Burrell v Burrell's Trustees* 1915 S.C. 333.

⁴³⁰ *Tanti v Carlson* [1948] V.L.R. 401.

⁴³¹ *Re Douglas* (1928) 29 S.R.(N.S.W.) 48 at 50-51; *Tanti v Carlson*, above.

⁴³² *Newgate Stud Co. v Penfold* [2004] EWHC 2993 (Ch); [2004] All E.R. (D) 372 (Dec) at [234]-[242]; and see *Re King's Will Trusts* (1959) 173 E.G. 627 (Harman J., not fully reported). See too *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch. 169; *Gilbey v Rush* [1906] 1 Ch. 11. These two cases concerned leases by tenants for life to their wives. In one case the lease was impeached on the ground that the tenant for life had not acted in good faith and in the other the lease was upheld. In neither case was there any suggestion that the lease was impeachable on the ground of self dealing.

⁴³³ *Robertson v Robertson* [1924] N.Z.L.R. 552 at 555, per Salmond J.; *Re McNally* [1967] N.Z.L.R. 521.

⁴³⁴ See *Scott and Ascher on Trusts* (5th edn), Vol 3, § 17.2.1.3.

⁴³⁵ *Newgate Stud Co. v Penfold*, above, at [242].

⁴³⁶ See *Tito v Waddell (No.2)* [1977] Ch. 106 at 240.

within the conflict rule on which the self-dealing rule is based.⁴⁵⁴ The issue is whether the general principle necessarily requires the application of the self-dealing rule in its full severity to a sale between two trusts sharing a common trustee so that the transaction can be set aside *ex debito justitiae* at the instance of a beneficiary of either trust irrespective of the fairness of the transaction, or whether a less severe rule applies so that it can be upheld if it can be shown that it was proper and reasonable to the trust whose beneficiary is seeking to have it set aside and that the common trustee took no advantage of his position. Although there is authority which supports the view that the self-dealing rule does apply in its full severity to all cases involving a purchase of trust property in circumstances where there is a conflict of duties in different fiduciary capacities unless some exception to the self-dealing rule applies,⁴⁵⁵ the most recent authority indicates that this takes the self-dealing rule too far.⁴⁵⁶ We consider that it is not altogether clear that the self-dealing rule applies in its full severity to sales between trusts sharing a common trustee, at any rate if each trust has an independent trustee who properly performs his function of scrutinising the transaction from the viewpoint of his trust.⁴⁵⁷ The element of doubt on the application of the severe rule may be fostered by United States' authorities which establish that sales between trusts sharing a common trustee can be set aside only if unfair to one trust.⁴⁵⁸ But the only safe course unless some exception to the self-dealing rule in any event applies is for the trustees of both trusts to make an application to the court for directions and if necessary sanction of the transaction. Many trusts nowadays expressly authorise trustees to enter into transactions in which they have an interest in another fiduciary capacity, and if both trusts contain such an authority an application to the court would not normally be necessary or appropriate since reliance can be placed on the express authority and the burden will be upon those who seek to impugn the transaction, not on those who seek to uphold it.⁴⁵⁹

20-124 If two trusts do not share a common trustee, a sale between the two trusts will not be set aside under the self-dealing rule merely because a trustee of the selling trust has a limited beneficial interest under the trusts of the purchasing trust, even if that trustee lends money to the purchasing trust in connection with the

⁴⁵⁴ As to conflict between duty and duty in connection with agents, see *Transvaal Lands Company v New Belgium (Transvaal) Land and Development Company* [1914] 2 Ch. 488 at 503, CA (director of two companies); *Moody v Cox and Hart* [1917] 2 Ch. 71 at 81 (solicitor); *North and South Trust Co. v Berkeley* [1971] 1 W.L.R. 470 at 484-485 (agent); *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 18-19, CA (solicitor); and see further Finn, *Fiduciary Obligations*, Chap. 22.

⁴⁵⁵ *Re Bell's Indenture* [1980] 1 W.L.R. 1217 at 1231; *Re Thompson's Settlement* [1986] Ch. 99 at 115; and see *Gregory v Gregory* (1815-21) G. Coop. 201 (purchase by trustee for himself for life with remainder to his children).

⁴⁵⁶ *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All E.R. 862 at 895-896; *Public Trustee v Cooper* [2001] W.T.L.R. 901.

⁴⁵⁷ Compare the approach of Hart J. in *Public Trustee v Cooper*, above, to issues involving management of conflicts.

⁴⁵⁸ *Scott and Ascher on Trusts* (5th edn), Vol 3, § 17.2.15. These have been followed in the Bahamas: *Roywest Trust Corp (Bahamas) Ltd v Savannah NV* (1996) 1 B.O.C.M. 61, Bah. SC (July 22, 1987).

⁴⁵⁹ See § 20-137.

purchase, though we consider that the existence of the interest, unless *de minimis*, has the effect of imposing the burden on those seeking to uphold the sale to show that it was proper and reasonable to the selling trust and that the trustee of the selling trust who was beneficially interested in the purchasing trust took no advantage of his position as trustee.⁴⁶⁰ The self-dealing rule applies if a trustee purchases trust property in trust for himself for life with remainder to his children.⁴⁶¹

Interest of trustee in sale of trust property but not as purchaser

A trustee may have a personal interest, or an interest in another fiduciary capacity, in a sale of trust property, though he may be wholly unconnected with the purchaser. This situation arose in a case⁴⁶² where a take-over offer on favourable terms by a company wholly unconnected with any of the relevant trustees was made for shares in a private company. A key holding of the shares was comprised in a trust primarily for the benefit of the company's employees who were largely opposed to the proposed take-over as being prejudicial to their interests. And one of the trustees also held a substantial minority holding beneficially and a further holding as one of the trustees of another trust which was a charitable trust with a clear interest in the offer being accepted. The trustees of the employee trust sought directions from the court whether they should accept the offer without surrendering their discretion to the court even though, *inter alia*, one of them was interested in other shares of the company. It was held that in the circumstances the self-dealing rule did not apply in relation to the employee trust and instead the burden was on the trustees of the employee trust to demonstrate that the conflicting interest or duty had not in fact operated in a vitiating way, a burden which was discharged so that there was no need for the trustees to surrender their discretion to the court. A less rigid approach to the application of the self-dealing rule was taken than in some previous cases, and Hart J., after referring to the conflict rule and specific rules which had been founded on it, explained the law as follows:⁴⁶³

"One must, however, beware of supposing, simply because the principle has bred these particular rules, that on every occasion on which the principle can be invoked in areas outside these specific rules some similar rigid rule either exists or should be crafted. There is in fact a surprising lack of English authority on the consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist. The relative absence of authority certainly suggests that there is no iron rule that, where such action has taken place, a beneficiary is entitled *ex debito justitiae* to have it set aside. Equally, one would expect to find, in the absence of such an iron rule, that, where such action is challenged on such grounds, the onus would be thrown on the trustee to demonstrate that the conflicting interest or duty has not in fact operated in a vitiating way.

In some areas of our law the existence of conflicts of this kind is recognised and managed by a variety of devices, ranging from requiring the affected person to

⁴⁶⁰ *Hickley v Hickley* (1876) 2 Ch.D. 190.

⁴⁶¹ *Gregory v Gregory* (1815) G. Coop. 201.

⁴⁶² *Public Trustee v Cooper* [2001] W.T.L.R. 901.

⁴⁶³ At 933-934.

Member trustees of pension schemes

- 20-136** The rule does not prevent trustees of pension schemes regulated by the Pensions Act 1995 who are also trustees from benefiting as members of the scheme from the exercise of powers vested in them as trustees. This is mainly of relevance to the exercise of dispositive powers and is considered later.⁴⁹³

Purchase authorised by trust instrument

- 20-137** In recent years it has become common for trusts to confer express authority upon trustees to enter into transactions in which they have a personal interest or an interest in another fiduciary capacity. Thus nowadays self-dealing transactions may frequently be authorised by the express terms of the trust instrument, but the terms of the authorisation must be fully and strictly satisfied if it is to avail the trustee.⁴⁹⁴ Reservations have been expressed in some recent cases, concerning the exercise of fiduciary dispositive powers, as to whether it is possible to exclude the self-dealing rule.⁴⁹⁵ Whatever might be the position in relation to the exercise of such powers,⁴⁹⁶ the rule, so far as it concerns purchase of trust property by the trustee and other comparable transactions, can clearly be excluded by the terms of the trust.⁴⁹⁷ In the context of agency, the rule takes effect subject to the terms of the contract.⁴⁹⁸ However, it may be doubted whether a power vested in trustees to alter the terms of the trust, by appointment or otherwise, may be exercised so as to authorise self-dealing by the trustees in whom the power is vested unless the power of variation expressly authorises variation of this kind,⁴⁹⁹ though we do not consider that there is any objection to an appointment by reason only that an existing provision in the trust instrument authorising self-dealing applies in relation to the appointed trusts. In a case where a testator appointed persons to be executors and trustees of his will, defining them as "my trustees", a power conferred upon "my trustees" to sell trust property to one of them was held to authorise a sale by those persons in their capacity as personal representatives.⁵⁰⁰ It has been held in Scotland that an express power for the trustees to sell to beneficiaries does not authorise a sale to

⁴⁹³ See § 20-184.

