Gilbert Kodilinye
Trevor Carmichael

Commonwealth Caribbean Law of Trusts

Third Edition

ROUTLEDGE

COMMONWEALTH CARIBBEAN LAW OF TRUSTS

Third Edition

The law of trusts is a subject of considerable importance in the Commonwealth Caribbean. Traditional areas, such as testamentary trusts, resulting and constructive trusts, and charitable trusts, are now fully incorporated into the mainstream substantive law of the region, while the principles associated with offshore trust regimes are constantly expanding and developing.

This third edition of *Commonwealth Caribbean Law of Trusts* has been updated to reflect new case law and legislation, and to highlight recent trends relating to both traditional and offshore trusts. The book provides a core text for students of trusts law in the Commonwealth Caribbean, comprehensively covering general legal principles and analysing key Caribbean and English cases. This established text will also serve as a useful reference source for practitioners of trusts law.

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COMMONWEALTH CARIBBEAN LAW OF TRUSTS

Third Edition

Gilbert Kodilinye and Trevor Carmichael

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FOREWORD[1]

The publication of the third edition of *Commonwealth Caribbean Law of Trusts* serves as an important and gratifying step in the ongoing development of Commonwealth Caribbean legal education and research. When the Faculty of Law and the Council of Legal Education were established in 1970 and 1971 respectively, it was expected that they would provide the stimulus for furthering the high standard set for the region by the Federal Supreme Court, whose all too short life ended when the Federation of the West Indies collapsed.

While these institutions have delivered on their early promise, there is no room for complacency. The establishment of the Caribbean Court of Justice signals our growing maturity as a region prepared to take ultimate responsibility for the administration of justice within CARICOM. At the same time, it places on our teaching institutions the obligation to produce a pool of the brightest and best minds to service the region's needs. How and what students of the Law are taught and how they are mentored, both in the classroom and in their formative years at the Bar, becomes even more important. For the probity of Caribbean jurisdictions in the modern era depends not only on sound Government policy and regulation, but also on the setting and maintenance of the highest standards of professionalism, integrity and scholarship for legal practitioners in all spheres. The existence of first class libraries at the Law Faculty and Law Schools facilitates the search for relevant authorities from legal systems throughout the Commonwealth and beyond. It also meets the increasing demand for specialisation, which is necessary to cope with the complexities of modern international relations in a variety of fields, including trade and commerce; economics and finance; politics and diplomacy; globalisation and multinational corporations; the environment and natural resources; and aid and development. Equally as important, available library resources enable the search for legislative solutions to all these problems to be focused on best practice wherever it is to be found.

It is in this context that *Commonwealth Caribbean Law of Trusts* is such an impressive and important piece of work. Its strength lies in the combination of academic and practical expertise and experience of its authors, Professor Gilbert Kodilinye and Dr. Trevor Carmichael, the range of topics it covers and the wealth of source material it draws upon. Of particular interest in this new edition is the material dealing with the evolving beneficiary principle as well as the role now played by the Foundation as an entity in the law of Trusts.

Commonwealth Caribbean Law of Trusts is essential reading for academic and practising lawyers, accountants and officers of government department and agencies, banks and financial institutions. The authors are to be warmly congratulated once more on the scope of their work, the clarity of their exposition and the depth of their insight.

Sir Roy Marshall

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January 2012

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1 Sir Roy Marshall, KT, C.B.E. is Barrister-at-Law at Inner Temple Chambers. He is the author of *Theobald on Wills* and *Nathan & Marshall on Trusts*.

PREFACE

The law of trusts is an area of growing importance in the Commonwealth Caribbean. Several islands in the region have developed, or are in the process of developing, facilities for offshore financial services and trust management, which has led to a great increase in the number of trusts established in those jurisdictions. In addition, economic development throughout the Caribbean has brought into focus such diverse aspects of trusts law as the nature of beneficial interests in the matrimonial or family home, *donationes mortis causa*, charitable trusts, pension scheme trusts and the fiduciary duties of trustees.

Many Caribbean jurisdictions have also implemented specialist 'offshore' trust legislation which seeks to make the trust a more attractive instrument for persons outside the jurisdictions. While this new development is complex and dynamic, we have sought to consider it in this edition in a multi-layered sense, so that the reader may be able to appreciate an integrated perspective on the subject.

The aim of this book is to provide a basic text for students of trusts law in the Commonwealth Caribbean by means of an account of general principles accompanied by analysis of selected Caribbean and English cases, both reported and unreported, which best illustrate the application of trust principles, and which deal with the kinds of issues that are most likely to be encountered in the Caribbean. It is hoped that practitioners will also find the book useful as a work of ready reference, particularly with respect to the unreported judgments which might otherwise be unavailable or inaccessible.

We are extremely grateful to persons who have assisted with the previous editions, and particularly to Vanessa Kodilinye, whose legal and editorial skills were again of great value in research. Andrea Mullin Henry and Giles Carmichael assisted us with some of the new developments relating to the 'offshore' trust environment. Colleagues at Chancery Chambers in Barbados were as always encouraging.

We would also like to thank the editorial staff at Routledge for delivering a most attractive finished product, and to again extend special gratitude to Sir Roy Marshall for his very insightful and generous foreword.

Gilbert Kodilinye
Trevor Carmichael

January 2012

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CHAPTER 1

DEVELOPMENT AND NATURE OF TRUSTS

THE USE

The law of trusts was developed by the Court of Chancery in England from medieval times. The medieval forerunner of the trust was the 'use', which arose whenever land was conveyed to A on A's undertaking to hold it to the use and benefit of B. Instances where land might be conveyed to A to the use of B were:

(a) where B, the beneficial owner of land, was about to go abroad on a crusade, it would be necessary for the land to be held by another person on his behalf, who would perform and receive feudal services;

(b) where B was a community of Franciscan friars who were prohibited by their vows of poverty from holding property; and

(c) where B was afraid of forfeiting his land on account of conviction for a felony, or of losing it to his creditors.

Whatever the purpose for which a use was created, the common law did not recognise any rights in B at all, but regarded A, the holder of the legal title, as alone beneficially entitled. Therefore, if A brought an action at law, his legal title and with it his right to possession would be upheld. The Court of Chancery, on the other hand, regarded it as unconscionable that B should be excluded and, although it would not deny A's legal title, it would act *in personam* against A by issuing a 'common injunction' restraining A from enforcing or exercising his legal right. Failure to obey such an injunction would be punishable by imprisonment for contempt of court. By this method, the Court of Chancery would ensure that the rights of B, the equitable owner (or *cestui que use*) would prevail over those of A, the legal owner (or *feoffee to uses*).

Employment of the use in medieval times made it possible to avoid some of the burdensome feudal incidents to which the holder of the legal estate was subjected. For instance, under feudal law the lord was entitled to a substantial payment (called 'relief') when an heir succeeded to feudal land; and if there was no heir, he was entitled to recover the land absolutely (called 'escheat'). Such consequences could be avoided if the land were vested in a number of feoffees to uses, for they were unlikely to die together or without heirs, and those who died could be replaced. Again, where land was held by a minor tenant, the lord had the right to choose his marriage partner (the incident of 'marriage'); and if the tenant refused the person chosen, he was liable to pay a fine to the lord. Where land was vested in a number of adult feoffees to uses, the lord would be denied these rights. Lastly, it was possible to avoid the common law rule that freehold land could not be devised by will, by vesting the land in feoffees and declaring the uses upon which the land was to be held after the testator's death. By this method, effective dispositions of equitable interests in land could be made on death.

The Statute of Uses 1535

The system of uses was clearly beneficial to tenants who had no tenants of their own, but it was obviously disadvantageous to the lords, and most of all to the person at the top of the feudal pyramid—the king. Henry VIII found that the royal revenues were being lost on a large scale, so he attempted to destroy the system by the Statute of Uses 1535. This Act provided, in effect, that where land was held by A 'to the use of B', A was to drop out of the picture and B was to have the

legal estate. The use was said to be 'executed'. The statute succeeded in abolishing most uses, but there were cases to which the statute did not apply, for instance, where the feoffees to uses had active duties to perform. Thus, for example, if the feoffees had a duty to sell land held upon use or to collect the rents and profits, the statute would not apply and the use would take effect as before.

It was not long before a way of circumventing the Statute of Uses was found. This involved the clumsy but ingenious device of the 'use upon a use'. For example, where land was given 'to A and his heirs, to the use of B and his heirs, to the use of C and his heirs', it had been decided before 1535 that in such a disposition C took nothing; A had the legal fee simple, B the equitable fee simple, but the limitation to C was repugnant to B's interest and therefore void. After 1535, the second use would still be held void, but the first use would be 'executed' so as to give B the legal fee simple and leave A, like C, with nothing at all. Eventually, by about the middle of the 17th century, and by a series of developments that are shrouded in mystery, the Chancellor began to enforce the second use, which came to be called a 'trust'. In order to create such a trust, the accepted form of words was: '. . . unto and to the use of B and his heirs in trust for C and his heirs.' B took the legal fee simple at common law, but the use in his favour prevented the second use from being executed, leaving it to be enforced in equity as a trust. The result was to restore dual ownership: B was the legal owner and C the equitable owner. The legislature did not attempt to prevent this evasion of the Statute of Uses since, by the end of the 17th century, the importance of feudal revenues had greatly diminished and there was little point in the Crown's seeking to prevent the development of trusts.

Reception in the Caribbean

The law of trusts has been received into Commonwealth Caribbean jurisdictions as part of the law of England. The method of reception has varied from one territory to another, principally according to whether the particular territory was subject to settlement or to conquest or cession.[1] In the case of settled colonies,[2] the British subjects who settled there were deemed to have taken English law with them and there was no need for statutory provisions expressly receiving common law or equity into those territories. In the case of conquered or ceded colonies,[3] on the other hand, the law in force at the time of cession or conquest remained in force until altered by or under the authority of the sovereign. In the latter class of territory, English law would not generally apply without statutory reception provisions.[4] The modern position is that the superior courts in Commonwealth Caribbean jurisdictions are empowered by statute to apply principles of common law and equity (including the law of trusts) concurrently.[5]

DEFINITION OF TRUSTS

A trust may be defined as: '. . . An equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the

1 See Roberts-Wray, *Commonwealth and Colonial Law*, 1966, pp 539–43; Patchett, 'Reception of Laws in the West Indies' (1972) JLJ 17 and 55; Wylie, *Land Law of Trinidad and Tobago*, 1981, p 5.
2 Eg, Antigua, Barbados.
3 Eg, Dominica, Jamaica, Trinidad and Tobago.
4 Roberts-Wray, above, pp 540, 541.
5 See, eg, Supreme Court of Judicature Act, Cap 117, s 31 (Barbados); Supreme Court of Judicature Act, Ch 4:01, s 12 (Trinidad and Tobago); Supreme Court Act, Ch 53, s 15 (The Bahamas); Judicature (Supreme Court) Act, s 48 (Jamaica).

benefit of persons (who are called beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of which may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.'[6]

NATURE OF TRUSTS

The main characteristic of a trust is that the trust property is vested in the trustees not for their own benefit, but for the benefit of the beneficiaries. Instead of giving the property directly to the beneficiaries, the donor's purpose may be more effectively carried out by appointing trustees, who will not only safeguard the property and apply it in the manner directed by the trust instrument, but will also make it productive, for example, in the case of land by letting it, or, in the case of money by investing it in shares or securities. Thus, in most cases, trustees are not merely passive custodians of the trust property but active business-people, responsible for ensuring that the property bears as much fruit as possible for the beneficiaries.

One question that may arise is whether the trustees or the beneficiaries are to be treated as the 'real' owners of the trust property. The answer will depend upon the circumstances. In *Schalit v Joseph Nudler Ltd*,[7] for instance, it was held that where premises forming part of the trust estate are let to a tenant, only the trustees, as legal owners, are entitled to levy distress against the tenant for arrears of rent; the beneficiaries, being merely equitable owners, cannot do so. The beneficiaries' only remedy is to compel the trustees to render an account of profits received. On the other hand, it is clear from *Baker v Archer-Shee*[8] that it is the beneficiaries, not the trustees, who are primarily liable for the payment of income tax from trust investments. As Ross JA explained in the Jamaican Court of Appeal in *Commissioner of Income Tax v Bank of Nova Scotia Trust Co Ltd*:[9]

> Although the legal estate in the trust property is vested in the trustees, it must be remembered that the beneficial ownership is in the beneficiaries, and so the trustees act as a conduit pipe to convey the trust income to the beneficiaries.

One of the great advantages of the trust is its flexibility. The trust can be used for a wide variety of purposes, such as:

(a) to control the destination of family property on death; for example, where a testator bequeaths property upon trust for his widow for life, and thereafter for his children in equal shares;
(b) to protect family property from spendthrifts, by the establishment of a 'protective trust';
(c) to enable two or more persons to own land. In some jurisdictions, where there is beneficial co-ownership of land, a statutory trust for sale arises;
(d) to facilitate investment through unit trusts;
(e) to benefit charitable institutions, such as schools, universities, hospitals and churches;
(f) to make provision for a non-charitable purpose, such as the upkeep of the testator's tomb or his animals;

6 Underbill, *Law of Trusts and Trustees*, 14th edn, 1987, p 3.
7 [1933] 2 KB 79.
8 [1927] AC 844.
9 (1985) Court of Appeal, Jamaica, Civil Appeal No 12 of 1982 (unreported).

(g) to provide pensions for retired employees and their dependants. Under such pension schemes, the funds will be vested in trustees and administered by a board of management;
(h) to enable property to be held for minors, who may not be capable of holding a legal estate;
(i) to establish beneficial interests in matrimonial and family property; and
(j) to avoid or minimise taxation.

TRUSTS DISTINGUISHED FROM OTHER LEGAL RELATIONSHIPS

The characteristics of trusts are perhaps best understood by comparing them with other legal relationships, such as bailment, agency, contract, debt, powers and administration of estates.

Trusts distinguished from bailment

Bailment arises where a chattel owned by X is, with X's consent, placed in the temporary possession of Y. It is similar to a trust in that Y is required to take good care of X's property, but it is dissimilar in the following respects:

(a) bailments are recognised at common law, whereas trusts are equitable only;
(b) the duties of a bailee are quite different from those of a trustee;
(c) only chattels can be bailed, whereas any property may be held upon trust; and
(d) a trustee is the legal owner of the trust property and the 'general property' is in him, whereas a bailee has only a 'special property' in the chattel bailed, the general property remaining in the bailor. Thus, a trustee who sells trust property in breach of trust can confer a good title (free from the interests of the beneficiaries) on a *bona fide* purchaser for value without notice of the trust, whereas a bailee who makes such an unauthorised sale cannot pass a good title as against the bailor.