⁴⁹⁴ *Barnsley v Noble* [2014] EWHC 2657 (Ch) at [281]-[283] (requirement for co-trustee to have no interest in the transaction concerned not satisfied because the co-trustee had a very small interest).

⁴⁹⁵ *Re William Makin & Son Ltd* [1993] O.P.L.R. 171 at 176; *Re Drexel Burnham Lambert U.K. Pension Plan* [1995] 1 W.L.R. 32 at 43A; and see *Re Beatty* [1990] 1 W.L.R. 1503 at 1508B (note the word "arguably").

⁴⁹⁶ See §§ 20-164 *et seq.*

⁴⁹⁷ *Bray v Ford* [1896] A.C. 44 at 51, HL; *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd* [1986] 1 W.L.R. 1072 at 1075, PC; *Sargeant v National Westminster Bank plc* (1990) 61 P. & C.R. 518 at 521-522, CA. As to the application of such clauses so as to exclude the effect of the two party rule, see §§ 20-102 and 20-102.

⁴⁹⁸ *Kelly v Cooper* [1993] A.C. 205 at 215, PC.

⁴⁹⁹ See *Re French Protestant Hospital* [1951] Ch. 567; *HSBC Trustees (CI) Ltd v Rearden* [2005] JRC 130.

⁵⁰⁰ *Re Hayes Will Trusts* [1971] 1 W.L.R. 758.

a trustee (even an original trustee) who is also a beneficiary.⁵⁰¹ Where a self-dealing transaction comes within the authority of the trust instrument, it is freed not only from the application of the self-dealing rule but also from any less severe rule under which the burden of supporting the transaction is thrown on those seeking to uphold it.⁵⁰²

Trustee not placing himself in a position of conflict of interest and duty

The rule does not apply where the trustee does not place himself in a position of conflict of interest and duty, but is placed in that position by the settlor or the terms of the trust.⁵⁰³ Thus where a testator granted tenancies of agricultural land to his sons, which conferred security of tenure and had the effect of depreciating the value of the land, and then appointed his sons executors and trustees of his will, they were in a position where their interest in preserving their tenancies and selling the land subject to the tenancies conflicted with their duty to obtain the best price for them; but since the sons had been placed in that position by the testator they were free to sell the land subject to the tenancies, whether to themselves (under a special power authorising that) or to third parties.⁵⁰⁴ Where this exception to the self-dealing rule applies, the transaction concerned is freed not only from the application of the self-dealing rule but also from any less severe rule under which the burden of supporting the transaction is thrown on those seeking to uphold it.⁵⁰⁵ A trustee cannot rely on this principle if he fails before the settlement is made to reveal to the settlor facts known to him (but not to the settlor) which are liable to bring about a conflict of interest and duty.⁵⁰⁶

This exception to the rule does not, however, apply so as to authorise a trustee to act in a case where there is an actual conflict of duties which has not been brought about by the settlor, or the terms of the trust, merely because the conflict is not of the trustee's own making.⁵⁰⁷ Hence a person appointed as a successor trustee at a time when he has a personal interest capable of conflicting with those of the trust is not thereby impliedly authorised to act.⁵⁰⁸ In such a case, having regard

⁵⁰¹ *Johnston v Macfarlane's Trustees* (1986) S.C. 298.

⁵⁰² Compare *Edge v Pensions Ombudsman* [2000] Ch. 602 at 630-633, CA. As to shifting the burden to the trustee, see § 20-106.

⁵⁰³ *Sargeant v National Westminster Bank plc* (1990) 61 P. & C.R. 518 at 522-524, CA; *Edge v Pensions Ombudsman* [1998] Ch. 512 (affd [2000] Ch. 602, CA), considered in §§ 20-126 *et seq.* See too *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 18-19E, CA.

⁵⁰⁴ *Sargeant v National Westminster Bank plc*, above. Contrast *Passingham v Sherborn* (1846) 9 Beav. 424 at 431-436, where a trustee who was expressly authorised by the terms of the trust to take a tenancy of trust land and did so, as was desired by the testator, was nonetheless removed from the trusteeship on the ground of conflict of interest and duty.

⁵⁰⁵ See *Edge v Pensions Ombudsman*, above, at 630-633, CA; and § 20-106.

⁵⁰⁶ See § 12-032.

⁵⁰⁷ *Bristol and West Building Society v Mothew*, above, at 19G-H. And see *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1616-1617; *Thrells Ltd v Lomas* [1993] 1 W.L.R. 456 at 459; *Buckley v Hudson Forge Ltd* [1999] P.L.R. 151 at 167.

⁵⁰⁸ *Brudenell-Bruce, Earl of Cardigan v Moore* [2012] EWHC 1024 (Ch); (2011-12) 14 I.T.E.L.R. 967 at [47].

20-138

20-139

Effect of ignorance

- 20-162 For laches to operate as a bar, it must be shown that the beneficiary knew that the trustee was the purchaser; for so long as the beneficiary continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale.⁵⁹⁵

Poverty of the beneficiary

- 20-163 The effect of the length of time may also be materially influenced by continued poverty of the beneficiary,⁵⁹⁶ but poverty is merely an ingredient in the case and will not alone displace the bar.⁵⁹⁷ If legal aid would have been available the fact of poverty of the beneficiary may be of little importance.

5. INTEREST OF TRUSTEES IN EXERCISE OF DISPOSITIVE POWERS

Introduction

- 20-164 The previous section of this chapter was concerned primarily with the application of the self-dealing rule to purchases of trust property and other transactions of an administrative character. This section is concerned with the question whether and to what extent the self-dealing rule⁵⁹⁸ applies so as to disable trustees from exercising fiduciary dispositive powers vested in them in favour of any of themselves.⁵⁹⁹

Beneficial and limited powers

- 20-165 The self-dealing rule can have no application to beneficial powers⁶⁰⁰ or even to limited⁶⁰¹ powers since the donees of such powers have no fiduciary duties in relation to their exercise, and hence the question of conflict of duty and interest does not arise. Nor is there any question of the donees of beneficial or limited powers profiting from their fiduciary position. Limited powers are subject to the doctrine of fraud on the power and the donees of limited powers have a duty to the beneficiaries interested in default of their exercise not to exercise such powers otherwise than for an authorised object of the power.⁶⁰² But if the donee of a non-fiduciary power is, as a matter of construction of the power, an object of it, then the power is a beneficial power⁶⁰³ and there is nothing in the doctrine of fraud on the power which precludes an exercise of the power in favour of the donee. Thus it is well settled that where, on the true construction of a personal special power

⁵⁹⁵ *Randall v Errington* (1805) 10 Ves. Jr. 423; *Chalmer v Bradley* (1819) 1 J. & W. 51.

⁵⁹⁶ *Oliver v Court* (1820) 8 Price 127 at 167, 168; and see *Gregory v Gregory* (1815-21) G.Coop 201; *Roche v O'Brien* (1810) 1 B. & B. 330.

⁵⁹⁷ *Roberts v Tunstall* (1845) 4 Hare 257.

⁵⁹⁸ See § 20-105.

⁵⁹⁹ See *Mowbray* (1996) 10 Tru.L.I. 49 and [1998] P.C.B. 239 at 243-250.

⁶⁰⁰ See § 29-016.

⁶⁰¹ See § 29-017.