Trusts distinguished from agency

The main feature which trusts and agency have in common is that both give rise to fiduciary duties on the part of the trustee and the agent respectively. Thus, for instance, neither a trustee nor an agent may put himself into a position where his personal interests might conflict with his duty; for example, by purchasing property belonging to the trust or the principal. Another aspect of the fiduciary relationship is that both trustees and agents are accountable for any profits made by them out of the trust or principal's property, respectively, in the course of carrying out their duties.

However, there are significant differences between the two concepts, in that:

(a) agency is a common law concept, whereas trusts are equitable;
(b) there is no contractual relationship between trustee and beneficiary, whereas there is invariably such a relationship between principal and agent;
(c) a trustee cannot involve his beneficiary in legal liability, whereas the chief function of an agent is to create contractual liabilities between his principal and third parties; and
(d) the agency relationship is personal, whilst the trust relationship is proprietary. For many years, *Lister and Co v Stubbs*[10] was the leading case on this distinction.

10 (1890) 45 Ch D 1.

In *Lister and Co v Stubbs*, the plaintiffs employed the defendant as an agent to purchase goods for them. The defendant, on behalf of the plaintiffs, purchased goods from a third party supplier from whom he received a secret commission of £5,541. The defendant used this sum to purchase property and investments for himself. It was held that the relationship between the defendant and the plaintiffs was not a proprietary one of trustee and beneficiary with respect to the money but merely a personal one of debtor and creditor, so that the plaintiffs had no greater claim to the property in the hands of the defendant than the defendant's other creditors. However, in the more recent case of *Attorney General of Hong Kong v Reid*,[11] the Privy Council took the opposite view and, in effect, overruled the *Lister v Stubbs* principle. In *Reid*, the Attorney General brought an action for an account in respect of bribes received by R, a former Acting Director of Public Prosecutions, paid to him as inducements to exploit his official position by obstructing the prosecution of certain prisoners. R used the bribe money to purchase land in New Zealand. The Privy Council held that since R was in a fiduciary position, the bribe and the property purchased with it were held by him on a constructive trust for the government; and as the land purchased with the bribe money had decreased in value since the date of the purchase, R was liable to account for the difference between the amount of the bribe and the current value of the property.

Lord Templeman, delivering the judgment of the Privy Council, said:[12]

> The decision in *Lister and Co v Stubbs* is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it, and that equity regards as done that which ought to be done. From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured. A fiduciary remains personally liable for the amount of the bribe if, in the event, the value of the property then recovered by the injured person proves to be less than that amount.

The principle in *Reid* was applied in the Cayman case of *Corporacion Nacional del Cobre de Chile v Interglobal Inc.*[13] Here, the claimant company had employed D as its agent and head of its futures trading department. According to his contract of employment, D was obliged not to act so as to place himself in a position where his personal interests might conflict with those of the company, and not to receive any secret commission or bribes or make any secret profit in his dealings with third parties on behalf of the company. Contrary to these express stipulations, D received secret payments from a third party as an inducement for D to procure the company to enter into certain contracts with commodity brokers, on terms apparently unfavourable to the company. Smellie CJ held that D was liable as a constructive trustee for the amount of the secret commission. He said:

> Where a fiduciary accepts bribes and other illicit payments as an incentive for his breach of duty, he not only becomes a debtor for the amount of the bribes to the person to whom the duty was owed, but he also holds the bribes and any property acquired therewith on constructive trust for the person. This is clear from the Privy Council decision in *Attorney General of Hong Kong v Reid*[14] . . . [The statements of principle in the *Reid* case] are an inevitable outcome of the development of the modern law on fiduciary relationships . . . The strictness of the principles is the result of the importance which equity attaches to the fiduciary duties and the extent to which equity will operate to prevent a fiduciary from benefiting from his fraud, or even from an abuse of his fiduciary position, by which he acts in conflict with the duties owed to his principal.

11 [1994] AC 324.
12 *Ibid* at 336.
13 [2002] CILR 298 (Grand Court, Cayman Islands).
14 [1994] AC 324.

Trusts distinguished from contract

A contract differs from a trust in the following respects:

(a) a contract is a common law obligation, whereas a trust is equitable;

(b) a contract arises from agreement or *consensus ad idem* between the parties. A trust may arise by agreement – for example, where a settlor covenants with trustees to settle property in the future, or where a company establishes a pension scheme for the benefit of its employees – but most often it will not, for instance where a testator creates a trust by his will or where a donor declares himself a trustee of his property for the benefit of volunteer beneficiaries;

(c) the right to enforce a contract is a right *in personam* since, as a general rule, action can be brought only against the other contracting party or parties. The right to enforce a trust, on the other hand, is almost, though not quite, a right *in rem* since, in the event of a breach of trust, the trust property can be recovered by means of the tracing remedy[15] not only from the trustee but also from any other person to whom he has transferred the property, except a *bona fide* purchaser for value without notice of the trust; and

(d) 'Valuable consideration' in the law of trusts has a wider meaning than in contract, for it includes not only money or money's worth but also the consideration notionally given in a marriage settlement by the spouses and issue of the marriage.[16]

Third parties

At common law, the doctrine of privity of contract applies. Accordingly, if a contract between A and B is intended to confer a benefit on C, C cannot sue to enforce that benefit, as he is not a party to the contract. But in two instances equity implies a trust in favour of C, thus enabling C to sue as beneficiary to enforce the contract. These are:

(a) Under the Married Women's Property legislation (see, for example, Married Women's Property Act (MWPA), The Bahamas, Ch 115, s 7; Married Persons Act, Barbados, Cap 219, s 25; Married Persons (Property) Act, Guyana, Cap 45:04, s 11; and Married Persons Act, Trinidad and Tobago, Ch 45:50, s 11) a life assurance policy effected by a man on his own life, and expressed to be for the benefit of his wife and children or any of them (similarly where the wife takes out such a policy in favour of her husband and children) creates a trust in favour of the objects named. When the assured dies and the policy moneys become payable, the moneys will not form part of the deceased's estate, so they are not liable for his debts. Trustees can be specifically named in the policy or can be named by separate writing: if none are named, the personal representatives of the assured will be trustees of the policy moneys.

(b) *Trust of the benefit of a contract.* A party to a contract may enter into it as trustee of the benefit of it for a third party, or he may subsequently declare himself a trustee of such benefit, in which case the third party may, as beneficiary under the trust, enforce the contract although not a party to it. In such a case, the 'trustee' can take proceedings as a contracting party to enforce the agreement for the benefit of the third party and, if he refuses to do so, the third party may himself sue, joining the trustee as co-defendant in the proceedings.

15 See Chapter 14.
16 See below, p 50.

However, the concept of the trust of the benefit of a contract has proved to be an elusive one, and it has been suggested that the way in which a court will decide a novel case is almost entirely unpredictable.[17] In recent times the courts have shown a marked reluctance to find a trust of the benefit of a contract. In *Swain v The Law Society*,[18] for instance, the respondents had arranged a master insurance policy for all practising solicitors under statutory powers. It had been agreed that a proportion of the commission earned by the insurance brokers would be paid to the Law Society for the benefit of the profession as a whole. Two solicitors who were dissatisfied with the way the scheme was being operated sought to make the Law Society accountable for the commission received, on the ground that the Law Society was a trustee of the benefit of the master policy contract for the benefit of all the solicitors. The argument was based on the fact that the contract stated that the policy had been entered into 'on behalf of' solicitors and former solicitors, which, it was contended, showed an intention to create a trust of the benefit of the contract. The House of Lords rejected this argument, holding that the wording in the contract did not create a trust either expressly or impliedly. In Lord Brightman's words:[19]

> It would indeed be surprising if a society of lawyers, who above all might be expected to make their intention clear in a document they compose, should have failed to express the existence of a trust, if that was what they intended to create.