⁶⁰² *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1613G-1614A. On fraud on the power, see § 29-289 *et seq.*

⁶⁰³ See § 30-005.

of appointment, the donee of the power is also an object of it, the power may be exercised in his favour.⁶⁰⁴

The problem with trustees' powers

Fiduciary relationships are often spoken of as involving a duty by one person to act for the benefit of another or others.⁶⁰⁵ The problem in applying to trustees the general principle against fiduciaries profiting from their position is that there is no necessary severance between the trusteeship and beneficial interests. Trustees can be, and indeed frequently are, beneficiaries⁶⁰⁶ and as such are entitled to benefit from the enjoyment of the trust property.

Trustees benefiting under fiduciary administrative powers

The problem is relatively slight so far as administrative powers are concerned, because the general duty of the trustees is to act in the best interests of the trust for the benefit of the beneficiaries as a whole, acting impartially, or fairly, as between beneficiaries with different interests, including themselves if they are beneficiaries.⁶⁰⁷ Even in the context of administrative powers, the trustees may be faced with decisions which affect different beneficiaries in different ways, for example investment decisions which affect the yield of a trust fund, or the prospects of long term capital growth. A trustee who is the life tenant, or who has a reversionary interest in capital, has a fiduciary obligation to participate in the decision, whether or not the decision affects his own personal interest as a beneficiary differently from other beneficiaries. It could not be seriously suggested that trustee investment powers are not fiduciary powers if the trustees include beneficiaries, or that a trustee is unable to exercise an investment power where he is also a beneficiary and has an obligation to reach an investment decision which affects his own interest differently from that of other beneficiaries. Otherwise a trustee could not be a beneficiary, but that is not English law.

Can trustees benefit under their own fiduciary dispositive powers?

When one turns from the administrative powers of trustees to their dispositive powers, however, the problem is more acute. That is because a trustee is entitled to be partial in the exercise of such powers, and to prefer some beneficiaries over

⁶⁰⁴ *Taylor v Allhusen* [1905] 1 Ch. 529; *Re Penrose* [1933] Ch. 793.

⁶⁰⁵ See generally *Thomas on Powers* (2nd edn), §§ 1-57 *et seq.* and the discussion of the duty of loyalty in *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 18-19, CA; approved *Arklow Investments Ltd v Maclean* [2000] 1 W.L.R. 594, PC; *Royal Bank of Scotland plc v Chandra* [2011] EWCA Civ 192; [2011] Bus. L.R. D149 at [24].

⁶⁰⁶ This is less common in the offshore jurisdictions than in England. There it is the norm to have corporate (or professional) trustees, though some of the functions which in England might be vested in trustees are often vested instead in protectors or the like, sometimes being or including beneficiaries. Accordingly, the issues which in England generally arise in relation to trustees often arise in the offshore jurisdictions in connection not with trustees but with protectors or the like. As to these, see §§ 29-044 to 29-046.

⁶⁰⁷ See § 35-075.

a mistake was made.⁹⁴⁴ In practice, however, an outward manifestation of such intention will be the most conclusive form of proof of the mistake as a result of which rectification is sought.⁹⁴⁵ In the context of a pension scheme, there will have to be communications between the relevant decision-makers which would almost of necessity provide the evidence to establish what the intentions of the relevant parties were.⁹⁴⁶

Circumstances dependent on duties owed by fiduciaries—*Re Hastings-Bass*⁹⁴⁷

General

29–263 A principle has been developed dependent on the duty of trustees (or, seemingly, other fiduciary donees) to have regard to relevant considerations, and only relevant considerations, when exercising powers vested in them. The duty extends to considering the consequences of a proposed exercise of a power in a particular way and not merely its nature or legal effect. If the exercise has effects or consequences not apprehended by the trustees, when they ought to have been, it may be vitiated. This is the so-called principle in *Re Hastings-Bass*,⁹⁴⁸ and though, as will appear, the name has become inapposite it is likely to continue in use.

29–264 As it now stands, the principle takes the form enunciated by the Supreme Court in *Pitt v Holt*⁹⁴⁹ in 2013, when the law was fully reviewed.⁹⁵⁰ Its main features are as follows:

- (1) Trustees are bound to take relevant matters into account and to ignore irrelevant matters when exercising a discretionary power.⁹⁵¹
- (2) Relevant matters include the fiscal consequences, if any, of any proposed exercise.⁹⁵²
- (3) If there is a breach of their fiduciary duty in failing to take into account relevant matters, or to ignore irrelevant matters, but only if there is

⁹⁴⁴ *AMP (UK) plc v Barker*, above, at [64]–[68], qualifying what was said in *Lansing Linde v Allied* above; *Irish Pensions Trust Ltd v Central Remedial Clinic* [2005] O.P.L.R. 13, Ir HC; *Lemforder UK Ltd v Lemforder UK Pension Trust Ltd* [2005] EWHC 2882 (Ch); [2005] P.L.R. 85; *Drake Insurance v MacDonald* [2005] EWHC 3287 (Ch); [2005] P.L.R. 401 at [32], following *AMP* where there were two joint donees of the power; *Industrial Acoustics Co Ltd v Crowhurst* [2012] EWHC 1614 (Ch); [2012] P.L.R. 371 at [45]–[46]; *IBM UK Pensions Trust Ltd v IBM UK Holdings Ltd* [2012] EWHC 2766 (Ch); [2012] P.L.R. 469 at [22].

⁹⁴⁵ *AMP (UK) plc v Barker*, above, at [66].

⁹⁴⁶ *IBM UK Pensions Trust Ltd v IBM UK Holdings Ltd* [2012] EWHC 2766 (Ch); [2012] P.L.R. 469 at [22], applying the objective test of continuing intention proposed by Lord Hoffmann at § 4–083.

⁹⁴⁷ [1975] Ch. 25, CA.

⁹⁴⁸ Above.

⁹⁴⁹ [2013] UKSC 26, [2013] 2 A.C. 108. The decision disposed of two appeals, heard together, in *Pitt v Holt* and another in *Re Futter*.

⁹⁵⁰ The SC (*ibid.*, at [5]) approved the judgment of Lloyd L.J. in the CA ([2011] EWCA Civ 120) [2012] Ch. 132, to which therefore reference may also be made (especially at [126]–[131]).

⁹⁵¹ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [6], [10], [39]–[41].

⁹⁵² *ibid.*, [65], [70].

such a breach, then the exercise of the power will be open to challenge.⁹⁵³

- (4) Because the basis of the challenge is the duty to give adequate consideration to the exercise of a power, a positive mistake is not necessary (though it may be sufficient) and ignorance or absence of thought may be enough.⁹⁵⁴
- (5) When open to challenge on that ground, the exercise is not void but voidable and relief is both discretionary and subject to any available equitable defences.⁹⁵⁵
- (6) Unless the trustees were at fault, the exercise is not open to challenge (in the absence of a positive mistake on their part⁹⁵⁶), as where their failure to take a given matter into account (for instance, adverse tax consequences) was the result of incorrect professional advice.⁹⁵⁷

History of the principle

Although the law has been authoritatively laid down by the Supreme Court, some explanation of the development of the principle is instructive. In decisions preceding *Pitt v Holt*, the principle had been thought to take a different and much wider form than it now has, so that any decision of trustees was vitiated if made in ignorance of material considerations or made after taking into account immaterial considerations, the general though not universal view being that that was so whether or not the trustees had been at fault and that the exercise was then void rather than voidable.⁹⁵⁸ The principle was attributed to the decision of the Court of Appeal in 1975 in *Re Hastings-Bass*, as understood and applied in *Mettoy Pension Trustees Ltd v Evans*⁹⁵⁹ in 1989, and so went under the name “the principle in *Re Hastings-Bass*”. In *Pitt v Holt*, however, it was held that *Re Hastings-Bass* had been misinterpreted in *Mettoy* and was not authority for the wide principle until recently attributed to it.⁹⁶⁰

⁹⁵³ *ibid.*, [39]–[41], [68], [73].

⁹⁵⁴ *ibid.*, [6], [60] (“inadequate deliberation”).

⁹⁵⁵ *ibid.*, [7], [70], [93].

⁹⁵⁶ That is, a mistake capable of founding relief on the general principle not dependent on the duties owed by fiduciaries, discussed at §§ 4–064 *et seq.*, 29–255 *et seq.*

⁹⁵⁷ *ibid.*, [70], [95]–[97].