In the Barbadian case of *Rochester v Arthur*,[20] the question arose as to whether a third party could obtain the benefit of a life assurance policy in which she had been named as beneficiary. Here, ES (deceased) was, at the time of his death, the holder of three life assurance policies which he had taken out with Manufacturers' Life (the first policy) and American Life (ALICO) (the second and third policies), GS being named as beneficiary in all three policies.

A clause (termed the 'beneficiary designation clause') in the Manufacturers' Life policy stated: 'Wherever a beneficiary is designated either in this policy or by a declaration in writing by the owner, such beneficiary will be deemed to be beneficially entitled to the proceeds of the policy, if and when the policy becomes payable . . .'

In the ALICO policies it was provided that: 'The proceeds are to be divided equally among all persons who are named as primary beneficiary and who survive the assured . . .'

It was conceded that the Manufacturers' Life policy, by its wording, created a trust in favour of the named beneficiary, but a dispute arose as to whether the clause in the ALICO policies created a trust in favour of the named beneficiary, or whether it was merely an ineffective attempt to confer a benefit on a third party.

Chase J applied the principle of law that a trust of a life assurance policy outside the Married Women's Property legislation was not to be inferred from a general intention to benefit a third party, but only on language clearly revealing an intention on the part of the life assured to declare himself a trustee of the benefits of the policy for the named beneficiary. The beneficiary clauses in the ALICO policies did not reveal any such intention. He said:

> The submissions in connection with the absence of a similarly worded beneficiary designation clause in the ALICO policy document argued that, since the policies issued by ALICO did not come within the scope of the Married Women's Property Act, a trust was not created in favour of the named beneficiary. Counsel further contended that a trust of a policy is not to be inferred from a general intention to benefit a third party but only on language clearly revealing an intention to create a trust.

17 See Cheshire, Fifoot and Furmston, *Law of Contract*, 13th edn, 1996, pp 467–69.
18 [1982] 3 WLR 261.
19 *Ibid* at 276.
20 (1989) High Court, Barbados, No 1,279 of 1987 (unreported).

This submission, in my view, raises the fundamental question [of] whether the wording of the section designated 'beneficiary' in the [ALICO] policy document is such as would lead a court of equity to the irresistible conclusion that, by naming his mother 'beneficiary', Elroy Scantlebury evinced an intention to declare himself unequivocally 'as trustee' of the benefits of the policies for his mother.

In considering this question it is to be borne in mind that 'men often mean to give things to their kinsfolk; they do not often mean to constitute themselves trustees'. Indeed, in his work on *Life Insurance Law in the Commonwealth Caribbean* (1984) at p 116, Denbow, while dealing with the rights and status of beneficiaries under a contract of life insurance that does not come within the provisions of the Married Women's Property Act, states:

'The position of the named beneficiary at common law under a life policy is governed by the well established rule of English Law that a third party, not being a party to a contract made in his favour, cannot enforce it . . .

The inability of the named beneficiary at common law to sue on the policy has never really been recognised in the countries of the Commonwealth Caribbean, notwithstanding the fact that the English common law applied in these countries. This fact is attested to by the existence of a considerable number of policies in which an individual, not being the spouse or child of the assured, is named as the beneficiary with the intention and expectation that such person shall be entitled to receive the policy proceeds on the death of the assured. This situation has come about because of the strong influence of Canadian life companies, and to a lesser extent American law, on the Caribbean life insurance market. In both of those countries the right of a named beneficiary to sue for and receive the policy proceeds is well established. In Canada, while at common law English law applied and the named beneficiary had no right of action against the insurer for the recovery of the policy proceeds, he has been given a statutory right to sue for the insurance money in his own name. Whereas in America the courts have for over a century recognised the right of a named beneficiary to sue in his own name to enforce a life policy. In the Commonwealth Caribbean, apart from s 139 of the Insurance Act 1980 of Trinidad and Tobago, there is no equivalent of the Canadian statutory provision, and therefore the position of the named beneficiary is governed by the English common law.'

Not only does the foregoing passage clearly reflect the settled principle of law that a stranger to a contract cannot sue upon the contract even though it was made for that person's benefit, it also reveals the background to, and the effect of, the named beneficiary appearing in the clauses of life insurance policies issued by North American companies.

Thus in the absence of an appropriately worded statutory provision in the legislation of states of the Commonwealth Caribbean, it would appear that a named beneficiary, as in the instant case, must establish that the language adopted by the policy document in relation to its beneficiary designation clause is so structured as to lead a court of equity on a true construction of that language to the conclusion that a trust was created. That is, certainty to create a trust must be found in the language employed in naming the beneficiary.

Rees J in the course of his judgment in *Rajkumar v First Federation Life Insurance Co Ltd*[21] observed that 'it must be borne in mind that equity leans against implying a trust for the benefit of a person not a party to the contract unless there is a clear intention to create one'.

. . . Turning my attention now to the effect of the wording of the section designated 'beneficiary' in the [ALICO] policy document, can it be truly said that, by naming his mother 'beneficiary' in each of the clauses of the policies as presently worded, Elroy Scantlebury evinced an intention by that act alone to declare himself trustee of the benefits of the policies for his mother?

In seeking to answer this question, it must also be borne in mind that the three policies effected on the life of the deceased Elroy Scantlebury were taken out by him as a single man at the ages of 21, 22, and 26.

21 (1970) 16 WIR 447 at 451.

> I find myself unable to come to the conclusion that Elroy Scantlebury at this tender age intended during his lifetime to deprive himself completely of the benefits of the policies, or to constitute himself a trustee of them for the benefit of his 62–66 year old mother.
>
> Accordingly, I take the view that the naming of his mother as beneficiary in the clauses as they are presently designed in the two policies issued by ALICO cannot be construed as an intention on the part of the deceased Elroy Scantlebury to constitute himself a trustee for his mother.

In Barbados, the legislature has introduced welcome statutory reform in ss 114–21 of the Insurance Act 1996, the effect of which is that it is no longer necessary to construe the language of the particular policy in order to find an intention on the part of the life assured to declare himself a trustee of the benefits for the named beneficiary. By s 114(2), the policyholder may designate a named person to be the beneficiary under his policy; by s 120, such beneficiary is given the right to enforce payment of the insurance moneys, notwithstanding the lack of privity of contract between himself and the insurance company; and by s 121(1), any money payable under the policy does not form part of the insured's estate and is not subject to the claims of his creditors.

Similar provisions have been enacted in Jamaica in the Insurance (Amendment) Act 1995, which provides, in s 2, that an insured person may designate a named beneficiary to receive the proceeds of a policy, and moneys payable under the policy shall not form part of the insured's estate nor be subject to creditors' claims.[22] It remains to be seen whether other Commonwealth Caribbean jurisdictions will introduce much needed statutory reform on these lines.

Trusts distinguished from debt

The trustee/beneficiary relationship must be distinguished from that of debtor/creditor in that the obligation of a debtor towards his creditor is personal, not proprietary. Thus a creditor has no right to trace against his debtor.