⁹⁵⁸ English decisions before *Pitt v Holt* included *Green v Cobham* [2000] W.T.L.R. 1101; *Abacus Trust Co. (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] S.T.C. 1344; *AMP (UK) Ltd v Barker* [2001] P.L.R. 77 (*obiter*); *Hearn v Younger* [2002] EWHC 963 (Ch); [2002] All E.R. (D) 223 (May); *Abacus Trust Co. (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409; *Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 W.L.R. 3811; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); [2005] O.P.L.R. 57 (*obiter*); *Burrell v Burrell* [2005] EWHC 245 (Ch); [2005] S.T.C. 569; *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453; *Jiggins v Low* [2010] EWHC 1566 (Ch); [2010] S.T.C. 1899; *Wyatt v Tyrrell* [2010] EWHC 3633 (Ch), together with the decisions at first instance reversed in *Pitt v Holt* itself, namely *Pitt v Holt* [2010] EWHC 236 (Ch); [2010] S.T.C. 901 and *Re Futter* [2010] EWHC 449 (Ch); [2010] S.T.C. 982. *Abacus Trust Co. (Isle of Man) Ltd v Barr* was alone in holding (i) that there had to be a breach of duty on the part of the trustees and (ii) that the exercise was then voidable, not void, though other decisions left one or other point open; the decision in *Pitt v Holt* upheld *Barr* on both points.

⁹⁵⁹ [1990] 1 W.L.R. 1587 at 1621.

⁹⁶⁰ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [32], approving Lloyd L.J.’s judgment in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [72], [131].

29-266 The problem in *Re Hastings-Bass* arose out of the exercise of a power of advancement by way of sub-settlement, effected by a transfer to another settlement for the benefit of the object of the power. A life interest so created in favour of the object did not breach the rule against perpetuities but the remaining trusts did so and hence were void.⁹⁶¹ The question arose whether the whole advancement was ineffective.⁹⁶² The Court of Appeal upheld the life interest, holding that the exercise of the power could be upset only if the exercise could not reasonably be regarded as being for the benefit of the beneficiary intended to be advanced.⁹⁶³ In words much quoted in later decisions, however, Buckley L.J. said:⁹⁶⁴

“... [W]here by the terms of a trust... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.”

That passage was relied on in *Mettoy* and later decisions to support a principle expressed in positive terms, to the effect that where a trustee acts under a discretion given to him by the terms of the trust but the effect of the exercise is different from that which he intended, the court will interfere if he would not have acted as he did but for failing to take into account considerations which he ought to have taken into account or taking into account considerations which he ought not to have taken into account.⁹⁶⁵

29-267 The court in *Pitt v Holt* declined to regard the passage quoted as the true ratio of *Re Hastings-Bass*.⁹⁶⁶ The decision was rather that the advancement, so far as not struck down by the rule against perpetuities, had to stand unless in that attenuated form it could not be regarded as beneficial to the object of the power.⁹⁶⁷ On that footing, the first limb of Buckley L.J.’s dictum covered the whole ground and the second added nothing.⁹⁶⁸ *Re Hastings-Bass* did not decide that a misapprehension on the part of trustees or a failure to take relevant matters into account would make an exercise of a power void and *Mettoy* was wrong to say that it did.⁹⁶⁹ It was only if the exercise of the power, once its effects were examined, could not

⁹⁶¹ Under the rule that the exercise of a power of advancement had to be read back into the original settlement for the purpose of the rule against perpetuities, see § 5-125.

⁹⁶² The question arose between the trustees and the (then) Inland Revenue, the Inland Revenue contending that the purported advancement was entirely void; no beneficiary sought to set the advancement aside.

⁹⁶³ *Re Hastings-Bass* [1975] Ch. 25 at 41B-C. See § 32-021.

⁹⁶⁴ *Re Hastings-Bass* [1975] Ch. 25 at 41F-H.

⁹⁶⁵ The formulation in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1621H, as modified and adopted in *Stieff v Fox* [2005] EWHC 1312; [2005] 1 W.L.R. 3811 at [46]-[49], [114], [119].

⁹⁶⁶ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [24]-[25], approving Lloyd L.J.’s judgment in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [59]-[67].

⁹⁶⁷ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108, *loc. cit.*

⁹⁶⁸ *ibid.*, at [25].

⁹⁶⁹ *ibid.*, at [32], [58] approving Lloyd L.J.’s judgment in the CA, [2011] EWCA Civ 197; [2012] Ch. 132 at [72], [94].

reasonably have been regarded as being for the benefit of the beneficiary being advanced that the exercise would have been void, for then it would have been outside the scope of the power.⁹⁷⁰ Otherwise the exercise might be voidable at the instance of a beneficiary but it would be valid until set aside; and it would be voidable only if the trustees had been in breach of duty.⁹⁷¹ No such question had arisen in *Re Hastings-Bass*, for no beneficiary had sought to set the decision aside and the contest was between the Inland Revenue, concerned to argue that the exercise was wholly void, and the trustees.

In future, therefore, attention will usually focus on the question whether the trustees were in breach of duty in exercising the power as they did and, if so, whether it should be avoided at the instance of a beneficiary. That is so at least in England. In a number of jurisdictions abroad the principle in *Re Hastings-Bass* in its wider form was adopted before *Pitt v Holt*.⁹⁷² Whether those jurisdictions will now adopt the narrowing of the principle effected in *Pitt v Holt* remains to be seen.⁹⁷³

Examples

Examples of the application of the principle in its re-stated form may be given as follows:

- (1) Where the trustees of a pension scheme did not properly inform themselves as to the value of the fund and the consequences of that value when exercising an imperative power to fix an amount to be transferred to another scheme on a sale by the employer of part of its business, their decision fixing the amount was held to be flawed;⁹⁷⁴
- (2) Where trustees were held to be at fault in exercising a power of appointment as to 60 per cent. of the fund, under the impression that

⁹⁷⁰ *Re Hastings-Bass*, above, at 41B-C; *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [23]-[25], [60] and in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [58], [66], [96], [222].

⁹⁷¹ *Pitt v Holt*, above, passages cited at § 29-264.

⁹⁷² *Re Green GLG Trust* [2002] JRC 235; (2002-03) 5 I.T.E.L.R. 590; *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006-07) 9 I.T.E.L.R. 302, Cayman GC; *Irish Pensions Trust Ltd v Central Remedial Clinic* [2005] O.P.L.R. 137, Ir HC; *A v Rothschild Trust Cayman Ltd* (2006-07) 9 I.T.E.L.R. 307, Cayman GC; *Re RAS I Trust* [2006] JRC 187; (2006-07) 9 I.T.E.L.R. 798; *Re Winton Investment Trust* [2007] JRC 206; [2008] W.T.L.R. 553; *Re Howe Family No.1 Trust* [2007] JRC 248; *Re Seaton Trustees Ltd* [2009] JRC 050; [2010] W.T.L.R. 105; *Re Ta-Ming Wang Trust* (2010-11) 13 I.T.E.L.R. 854, Cayman GC; *Re R Trust* [2011] JRC 85.

⁹⁷³ In Jersey, a form of the principle in *Re Hastings-Bass* as it was understood before *Pitt v Holt* has been introduced by legislation: see *Trusts (Jersey) Law 1984* (revised edn 2014), arts 47B, 47D, 47F, 47H, 47J. In *Re B Life Interest Settlement* [2012] JRC 229 at [53]-[104], the Jersey RC had previously expressed the view *obiter* that it ought to adopt the narrower principle laid down in *Pitt v Holt* in the CA in preference to its own earlier decisions (described as clearly wrong) unless the SC reverted to the previous wider rule or something similar to it; the decision may now be of only historical interest.

⁹⁷⁴ *Stannard v Fisons Pensions Trust Ltd* [1992] I.R.L.R. 27, CA, as commented on in *Pitt v Holt* in the CA, [2011] EWCA Civ 197; [2012] Ch. 132 at [73]-[74]. It is not in fact clear from the report of *Stannard* what relief was sought or whether the decision was treated only as voidable.

loss caused by the breach of duty; but that is not inconclusive for present purposes, as the question is whether the challenged exercise of the power is to be avoided, not whether compensation should be paid. The Supreme Court declined to limit the cases in which the court would intervene by reference to that distinction, insisting on "a high degree of flexibility".¹⁰¹¹ Relief may be granted on terms.¹⁰¹²

Standing to challenge

- 29-279** Since it is now necessary to prove a breach of duty on the part of the trustees in order to invoke the principle re-stated in *Pitt v Holt*, it will usually be a beneficiary who applies and in general it will be unsuitable for trustees to do so.¹⁰¹³ Previously it was not uncommon for the trustees to approach the court to overturn a decision of their own once it was realised that it had unintended consequences.¹⁰¹⁴ The trustees at fault will not generally wish to acknowledge a breach of duty; nor is it obvious that they, or indeed successor trustees, can invoke the jurisdiction of the court to avoid the exercise of the power. But it was recognised in *Pitt v Holt* that trustees might seek directions from the court if there was no other suitable person to bring the matter before the court¹⁰¹⁵ or if a beneficiary alleged a breach of trust but did not issue his own proceedings;¹⁰¹⁶ and when trustees identify a problem promptly it would be unfair not to allow them go to court themselves, if need be, since delay might increase the adverse financial consequences for which they would be liable.

Discretion and equitable defences

- 29-280** Where there is a case for challenging the exercise of a power, the court's intervention is discretionary and is subject to available equitable defences.¹⁰¹⁷ The defences include laches, complicity and acquiescence.¹⁰¹⁸ How far the discretion adds to the available defences is not yet clear. The seriousness of the mistake or other failing on the part of the trustees may well be a material factor.
- 29-281** As between those interested in the trust, the principal equitable defence likely to be invoked is laches.¹⁰¹⁹ A beneficiary who stands by once he knows of the possibility of a challenge is unlikely to succeed in upsetting the exercise of a

¹⁰¹¹ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [91]–[92].

¹⁰¹² See § 29-283.

¹⁰¹³ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [69], approving Lloyd L.J.'s judgment in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [130], the latter saying also that proceedings ought to be by a Pt 7 claim, since there may be a substantial dispute of fact to be resolved.

¹⁰¹⁴ See, e.g. *Abacus Trust Co. (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] S.T.C. 1344.

¹⁰¹⁵ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [69]. For an instance, see *Roadchef Employee Benefits Trust Ltd v Hill* [2014] EWHC 109 (Ch) at [124].

¹⁰¹⁶ *Pitt v Holt* in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [130].

¹⁰¹⁷ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [7], [43], [70], approving Lloyd L.J.'s judgment in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [127], [222].

¹⁰¹⁸ *ibid.*, at [43].

¹⁰¹⁹ For the requirements of laches, see §§ 44-016 and 44-017.

power.¹⁰²⁰ Supervening equitable interests created by later exercises of dispositive powers will not have an automatic priority, even though the right to seek an avoidance of the prior exercise of the power is a mere equity, but will be an important factor in the exercise of the court's discretion.

As to third parties, they may have dealings either with a beneficiary or with the trustees. In the former case, a gratuitous assignee of a supervening equitable interest will be in the same position as the assignor. But if the third party gives value for the assignment, and has no notice of the defect in the prior exercise of the trustees' discretion, his interest, though equitable, will on ordinary principles have priority over the right to seek an avoidance of the prior exercise.¹⁰²¹ If the third party deals with the trustees and the subject of the assignment is the trust property itself, of which he takes a legal assignment, for value and without notice, then again on ordinary principles he will take free of the right to seek an avoidance, though the right will attach to the proceeds of sale.¹⁰²² The court might in any case require an undertaking to protect the rights of third parties.¹⁰²³

Relief

The relief to be sought when invoking the principle re-stated in *Pitt v Holt* will primarily be the setting-aside of the whole exercise of the power under challenge and the consequent reversal of any steps taken under it, such as the transfer of trust funds. The court indicated that it might wish to know what further disposition the trustees were minded to make before granting relief and even that it might require an undertaking to do so.¹⁰²⁴ Relief may therefore be granted on terms.¹⁰²⁵

Under the broader principle that was understood to exist before that decision, the question arose whether only part of the exercise could be treated as bad; and it was held that it could.¹⁰²⁶ Hence, so it was said, if on a proper consideration of

¹⁰²⁰ In *Abacus Trust Co. (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409, the only decision before *Pitt v Holt* to hold that the exercise was voidable rather than void, the life tenant (and settlor) had known of the problem for nearly 10 years before proceedings were issued and the case was adjourned for consideration whether the exercise should be avoided.

¹⁰²¹ *Snell's Equity* (33rd edn), § 4-024.

¹⁰²² *Pitt v Holt* in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [99]; *Roadchef Employee Benefits Trust Ltd v Hill* [2014] EWHC 109 (Ch) at [137]–[139] (challenge to a transfer to another settlement; trustees of the transferee settlement held volunteers and its beneficiary also held to lack good faith). The same applies to a contract with a third party: *Donaldson v Smith* [2007] W.T.L.R. 421 at [51]–[55]. (The passage is omitted in [2006] EWHC B9 (Ch).) It may perhaps be different where the third party is agreeable to the setting-aside of the contract or disposition: *Re Winton Investment Trust* [2007] JRC 206; [2008] W.T.L.R. 553 at [12], [19].

¹⁰²³ Cf. *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [138], [141], referring to an undertaking offered in conjunction with the claim in *Re Futter* based on the general jurisdiction to set aside for mistake.

¹⁰²⁴ *ibid.*, at [92].

¹⁰²⁵ *ibid.*, *loc. cit.* It was said (at [63]), citing *Re Baden's Deed Trusts* [1971] A.C. 424 at 456–457) that setting aside the decision might not be the only course open to the court, perhaps meaning that other relief might be granted in addition to rather than in lieu of such an order.

¹⁰²⁶ *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1624H–1625B; *Burrell v Burrell* [2005] EWHC 245 (Ch); [2005] S.T.C. 569 at [25].

relevant matters trustees would still have executed the deed they did execute but with the omission of a particular provision, the court might declare only that provision ineffective;¹⁰²⁷ similarly, if trustees given proper tax advice would have omitted some assets from an appointment but not others, the appointment might be held ineffective only as to the assets which would have been omitted.¹⁰²⁸ But a single provision in an instrument could not be omitted if the omission would leave the remainder unworkable or would amount to rectification of the instrument rather than a partial undoing of the exercise of a power.¹⁰²⁹ Whether a partial avoidance remains possible after *Pitt v Holt* was not determined¹⁰³⁰ but there seems to be no reason why not: it must be easier to avoid part of the exercise of a power if the exercise is only voidable.

- 29-285** Since an application to avoid the exercise of a power must now be based on a breach of duty on the part of trustees, it will be common to combine it with a claim for compensation to the extent that an order avoiding the exercise is refused or such an order does not fully restore the trust fund. Consequential orders may also be claimed against the recipients of dispositions sought to be avoided. Where trustees exercised a power to pay to a widow “generous and appropriate sums” out of both income and capital without making any enquiry as to her other means, though directed by the trust instrument to do so, her estate was held liable to refund the entirety of the sums so paid.¹⁰³¹

No positive effect of principle

- 29-286** The principle re-stated in *Pitt v Holt* is negative only. It is invoked where trustees have not given proper consideration to relevant matters and if in consequence the exercise of a power is avoided the power is treated as not having been exercised. It does not apply in the converse case, so as to permit the court to treat the trustees as having exercised a power which they have not in fact exercised on the ground that the failure to exercise it was caused by a misapprehension and that they would have done so if properly informed.¹⁰³² Hence if trustees fail to exercise a power before it has expired there can be no recourse to the principle.¹⁰³³

Third parties

- 29-287** The cases of a power vested in trustees but subject to the consent of a third party and of a power vested in a third party but vested in trustees have already been

¹⁰²⁷ *Mettoy Pension Trustees Ltd v Evans*, above, *loc. cit.*

¹⁰²⁸ *Burrell v Burrell*, above, at [25].

¹⁰²⁹ *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453.

¹⁰³⁰ The point was left open in the CA [2011] EWCA Civ 197; [2012] Ch. 132 at [72]; it was not mentioned in the SC.

¹⁰³¹ *Sinclair v Moss* [2006] VSC 130. The trustees' decisions were held void in consequence of the failure to make enquiries. It was held on the facts that the trustees would have made different decisions if they had made those enquiries.

¹⁰³² *Breadner v Granville-Grossman* [2001] Ch. 523, decided before *Pitt v Holt* but cited without disapproval [2013] UKSC 26; [2013] 2 A.C. 108 at [35].