In particular, where a customer deposits money in a bank, the bank is not a trustee of the money but a debtor. In *Reid v Grant*,[23] Watkins JA (Ag) in the Jamaican Court of Appeal emphasised that 'it is now settled beyond controversy that at common law the relationship between a depositor and his banker is that of creditor and debtor, and that pursuant to this contractual relationship the depositor holds the legal title to the debt or chose in action'. As a creditor, the customer has merely personal and not proprietary rights against the bank. Thus, if the bank goes into liquidation, the customer is not entitled to gain precedence over the bank's other creditors by obtaining a charge against money or other property in the possession of the bank. This principle is illustrated by the Cayman case of *Hahn v Bank Intercontinental Ltd*,[24] where, by a deed of settlement, the defendant bank was appointed trustee of a fund for the benefit of the plaintiff and members of his family. The bank placed the fund in an interest-bearing deposit account with itself. The bank became insolvent and its licence was suspended. A new trustee was appointed. The issue to be decided was whether the fund could be paid over to the new trustee. This fell to be determined by the true construction of the deed of settlement. If the deed of settlement empowered the bank to deposit the trust fund with itself, the new trustee could not recover it in preference to other unsecured creditors. If it did not, the new trustee could recover the fund.

It was held that the deed of settlement did confer such a power, and the new trustee was not entitled to recover the fund in preference to the bank's other creditors. Hull J referred to the

22 See also Insurance Act 1980, s 139(1) (Trinidad and Tobago).
23 (1976) 23 WIR 91 at 95.
24 [1987] CILR 407 (Grand Court, Cayman Islands).

judgment of Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd*[25] in which his Lordship had pointed out that beneficiaries are not protected against the consequences of the exercise in good faith of powers conferred by the trust instrument. He continued:

> The beneficiaries do not become entitled to an interest in (ie an equitable charge over) the bank's assets, and it does not matter that the bank has placed the money in a 'trust deposit account'. There is no justification for the intervention of equity. The settlor has allowed the trust money to be treated *as if it were customers' money*, ie belonging absolutely and beneficially to the trustee bank. He has accepted the risk of the bank's insolvency. The trust money has become that bank's property to use in any manner that it thinks fit.

Co-existence of debt and trust

It is possible for a debt and a trust to co-exist, as is illustrated by *Barclays Bank Ltd v Quistclose Investments Ltd*. In this case, Rolls Razor Co, which had a large overdraft at Barclays Bank, borrowed £209,719 from Quistclose to pay dividends declared on its (Rolls Razor's) shares. It was arranged between Rolls Razor and Quistclose that the loan was to be used only for the purpose of paying the dividends. The money was paid into a separate account at Barclays, and Barclays had notice of the arrangement. Before the dividends were paid, Rolls Razor went into liquidation, and the question was whether the money in the separate account belonged to Rolls Razor beneficially, in which case Barclays could set it off against the overdraft, or whether Rolls Razor held the money upon trust for Quistclose.[26]

The House of Lords held that, since Rolls Razor had received the money as trustee to apply it for a purpose which could no longer be achieved, Rolls Razor held the money on a resulting trust for Quistclose. The fact that the money had been advanced by way of loan did not preclude the simultaneous imposition of a trust, and Barclays, having had notice of the trust, could not retain the money as against Quistclose.

The principle in *Quistclose* was applied in Jamaica in *Universal Investment Bank v Lawla*.[27] In this case, the Bank operated a business of accepting funds from clients for investment, the relationship between the Bank and its clients being governed by an 'investment management agreement'. When the Bank subsequently went into liquidation, the question arose as to whether the effect of the agreement was to make the Bank a trustee of the funds handed over for investment. Clarke J held, following *Quistclose*[28] and *Carreras Rothmans v Freeman Matthews Treasure Ltd*,[29] that 'each of the clients . . . who placed money with the Bank simply said to the Bank, "here is my money to be invested according to the investment management agreement" ', and the Bank 'had full knowledge of that particular purpose'. Accordingly, the funds were held by the Bank on trust for the benefit of the clients and were not available for the Bank's general creditors.

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25 [1986] 3 All ER 75 (see below, pp 220–222).

26 In *Daily News Ltd v Inter-Alliance Trading Corporation* (1987) Court of Appeal, Jamaica, Civil Appeal No 32 of 1987 (unreported), where the Ministry of Finance had advanced a large sum of money for the purchase of printing equipment for use by the Daily News Ltd, a wholly-owned Government company, it was held that, on the liquidation of Daily News Ltd, no resulting trust arose in favour of the Ministry under the *Quistclose* principle, as there was nothing in the transaction which imposed an initial trust upon the money advanced. The Ministry was held to be merely an unsecured creditor of the Daily News Ltd.

27 (1997) Supreme Court, Jamaica, No CLU-005 of 1996 (unreported).

28 Above.

29 [1985] 1 All ER 155.

On the other hand, *Re Kayford Ltd*[30] shows:

(a) that it is possible for proprietary rights to be created by a unilateral act on the part of a potential debtor; and

(b) that circumstances which *prima facie* create a debt may in fact create a trust having the effect of excluding the debt.

In this case, a mail-order company received advance payment from customers for goods purchased by them. The company was in financial difficulties and, in order to protect its customers from losing their money in the event of its insolvency, it opened a separate bank account, called 'Customers' Trust Deposit Account', into which it paid the purchase money. When the company subsequently went into liquidation, it was held that the money was held upon trust for the customers and was not available for the company's general creditors. The reasoning in the case was that the company had created a trust by opening the special account before receiving the customers' money, thus converting the relationship from one of debt to one founded on trust.

The principle in *Re Kayford* was applied in *Re Dominion Investments (Nassau) Ltd*,[31] where a customer had entered into an agreement with Dominion whereby the latter was to open and operate a brokerage account on behalf of the customer. Instructions of the customer were to be accepted by fax, email or verbally, and the agreement concluded with the words, 'All credit to the account will be beneficially owned by the customer'. Funds sent by the customer would be deposited to one of Dominion's accounts, and Dominion would maintain on each customer's file a running account called 'Register', recording the transactions executed and the daily balance standing to the order of the customer. Brokerage accounts set up by Dominion would be in Dominion's name but the investments would be held in sub-accounts titled in a code name chosen by the customer.

On the liquidation of Dominion, the issue as to the beneficial ownership of the investments arose. Lyons J noted that Dominion did not appear to operate as a trustee of any formal trust set up by its investors, but that 'a trust is capable of arising without having been specifically declared by an express deed'. Such trusts were implied by law and could be categorised as resulting or constructive. In the present case, there was 'nothing in the records of Dominion to reflect that its customers intended to confer a benefit on it'. It was a question of fact to be determined by the court as to the extent of the relationship between Dominion and its investors, and as to whether a trust had arisen. Considering that in the instant case there were certain parallels with *Re Kayford*, Lyons J found that 'Dominion clearly intended to hold the funds and securities in trust', and there was 'a relationship that differentiated and held separate its assets and the assets of the investor. In so doing, Dominion created a fiduciary relationship between it and its investors from which must inevitably flow a resulting trust.' In the course of his judgment, Lyons J also pointed out that a clear distinction should be drawn between the legal principles applicable to banks that hold customers' money[32] and those applicable to non-bankers. In the present case Dominion was not acting as a banker but rather as an agent for the investor, in its capacity as a security broker or financial services provider.