¹⁰³³ *ibid.* As to the possibility of a claim for damages by a disappointed beneficiary, see [43-022].

mentioned in the discussion of the general jurisdiction to give relief for mistake.¹⁰³⁴ We consider that if the trustees have exercised the power under a misapprehension which would otherwise attract the operation of the principle re-stated in *Pitt v Holt*, the fact that a requisite consent is forthcoming from a third party who is not mistaken should not be a bar to relief,¹⁰³⁵ and that if the trustees have consented to an exercise under such a misapprehension, that similarly should ground relief even though the donee was not mistaken.¹⁰³⁶

Other fiduciaries

The principle re-stated in *Pitt v Holt* applies to other fiduciaries, at any rate those holding a discretionary power which obliges them to consider relevant matters and ignore irrelevant ones. The Supreme Court in that case evidently took it for granted that the principle did apply to a receiver of another's property appointed under the Mental Health Act 1983 (now a deputy appointed under the Mental Capacity Act 2005).¹⁰³⁷ In Jersey, the former principle in *Re Hastings-Bass* has been applied to a protector when deciding on the appointment of new trustees.¹⁰³⁸ Directors have been said to fall within the principle.¹⁰³⁹ We consider that such fiduciaries should be treated as being on the same footing as trustees.

29-288

15. FRAUD ON A POWER—ULTERIOR PURPOSES

General principle

The donee of a beneficial power may exercise it as he pleases; he may, if he wishes, use it for his own benefit. That is what makes it a beneficial power. The donee of a power of any other kind must not misuse it. Where the power is a limited but non-fiduciary power he is under no obligation to exercise it or to consider doing so, but if he does exercise it he must do so for a proper purpose. Where the power is a fiduciary power the donee is under an obligation at least to

29-289

¹⁰³⁴ See § 29-261.

¹⁰³⁵ *Cf. Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 W.L.R. 3811 at [115], [119(vii)], where the trustees' power was subject to the consent of a third party, a non-fiduciary; the trustees were permitted to invoke the principle in *Re Hastings-Bass* because of incorrect tax advice (the requirement of a breach of duty not having then been established) and the third party held to have given his consent under a mistake. The decision was noted in *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [45].

¹⁰³⁶ But in *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453 relief was refused where a definitive pension deed had been entered into under a misapprehension, on the ground that it had been devised by the employer, though accepted by the trustees, and so the adoption of the deed was “essentially”, “predominantly” or “overwhelmingly” the act of the employer, not the trustees (*ibid.*, at [81], [92]). An appeal was compromised: see [2008] EWCA Civ 996.

¹⁰³⁷ *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 at [57], [97]; the CA had been prepared to assume that that was so [2011] EWCA Civ 197; [2012] Ch. 132 at [162]. The court at first instance had decided that a receiver did attract the operation of the former principle in *Re Hastings-Bass*, see [2010] EWHC 236 (Ch); [2010] S.T.C. 901.

¹⁰³⁸ *Re R Trust* [2011] JRC 085.

¹⁰³⁹ *Re Ta-Ming Wang Trust* (2010-11) 13 I.T.E.L.R. 854, Cayman GC. See too *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch); [2005] 1 B.C.L.C. 175 at [172] *et seq.*

- (1) Where a testator gives property subject to a trust power in favour of a class and it appears to be the intention that the distribution or selection should take place as soon as conveniently may be after his death, the court will execute the power in favour of the class as it stood at his death.¹⁰⁷ The same applies where the donee of the power is given a life estate but the donee dies in the testator's lifetime.¹⁰⁸ Similarly, where income is to be distributed by trustees amongst a class within a reasonable time after it is received¹⁰⁹ and they fail to make a distribution but the court permits them to do so out of time or directs the distribution itself, the distribution is confined to those persons who were members of the class at the time when it ought to have been made.¹¹⁰
- (2) Subject to that rule, it is necessary to consider whether the trust in default of appointment arises because there is a gift to the class amongst which the donee has a power of selection or because, in the absence of words of gift to the class, a trust is nonetheless implied from the power itself.¹¹¹ The former category of case is exemplified by a gift to divide property amongst A's children in such shares as B shall decide¹¹² and the effect is that the property vests immediately but the exercise of the power will divest it.¹¹³ For that reason, a gift to A's children as B may appoint goes to all the children living at the testator's death to the exclusion of any born afterwards, even if they are born before B dies.¹¹⁴ Similarly, if the donee takes a life interest with remainder to his children as he shall appoint, the class to take in default of appointment includes the personal representatives of a child dying before the donee.¹¹⁵ The rule is the same even though the donee can appoint only by will and not *inter vivos*.¹¹⁶
- (3) The alternative category of case is one where the trust is implied from the power itself. It is exemplified by a gift to any of A's children in such shares as B shall appoint.¹¹⁷ The rule in that event is that the donor is presumed to have intended to give the property in default of appointment only to those to whom the donee of the power might have given it.¹¹⁸ If, therefore, the power may be exercised by will only, the court executes the power only in favour of those members of the class

¹⁰⁷ *Brown v Higgs* (1799) 4 Ves. Jr. 708; *Longmore v Broom* (1802) 7 Ves. Jr. 124.

¹⁰⁸ *Penny v Turner* (1848) 2 Ph. 493.

¹⁰⁹ See § 29-225.

¹¹⁰ *Re Locker's Settlement Trusts* [1977] 1 W.L.R. 1323.

¹¹¹ See § 30-029.

¹¹² *Lambert v Thwaites* (1866) L.R. 2 Eq. 151.

¹¹³ *ibid.*

¹¹⁴ *Coleman v Seymour* (1749) 1 Ves. Sen. 209.

¹¹⁵ *Casterton v Sutherland* (1804) 9 Ves. Jr. 445; *Pattison v Pattison* (1855) 19 Beav. 638; *Lambert v Thwaites* (1866) L.R. 2 Eq. 151; *Re Gun* [1915] 1 I.R. 42 at 49.

¹¹⁶ *Lambert v Thwaites*, above.

¹¹⁷ *Cf. Re Arnold* [1947] Ch. 131.

¹¹⁸ *Lambert v Thwaites* (1866) L.R. 2 Eq. 151.

- who are in being at the death of the donee,¹¹⁹ excluding those predeceasing the donee.¹²⁰ If the power may be exercised either by deed or will, it seems that members of the class dying before the donee will be included and so will members who come into being during any preceding life interest,¹²¹ on the ground that since the donee of the power had no duty to exercise it at one time more than another the objects of the power are all those who might possibly have taken a benefit under it.¹²²
- (4) If, however, an intention appears that there should be personal enjoyment by the objects of the power different considerations apply. There are then good grounds for holding that the object must survive the donee if he is to participate.¹²³

Whatever the class held to be entitled in default of appointment, they will take as tenants in common in equal shares.¹²⁴ **30-040**

Meaning of "relations" and "family"

Special rules have been laid down to determine the meaning of powers of appointment in favour of a person's "relations" or "family" or the like. Such a power is not inherently uncertain¹²⁵ but the class so pointed out is obviously indeterminate. At one time, the scope of the class to which the donee might appoint depended on the now otherwise obsolete distinction between a power of selection and a power of distribution,¹²⁶ the former authorising the donee to select one or more of a designated class of objects to the complete exclusion of the other or others and the latter confining him to fixing the shares of the objects without enabling him to exclude any of them entirely. Where the power was to appoint amongst "relations" or "family", the donee was held to be entitled to appoint amongst relations in any degree if the power was a power of selection but only amongst the next-of-kin if it was a power of distribution.¹²⁷ That rule applied equally to trust powers¹²⁸ and mere powers.¹²⁹ Now, however, that all

30-041

¹¹⁹ *Cruwys v Colman* (1804) 9 Ves. Jr. 319; *Walsh v Wallinger* (1830) 2 Russ. & M. 78; *Brown v Pocock* (1833) 6 Sim. 257; *Bonser v Kinnor* (1860) 2 Giff. 195; *Re Caplin's Will* (1865) 2 Dr. & Sm. 527; *Kennedy v Kingston* (1821) 2 Jac. & W. 431.

¹²⁰ See cases cited in the previous footnote.

¹²¹ *Re Jackson's Will* (1879) 3 Ch.D. 189; *Wilson v Duguid* (1884) 24 Ch.D. 244; *Re Llewellyn's Settlement* [1921] 2 Ch. 281; *Re Arnold* [1947] Ch. 131. Compare *Doyley v Att.-Gen.* (1735) 2 Eq. Ca. Ab. 194; *Harding v Glyn* (1739) 1 Atk. 469; *Pope v Whitcombe* (1810) 3 Mer. 689, as corrected in *Finch v Hollingsworth* (1855) 21 Beav. 112 at 116.

¹²² *Wilson v Duguid*, above, at 249.

¹²³ *Re White's Trusts* (1860) Johns. 656; *Re Phene's Trusts* (1868) L.R. 5 Eq. 346; *Carthew v Enraght* (1872) 20 W.R. 743; *Re Llewellyn's Settlement* [1921] 2 Ch. 281.

¹²⁴ *Re Arnold* [1947] Ch. 131, not following *Brown v Pocock* (1833) 6 Sim. 257. See, however, § 30-034.

¹²⁵ *Re Bose* [2012] EWHC 858 (Ch) at [18], citing this paragraph.

¹²⁶ See § 30-025, where Law of Property Act 1925, s.158(1) is printed.

¹²⁷ *Harding v Glyn* (1739) 1 Atk. 469, as recorded in *Brown v Higgs* (1800) 5 Ves. Jr. 495 at 501-502; *Pope v Whitcombe* (1810) 3 Mer. 689; *Grant v Lynam* (1828) 4 Russ. 292; *Lawlor v Henderson* (1877) 10 I.R. Eq. 150; *Wilson v Duguid* (1883) 24 Ch.D. 244 at 251; *Re Deakin* [1894] 3 Ch. 565.

¹²⁸ See cases cited in previous footnote.

¹²⁹ *Snow v Teed* (1870) L.R. 9 Eq. 622.

- (3) The third form, which is perhaps more common than any other, and sometimes difficult to distinguish in its terminology from a power in the second form, is a power to make to another settlement a transfer which is for the benefit of one or more of the beneficiaries of the transferor settlement, whether or not other persons may also be interested or eligible to benefit under the recipient settlement. A power in this form is essentially different from powers in the first or second form, in that it is a special power exercisable for the benefit of members of a class of beneficiaries of the transferor settlement, and the transfer is made to the recipient settlement on the ground that the inclusion in that settlement of beneficiaries who are not within the class of beneficiaries of the transferor settlement is beneficial to one or more beneficiaries of the transferor settlement. A power in this form is similar in this respect to the statutory power of advancement,²⁴⁵ save that there is more than one object of the power, and effect is given to the well-established principle that a power exercisable for the benefit of person does not necessarily mean that he alone can take under an exercise of the power.²⁴⁶ Where the power is in the third form, there may be difficulties in justifying a transfer to a settlement of which the beneficiaries consist of beneficiaries of the transferor settlement and their close relatives, but which also confers wide powers of addition and exclusion of beneficiaries on its trustees, even if the transferor settlement contains similar powers conferred on its trustees.
- (4) A narrow form of the power is a power to make a transfer to a settlement of which every beneficiary is also a beneficiary of the transferor settlement, though the recipient settlement may be narrower in its range of beneficiaries. Under this form a transfer to a settlement which contains any trusts or dispositive powers exercisable in favour of persons who are not within the class of beneficiaries of the transferor settlement is excessive, unless the transferor settlement authorises a transfer to another settlement which is for the benefit of the beneficiaries of the transferor settlement, the inclusion of the words "for the benefit of" widening the scope of the power²⁴⁷ so as to make it similar to powers in the third form. If, however, there is a power of transfer in this narrow fourth form, the restriction to a settlement of which every beneficiary is also a beneficiary of the transferor settlement cannot be evaded by reliance on a power of advancement in general terms, for the general power is confined by the terms of the more specific.²⁴⁸

30-082 Where the power is fiduciary, whatever the form, the trustees or other fiduciary exercising the power will not be permitted to exercise the power so as benefit one

²⁴⁵ See §§ 32-011 *et seq.*

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*; and see *Holden-Hindley v Holden-Hindley* [2013] EWHC 3053 (Ch); [2014] W.T.L.R. 275 (power of appointment).

²⁴⁸ *Re Pinto Voluntary Settlement* [2004] JRC 047; [2004] W.T.L.R. 879; distinguished in *Holden-Hindley v Holden-Hindley*, above.

or more of the trustees or the fiduciary exercising the power unless that is permitted by the terms of the transferor settlement.²⁴⁹ We do not, however, consider that there is an objection to a transfer to another settlement of which a trustee of the transferor settlement is also a trustee, by reason only that the transferee settlement contains remuneration and indemnity provisions in favour of its trustees, at any rate if the remuneration and indemnity provisions in the recipient settlement are no wider than those in the transferor settlement. Generally, the form of the power will, as in the case of the statutory power of advancement,²⁵⁰ be wide enough to permit a transfer to another settlement containing discretionary trusts or powers (if beneficial to the objects of the power in the case of powers in the third or fourth form), despite the general rule against delegation of powers,²⁵¹ though there may be cases where a narrow form of power requires the trusts of the transferee settlement to be the same as those of the transferor settlement. For the purposes of the rule against perpetuities, a power to transfer to another settlement is treated as a special power of appointment, and so the perpetuity period runs from the date of the transferor settlement as regards property received from the transferor settlement, and generally the trusts of the recipient settlement must comply with the rule against perpetuities as applicable in relation to the transferor settlement.²⁵²

Whatever the form of the power, including a power in a pension or employee benefit trust, it must be exercised, unless it is an intermediate power in the first or second form described above, for the benefit of one or more of the beneficiaries of the transferor settlement.²⁵³ Where the power is in the wider form, the wording of the transferor settlement may permit a transfer even though one of the beneficiaries of the recipient settlement is wholly excluded from benefiting from the transferor settlement.²⁵⁴ If, however, there is an excessive exercise²⁵⁵ or an exercise for an ulterior purpose constituting a fraud on the power,²⁵⁶ then though the legal interest in the assets transferred may pass no beneficial interest in them will do so.²⁵⁷

8. POWERS OF REVOCATION

Creation of power of revocation

Settlement

A power of revocation of the whole settlement may be reserved by the settlor to himself when creating it. Such a settlement creates an immediately constituted

²⁴⁹ See §§ 20-168 *et seq.*

²⁵⁰ See § 32-020.

²⁵¹ See §§ 29-093 *et seq.*

²⁵² See § 5-125; and compare § 32-021.

²⁵³ *Roadchef Employee Benefits Trust Ltd v Hill* [2014] EWHC 109 (Ch) at [111]-[114].

²⁵⁴ *I.R.C. v Botnar* [1999] S.T.C. 711, CA.

²⁵⁵ See §§ 29-240 *et seq.*

²⁵⁶ See §§ 29-289 *et seq.*

²⁵⁷ *Allan v Rea Brother Trustees Ltd* [2002] EWCA Civ 85; [2002] W.T.L.R. 625 at [48]-[51] (transfer out of pension trust without genuine change of employment).

30-091 Where trustees have reserved a power of revocation to themselves, the power will devolve with the trusteeship in accordance with the ordinary rule.²⁷⁸ The same will apply where the reservation is made by some other fiduciary holding a continuing office, such as a protector.

30-092 No doubt it is possible for the instrument creating a dispositive power to provide that an exercise may be made revocable by a third party.

Whether fiduciary

30-093 An unrestricted power of revocation of the settlement vested in the settlor, to whom an exercise of the power returns the trust property, must be intended to be exercisable entirely for the settlor's own benefit, which is the mark of a beneficial power.²⁷⁹ When the settlor has imposed a requirement of consent for the exercise of the power, the power to give or withhold consent may be beneficial or it may be fiduciary. If the consent required is that of some beneficiary or beneficiaries, they are likely to be free to withhold it for their own protection. On the other hand, if consent is required from the trustees, and they have no beneficial interest, they must be intended to act in a fiduciary fashion in giving or withholding their consent. That cannot mean, however, that where the settlor is not a beneficiary of the settlement the trustees are to act in the interest of the beneficiaries exclusively, and are therefore unable to consent to any revocation of the trusts, as that would nullify the power. The discretion is similar to that under a discretionary trust, the settlor being in a sense an object of the power of consent. We consider that in such a case the trustees must weigh the interests of the beneficiaries against those of the settlor as best they can.²⁸⁰

30-094 A power of revocation of an appointment or other dispositive exercise vested in trustees will be fiduciary, in that they have to advert to it from time to time and must weigh up the interests of those entitled under the existing trusts with those eligible under a new appointment or those entitled in default of appointment. A power of revocation vested in a third party may be fiduciary if the dispositive power was fiduciary. Otherwise, it will not be; and since the doctrine of fraud on a power does not apply to powers of revocation it is open to the donee to stipulate for some benefit to himself as a condition of exercising it²⁸¹ (though not as a condition of making a new appointment).