In some cases, it may be difficult to determine whether a loan or a trust was intended. This difficulty has arisen particularly in the context of informal arrangements relating to the

30 [1975] 1 All ER 604.
31 (2008) Supreme Court, The Bahamas, Commercial Division, No 10 of 2006.
32 See, eg, *Realty Ltd v Euro Bank Corp* [1999] CILR 48, p 481, where Murphy J emphasised that 'for virtually all purposes a depositor is, at law, nothing more than a creditor of a bank. It would take extremely unusual facts to elevate the relationship to one of *cestui que trust* and trustee.'

matrimonial or family home. In *Hussey v Palmer*[33] the plaintiff paid £607 towards an extension to the house of her daughter and son-in-law. The extension was built in order to accommodate the plaintiff, who had been invited to live with the couple. A dispute arose between the parties and the plaintiff left the house. She then claimed to have acquired a beneficial interest in the home by virtue of her contribution. The Lords Justices in the Court of Appeal were unable to agree as to whether the money had been advanced by way of loan or whether it gave rise to a resulting or constructive trust. Cairns LJ held that the transaction was a loan; Lord Denning held that it was not; Phillimore LJ suggested that it 'might be' a loan. The ultimate and majority decision was that the payment gave rise to a constructive trust, as it would be inequitable for the couple to deny that the mother-in-law had an interest in the property; but, to confuse matters, Phillimore LJ (with whom Cairns LJ disagreed on this point) took the view that a resulting trust could arise even if the transaction was one of loan.

In *Re Sharpe*, on the other hand, S purchased a house with the help of a loan from his aunt on the understanding that the aunt could live in the house for the rest of her life. When S became bankrupt, the aunt claimed a beneficial interest in the house. Browne-Wilkinson J, while finding in the aunt's favour on another ground, rejected her argument that the loan gave rise to a resulting trust. He said, '[where] moneys are advanced by loan, there can be no question of the lender being entitled to an interest in the property', *Hussey v Palmer* being regarded as having been decided on its 'very special' facts. In any event, it is doubtful whether the broad scope given to the constructive trust doctrine by Lord Denning in *Hussey* remains good law. It seems, therefore, that in the family home context at least, the existence of a loan arrangement should preclude the finding of a trust.

Trusts distinguished from powers

The basic distinction between a trust and a power is that a trust is imperative, whereas a power is discretionary. The distinction is most often seen in relation to *powers of appointment*. A power of appointment enables the donee of the power (the 'appointor') to 'appoint' the settlor's property in favour of other persons (called 'objects of the power'). Such powers are useful because they make it possible for the donee of the power to take into consideration circumstances existing at the date of the appointment which the settlor could not have foreseen when he executed the settlement. For instance, a husband (H) may wish to leave all his property to his wife (W) for life, and after her death to their children. He may also wish to give the wife power to decide what shares, if any, each child is to receive, taking into account their individual circumstances at the date of the exercise of the power. H may thus, for example, by his will, give W a 'power to appoint amongst our children in such shares as W shall in her absolute discretion think fit'. Such a power will normally be followed by a *gift over in default of appointment*, that is, the testator will name the persons who are to be entitled to receive the property should the power of appointment not be exercised. For example, S may bequeath $50,000 to D 'with power to appoint to such of the nieces and nephews of X as D shall think fit, and, in default of such appointment, to A, B and C in equal shares'.

Since a trust imposes an imperative obligation on trustees, where D holds property *upon trust* to divide amongst a specified class of beneficiaries (for example, the children of X) as he thinks fit, D is under a binding duty to carry out the trust by making the division, and if he fails to do so, the court will divide the property amongst the class. But where D is given a mere *power to appoint* property amongst members of a certain class, he cannot be compelled to exercise the

33 [1972] 3 AH ER 744.

power, and if he fails to exercise the power, the property will pass to those named as entitled in default of appointment or, if none are named, there will be a resulting trust[34] to the settlor.

Power in the nature of a trust

An intermediate category between a power and a trust is the 'power in the nature of a trust' or 'trust power'. Such powers are often found in family trusts where the donee of a power of appointment has died without exercising it, and where there is no gift over in default of appointment. In such a case the court may have to decide, as a matter of construction, whether a 'mere power' or a 'power in the nature of a trust' has been created. If it is a mere power, and the donee has died without exercising it, the property will revert to the settlor and the objects of the power will have no claim; but if it is a power in the nature of a trust, the court will normally distribute the property amongst the objects of the power in equal shares. Thus, for example, in *Burrough v Philcox*,[35] where T gave to his surviving child power 'to dispose of all my property amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper', and the child died without making any appointment, it was held that there was a trust in favour of the nephews and nieces and their children, subject to a power of selection in the surviving child, and that they were entitled to take the property in equal shares.

It should be noted that the donee of a trust power may have the property vested in him *as trustee*, in which case the 'trust power' will be indistinguishable from a discretionary trust (below); or the donee may not be a trustee of the property but a third party (for example, a relative of the settlor) who has no interest (legal or equitable) in the property and whose only role is that of exercising the discretion to appoint the trust property.

Examples of mere powers are:

(a) where a testatrix gave her husband a life interest in certain property, and gave him 'power to dispose of such property by will amongst our children',[36]

(b) where a testator stipulated that 'if my wife feels that I have forgotten any friend, I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend, so that such friend may buy a small memento of our friendship',[37] and

(c) where a testator gave his residuary estate to his trustees upon trust to pay the income 'to such persons and in such shares as my sister should from time to time direct in writing'.[38]

Whether there is a mere power or a power in the nature of a trust is a matter of intention. For there to be a power in the nature of a trust it must be shown that the settlor intended to benefit the objects of the power *in any event*, and in making the distribution the court carries out that intention. On the other hand, the presence of a gift over in default of appointment is conclusive that a mere power and not a power in the nature of a trust was intended, since the gift over is inconsistent with an intention to benefit the objects of the power in any event.

In *Rosaline v Singh*,[39] Crane JA explained the distinction between a mere power and a power in the nature of a trust thus:

34 See below, Chapter 6.
35 (1840) 41 ER 299.
36 *Re Weekes' Settlement* [1897] 1 Ch 289.
37 *Re Coates* [1955] Ch 495.
38 *Re Perowne* [1951] Ch 785.
39 (1974) 22 WIR 104, CA (Guyana) at 115.

> While a court will always itself execute a trust which has not been carried out by a trustee, it will not compel the exercise of a mere power of disposition, if the donee does not do so. (See *Re Weekes' Settlement*.)[40] This is so because a trust involves an obligation while a power involves a discretion. However, a trust exists whenever a person comes under an obligation to deal with property in a specified manner, whereas a power exists where a person is authorised to dispose of property. But sometimes it turns out that that which on the surface appears to be a mere power is considered a trust in the eye of the law. In this event, though subject to the rules governing trusts, being of a fiduciary character it is called a power in the nature of a trust. The attitude of the court towards it was clearly expressed by Lord Eldon in *Brown v Higgs*.[41]
>
> 'It is perfectly clear that where there is a mere power, and that power is not executed, the court cannot execute it. It is equally clear that wherever a trust is created, and the execution of the trust fails by the death of the trustee or by accident, this court will execute the trust. But there are not only a mere trust and a mere power, for there is also known to this court a power which the party to whom it is given is entrusted with and required to execute; and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place . . .'
>
> . . . Whether a power is a mere power or a power in the nature of a trust is always a matter of intention to be gathered from the terms of the instrument . . .
>
> It is well recognised, though not by an inflexible rule of construction, that 'if there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the court implies a gift to those objects equally, if the power be not exercised.' (See *Farwell on Powers* (3rd edn), p 528.) But before this rule can come into operation, the terms of the will must show a clear intention that a power in the nature of a trust, as distinct from a mere power, has been created.

In the Trinidadian case of *Ramdial v Christopher*,[42] the testator by his will devised a plot of land to his wife, Latchnie Ramdial, 'for the duration of her natural life', and empowered her 'to devise the remainder after her life interest hereinbefore given to all or any of my lawful children, in the absolute discretion of my wife as she may choose'. Latchnie Ramdial died one year after the testator, leaving a will in which she devised and bequeathed all her real and personal property to her daughter, the defendant, who was not a child of the testator. The defendant alleged that the testator had intended to give a mere power of appointment to Latchnie and that, since she had not exercised the power, the property fell into residue and under the residuary clause Latchine was entitled to devise it to whomsoever she wished. Sealey J held, however, that on a true construction of the will, the testator had intended to create a power in the nature of a trust. She said:

> In the present case, two issues arise:
>
> 1 Whether the power given to Latchnie Ramdial was a power in the nature of a trust and she was obliged to give the property to one or all of the children, or was it a mere power and she could give to all, or any or none at all.
>
> 2 Having not exercised the power, in whom does the property vest on the death of Latchnie Ramdial?
>
> It seems to me that the intention of the testator is clear. Latchnie Ramdial had the power to dispose of the estate of the deceased in one manner only; she was to distribute the remainder to whichever of the lawful children of the deceased that she chose. This was a class of persons from whom she would choose, her discretion was only as to which one or ones she would choose. She

40 [1897] 1 Ch 289.
41 (1803) 8 Ves 561 at 570.
42 (1994) High Court, Trinidad and Tobago, No 2103 of 1991 (unreported).

could not decide that none of them was worthy. It would not be a lawful exercise of this power for the said Latchnie to give a portion of the land to one of the children. It is the whole of the land which she was expected to distribute to the one or ones whom she selected from the class. This is not a mere power of disposing the land to anyone whom the said Latchnie thought fit. It is my view that the testator intended that the power which was exercisable by Latchnie was in the nature of a trust, and that the lawful children of the deceased belong to the class of persons entitled to benefit therefrom, but with a power of selection given to the said Latchnie.

The next question is what becomes of that property on the death of Latchnie when she did not exercise the power given to her under the will of the testator. The authorities show that once it is clear that the testator intended that the class should benefit and that particular individuals of that class are to be selected by another person, then when that was not done, the court will carry out the general intention in favour of the class *(Burrough v Philcox)*.[43] Where it was the duty of the donee of the power to execute the intention of the testator, and that power was not exercised, the court is not likely to allow the persons entitled to property to suffer because of inability of the person with the power to exercise same. The court 'fastens upon the property a trust for their benefit' *(Burrough v Philcox)*.

It has been submitted by attorney for the defendant that the said Latchnie not having exercised the power, which he said was a mere power, the property fell into residue and under the residuary clause, the property was that of Latchnie to do as she wished. Her will then gave to the defendant that and any other property which she had or was entitled to at her death. That residuary clause provided for property not disposed of by the will to be given to the said Latchnie, absolutely. It is my view that the subject property had been disposed of by the will, so could not form part of the residuary estate of the testator.

Having said that it is a trust, it is clear that the defendant could not hold it as her property inherited from her mother. Having regard to the authorities, the defendant must hold the property on trust for those persons of the class without the power of selection which her mother had. I hold therefore that the defendant holds the property in trust for all of the lawful children of the testator.

Fiduciary and non-fiduciary powers

In a number of recent cases, a distinction has been drawn between powers of appointment given to *trustees* and those given to *private persons* (for example, the settlor's widow). Powers of appointment exercisable by trustees are called fiduciary powers, whilst those given to private persons are termed non-fiduciary or personal powers. The significance of the distinction is that the donee of a fiduciary power is under a duty:

(a) to consider periodically whether to exercise the power; and
(b) to consider the range of objects, and the appropriateness of individual appointments; and, if he does decide to exercise the power:
    - to do so in a responsible manner according to its purpose; and
    - not to release the power so as to cause the property to pass to those entitled in default of appointment.[44]

A case in which the trustees of a fiduciary power failed to consider whether an appointment was appropriate is *Turner v Turner*.[45] There, the trustees were the settlor's father, sister-in-law and brother-in-law. None of them had any experience or understanding of trusts. They appointed

43 (1840) 41 ER 299.
44 *Re Hay's Settlement Trusts* [1981] 3 All ER 786.
45 [1983] 2 All ER 745.

some of the settlor's property to one of the settlor's children, following the instructions of the settlor himself, to whom they habitually left the decision making. It was held that the appointment was invalid, as the trustees had never considered the appropriateness of the appointment nor used their own independent judgment in the matter.

Where, on the other hand, a non-fiduciary or personal power is given, the donee of the power is under no such duties, and it seems that his only duty is to keep within the terms of the power and not to misuse it.[46] Furthermore, he may release the power at any time and cause the property to pass to those entitled in default of appointment.

Another example of a fiduciary power can be found in *Mettoy Pension Trustees v Evans*.[47] Here, a company held a power to appoint any surplus in its pension fund (which was vested in a separate trustee company) in favour of its retired employees, with a gift over to itself in default of appointment. When the company went into receivership, the liquidators wished to release the power so that the surplus would become available for the company's creditors. Warner J held that the power was a fiduciary one which could not be released, and the court was required to decide what method of exercise would be appropriate. Warner J's judgment contains an interesting analysis of the nature of fiduciary powers, in particular those pertaining to company pension schemes:[48]

> The beneficiaries under a pension scheme such as this are not volunteers. Their rights have contractual and commercial origins. They are derived from the contracts of employment of the members. The benefits provided under the scheme have been earned by the service of the members under those contracts and, where the scheme is contributory, *pro tanto* by their contributions.
>
> It would be inappropriate and indeed perverse to construe such documents so strictly as to undermine their effectiveness or their effectiveness for their purpose. I do not think that, in saying that, I am saying anything different from what was said by Lord Upjohn when in *Re Gulbenkian's Settlements*,[49] he referred, in the context of a private settlement, to 'the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it . . .'.
>
> What the court has to do here is to perform that duty in the comparatively novel and different context of pension scheme trusts. The most important and difficult, though by no means the only question in this case, is as to the validity of the conferment on the employer, by the last paragraph of rule 13(5) of the 1983 Rules, of the discretion to augment benefits out of surplus.
>
> Mr Walker suggested a classification, which I accept, of fiduciary discretions into four categories. In this classification, category 1 comprises any power given to a person to determine the destination of trust property without that person being under any obligation to exercise the power or to preserve it. Typical of powers in this category is a special power of appointment given to an individual where there is a trust in default of appointment. In such a case the donee of the power owes a duty to the beneficiaries under that trust not to misuse the power, but he owes no duty to the objects of the power. He may therefore release the power but he may not enter into any transaction that would amount to a fraud on the power, a fraud on the power being a wrong committed against the beneficiaries under the trust in default of appointment: see *Re Mills*.[50] It seems to me

46 The terms of the trust instrument may enable the donee of a personal power to exercise the power in a manner that amounts to self-dealing: see *Re Z Trust* [1997] CILR 248, and pp 183–185, below.
47 [1990] 1 WLR 1587.
48 *Ibid* at 1610–14. See also *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589; J Martin, [1991] Conv 364.
49 [1970] AC 508 at 522.
50 [1930] 1 Ch 654.

to follow that, where the donee of the power is the only person entitled under the trust in default of appointment, the power is not a fiduciary power at all, because then the donee owes no duty to anyone. That was the position in *Re Mills*[51] and will be the position here if the discretion in the last paragraph of rule 13(5) of the 1983 Rules is in category 1.