Intention to exercise

30-095 In common with other powers, a power of revocation is not exercised unless an intention to exercise it is apparent.²⁸² A power of revocation is not a power of

²⁷⁸ *Re Watson's Settlement Trusts* [1959] 1 W.L.R. 732 at 737. For the ordinary rule, see §§ 29-06 *et seq.*

²⁷⁹ *Tassaruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co. (Cayman) Ltd* [2011] UKPC 17; (2011-12) 14 I.T.E.L.R. 102 at [59]-[62], on appeal from (2010-11) 13 I.T.E.L.R. 1, Cayman CA.

²⁸⁰ *Cf. Re Parry* [1904] 1 K.B. 129.

²⁸¹ See § 29-310.

²⁸² *Pomfret v Perring* (1854) 5 De G.M. & G. 775, CA in Ch; *Re Hall* (1903) 19 T.L.R. 420; *Re Wells' Trusts* (1889) 42 Ch.D. 646. For the general principle, see §§ 29-193 *et seq.*

appointment but is a power the exercise of which is a condition precedent to the exercise anew of a power of appointment.²⁸³ Hence an appointment in general terms in exercise of a particular power and of every other available power will not, without more, revoke an earlier exercise;²⁸⁴ and if a will is executed exercising a power of appointment and later a deed is executed revocably exercising it in a different way, the deed is not revoked when the will takes effect.²⁸⁵ But it is not necessary that there should be any express reference to the power of revocation²⁸⁶ and a grant of the specific property subject to the power will be enough.²⁸⁷ A gift in a will of property of a general description will be an exercise of the power only if the testator has no property of his own of that description, so that the gift has to be treated as an exercise of the power to take effect at all.²⁸⁸ A release of the power of appointment will operate as a revocation, at any rate if the release is expressed to free the property subject to the power from the power altogether.²⁸⁹

Since a power of revocation is not a power of appointment, it falls outside the provisions of section 27 of the Wills Act 1837, by which a testamentary gift of realty or personalty in general terms carries all property over which the testator had a general power of appointment.²⁹⁰

Consequences of revocation

In general, the beneficial interests created by a settlement or an appointment which is revoked are wholly extinguished. But certain entitlements will not be displaced.

Income

Income can only be distributed or accumulated. In the absence of a duty to accumulate, and in the absence of a power to accumulate which is actually exercised, the life tenant under a revocable life interest is entitled to be paid the income of the trust property until the interest is revoked; it becomes his absolutely and he continues entitled even to such income as happens to remain in the trustees' hands at the time of revocation.²⁹¹ Accumulations of income, however, to which a beneficiary is contingently entitled on reaching a certain age²⁹² will not go to the beneficiary if his interest is revoked before it vests.²⁹³

²⁸³ *Re Thursby's Settlement* [1910] 2 Ch. 181 at 186, CA.

²⁸⁴ *Pomfret v Perring*, above; *Re Thursby's Settlement*, above.

²⁸⁵ *Re Butler's Settlement Trusts* [1942] Ch. 403.

²⁸⁶ *Re Thursby's Settlement*, above; *Re Chatterton's Settlement* [1946] Ch. 284.

²⁸⁷ *Cowlishaw v Hardy* (1857) 25 Beav. 169; *Re Thursby's Settlement*, above; *Sugden on Powers* (8th edn), p.290.

²⁸⁸ *Pomfret v Perring*, above.

²⁸⁹ *Re Chatterton's Settlement*, above.

²⁹⁰ See §§ 29-200 *et seq.*, especially § 29-201.

²⁹¹ *Lord Inglewood v I.R.C.* [1983] 1 W.L.R. 366 at 375, CA; *Swales v I.R.C.* [1984] 3 All E.R. 16 at 21; *Re Delamere's Settlement* [1984] 1 W.L.R. 813 at 820, CA.

²⁹² Under Trustee Act 1925, s.31(2)(i) or otherwise. For s.31, see Chap.31.

²⁹³ *Re Mallinson's Consolidated Trusts* [1974] 1 W.L.R. 1120.

Capital

30-099 A revocable settlement or a revocable appointment may create a power to apply capital, whether expressly or by adopting the power of advancement conferred by section 32 of the Trustee Act; section 32 is expressed to apply even though the interest of the person to be advanced is revocable.²⁹⁴ If the power is exercised, the trustees may part with the capital notwithstanding that the settlement or appointment is revocable.²⁹⁵ Hence if the power is exercised so as to give an absolute interest in capital to a beneficiary of full age and capacity, the capital is payable to the beneficiary and is not liable to be refunded if his interest is subsequently revoked; effecting the advancement or benefit will often require the capital to be actually paid out. Similarly, therefore, a revocation of the settlement or the appointment will not disturb the previous exercise of the power to apply capital even though the capital remains in the trustees' hands, as it may do where the beneficiary is not of full age and capacity²⁹⁶ or where the power is exercised so as to re-settle the capital.

30-100 If, however, a revocable interest is created contingent, say, on a beneficiary's reaching a certain age, it may be revocable as a matter of construction not only before the contingency is fulfilled but also afterwards; and that is so even if, but for the power of revocation, the beneficiary is absolutely entitled.²⁹⁷ In such a case, the trustees pay the income to the beneficiary until his interest is revoked but cannot pay over the capital unless they have some other power to do so or the power of revocation is released.

Revocation and new appointment

30-101 Where under a power an appointment authorised by the power is made reserving merely a power of revocation, and subsequently an instrument of revocation is executed, the original trusts are revived and the power of appointment can be exercised afresh, either at the same time or later.²⁹⁸ The same applies where an appointment is made reserving both a power of revocation and new appointment: the new appointment operates as an exercise of the original power,²⁹⁹ which is not extinguished by the reservation of the power of new appointment. The significance of the point is that if, say, the original power is exercisable by deed or will but the reserved power of new appointment is expressed only to be exercisable by deed, a new appointment made by will is nonetheless valid.³⁰⁰

Whether power of revocation implies power of amendment

30-102 We consider that in general a power of revocation of a settlement implies a comprehensive power of amendment, where the power is vested in the settlor.

²⁹⁴ See Trustee Act 1925, s.32(1).

²⁹⁵ *Re C.W.H.T.* [1978] Ch. 67.

²⁹⁶ Though the capital may nonetheless be applied for his benefit and so paid out.

²⁹⁷ *Le Marchant v Denby* [2007] EWHC 65 (Ch); [2007] All E.R. (D) 291 (Jan). See also *O'Donohue v Comptroller of Stamps* [1969] V.R. 431.

²⁹⁸ *Evans v Saunders* (1855) De G.M. & G. 654 at 665, CA in Ch. (affd (1861) 8 H.L.C. 721).

²⁹⁹ *Wilson v Kenrick* (1885) 31 Ch.D. 658 at 662.

³⁰⁰ *Evans v Saunders*, above; see especially the speech of Lord St Leonards, (1861) 8 H.L.C. at 734-744.

since it would be open to him to revoke the settlement and re-settle the assets; and what can be done in two steps can be done in one. But if the power of revocation is confined in some way, it may not be capable of being used to effect an amendment.³⁰¹

Extinguishment of power of revocation

A settlor may plainly release a power of revocation of the settlement which he has reserved to himself,³⁰² so that it becomes irrevocable. A third party who has exercised a dispositive power may equally plainly release a power of revocation which he reserved when exercising it. Even trustees may release a power of revocation,³⁰³ though in general powers which they hold in virtue of their office cannot be released,³⁰⁴ presumably because it would be futile to insist on the circuity of requiring them to revoke the previous exercise and then exercise the original power anew irrevocably.³⁰⁵

30-103

³⁰¹ *Re Dion Investments Pty Ltd* [2013] NSWSC 1941; (2013-14) 16 I.T.E.L.R. 627, where the power of revocation was exercisable by a beneficiary and seems to have been construed as exercisable only for the purpose of declaring fresh trusts from which the beneficiary would be excluded.

³⁰² As in *Re Trafford's Settlement* [1985] Ch. 32.

³⁰³ As in *Lord Inglewood v I.R.C.* [1983] 1 W.L.R. 366, CA.

³⁰⁴ See § 29-320.

³⁰⁵ For that possibility, see *O'Donohue v Comptroller of Stamps*, above.