Category 2 comprises any power conferred on the trustees of the property or on any other person as a trustee of the power itself: *per* Romer LJ at p 669. I will, as Chitty J did in *Re Somes*,[52] call a power in this category 'a fiduciary power in the full sense'. Mr Walker suggested as an example of such powers vested in persons other than the trustees of the property the powers of the managers of a unit trust. A power in this category cannot be released; the donee of it owes a duty to the objects of the power to consider, as and when may be appropriate, whether and if so how he ought to exercise it; and he is to some extent subject to the control of the courts in relation to its exercise: see, for instance, *Re Abrahams' Will Trusts*;[53] *Re Manisty's Settlement*[54] and *Re Hay's Settlement Trusts*.[55]

Category 3 comprises any discretion which is really a duty to form a judgment as to the existence or otherwise of particular circumstances giving rise to particular consequences. Into this category fall the discretions that were in question in such cases as *Weller v Ker*,[56] *Dundee General Hospital Board of Management v Walker*[57] and the two cases reported by Lexis that I have already mentioned, namely *Kerr v British Leyland (Staff) Trustees Ltd*, and *Mihlenstedt v Barclays Bank International Ltd*.

Category 4 comprises discretionary trusts, that is to say, cases where someone, usually but not necessarily the trustees, is under a duty to select from among a class of beneficiaries those who are to receive, and the proportions in which they are to receive, income or capital of the trust property. Mr. Walker urged me to eschew the phrases 'trust power', 'power coupled with a duty', 'power coupled with a trust' and 'power in the nature of a trust', which, as demonstrated by means of an impressive survey of reported cases, have been variously used to describe discretions in categories 2, 3 and 4.

In the present case the question is whether the discretion given to the employer by the last paragraph of rule 13(5) of the 1983 Rules is in category 1 or category 2. That depends on whether the words by which that discretion is expressed to be conferred on the employer mean in effect no more than that the employer is free to make gifts out of property of which it is the absolute beneficial owner or whether those words import that the employer is under a duty to the objects of the discretion to consider whether and if so how the discretion ought to be exercised. That is a question of construction of the deed of 1983 in the light of the surrounding circumstances . . .

I have come to the conclusion that the discretion conferred on the employer by the last paragraph of rule 13(5) of the 1983 Rules is a fiduciary power in the full sense . . .

The question then arises, if the discretion is a fiduciary power which cannot be exercised either by the receivers or by the liquidator, who is to exercise it? I heard submissions on that point. The discretion cannot be exercised by the directors of the company, because on the appointment of the liquidator all the powers of the directors ceased. I was referred to a number of authorities on the circumstances in which the court may interfere with or give directions as to the exercise of discretions vested in trustees . . . None of those cases deal directly with a situation in which a fiduciary power is left with no-one to exercise it. They point, however, to the conclusion that in that situation the court must step in.

51 *Ibid*.
52 [1896] 1 Ch 250 at 255.
53 [1969] 1 Ch 463 at 474.
54 [1974] Ch 17 at 24.
55 [1982] 1 WLR 202 at 210.
56 (1866) LR 1 Sc & Div 11.
57 [1952] 1 All ER 896.

Trusts distinguished from administration of estates

The origins of trusts differ from those of administration of the estates of deceased persons in that, whereas trusts were the invention of the Court of Chancery, the law relating to administration of estates was developed by the ecclesiastical courts. However, in some respects the position of personal representatives (that is, executors and administrators) has been assimilated to that of trustees. For instance, (a) both personal representatives and trustees owe fiduciary duties to the beneficiaries; and (b) the provisions of the Trustee Acts apply to both trustees and personal representatives, except where it is expressly provided to the contrary. Thus, for example, Trustee Act, Cap 250 (Barbados), s 2 provides that the expressions 'trust' and 'trustee' extend to the duties incident to the office of a personal representative, and the word 'trustee' includes a personal representative.

The distinction between administration and trusteeship is often blurred, since it is common for a testator to appoint the same persons to be executors and trustees. The precise point at which an executor/trustee ceases to act as executor and commences to act as trustee depends upon the circumstances of the particular estate but, as a general rule, the transition will take place when the administration is complete, which may be evidenced by the executor's carrying in his residuary account.[58]

Some important differences between trusts and administration of estates are:

(a) The basic function of personal representatives is to wind up the estate by paying debts and death duties, and handing over the net residue to the persons beneficially entitled under the will or intestacy or to trustees (who may be themselves) to hold upon trust. The process of winding up the estate should normally be complete within the 'executors' year'.

The function of trustees, on the other hand, is to manage and administer the trust estate, which may continue for many years, and the duties and powers of trustees are varied; for example, trustees have a duty to invest trust funds, or, where the trust property is land, to let it to tenants and make it productive, and they have powers to insure the property, to settle claims and to apply income for the maintenance of minor beneficiaries.

(b) Whereas a beneficiary under a trust has an equitable interest in the trust property as soon as the trust takes effect, a legatee, devisee or person entitled on intestacy has no legal or equitable interest in the deceased's property until he receives an assent from the personal representatives. In the meantime, the legatee or devisee has only a chose in action in the form of a right to compel the due administration of the estate. The position is illustrated by *Comr of Stamp Duties v Livingston*.[59] In that case a widow died domiciled in New South Wales. She was the residuary legatee under her late husband's will. The estate, which was still in the course of administration at the time of the widow's death, contained land in Queensland, and the question arose as to whether succession duty was payable on that property. It would only be payable if the widow became the owner of it at the time of her husband's death. The Privy Council held that she was not the legal or equitable owner of the land, and so duty was not payable. The widow had only a chose in action, that is, a right to compel the administration of the estate, and that was situated in New South Wales, the state of her and her husband's domicile.

(c) The authority of trustees is always joint: thus, where there are two or more trustees, no one trustee can validly dispose of any trust property, whether real or personal:'[60] all the trustees

58 *See Re Claremont* [1923] 2 KB 718.
59 [1964] 3 All ER 692.
60 *Attenborough v Solomon* [1913] AC 76.

must combine in the sale. But the authority of personal representatives is joint only in relation to land. In relation to pure personalty, their authority is several. Thus, one of several personal representatives can validly dispose of title to pure personalty.

(d) Whereas trustees must always 'hold the balance evenly between the beneficiaries' (that is, they must not favour one beneficiary at the expense of another), personal representatives are under no such obligation, because their duty is to the estate as a whole and not to individual beneficiaries. *Re Hayes' Will Trusts*[61] is authority for the proposition that an executor, provided he considers the well-being of the estate as a whole, may undertake a course of action which is detrimental to a particular beneficiary or beneficiaries. The facts of the case were that a testator appointed four persons, including his son, as executors and trustees of his will, and he gave power to 'my trustees . . . to sell to any person, including my son, despite his being a trustee, and in his case at the value placed upon the same for purposes of estate duty'.

He gave his residuary estate to his widow for life and after her death to such of his children as should be living at his death. The son was thus both an executor/trustee and a beneficiary.

The executors/trustees sold a farm, being part of the estate, to the son, having negotiated in the usual way with the District Valuer and having agreed as low a valuation for estate duty purposes as they could obtain, which benefited the son but not the other beneficiaries (who wanted a high valuation). It was held that:

- the fact that the power of sale had been given to the 'trustees' did not prevent them from exercising the power in their capacity as executors; and
- in obtaining the valuation, the executors were not obliged to have regard to the fact that the other beneficiaries would have benefited from a high valuation; and they were right to sell to the son at that price.

61 [1971] 2 All ER 341.

CHAPTER 2

FORMALITIES FOR THE CREATION OF TRUSTS

In general, a trust may be created in any form, whether by deed, will, simple writing or word of mouth; all that is required is an intention on the part of the settlor to create a trust. Thus, in the case of an *inter vivos* trust of personalty, no formalities are required. But the general rule has been modified by statute in relation to:

(a) trusts of land;
(b) assignments (or 'dispositions') of existing equitable interests under trusts; and
(c) testamentary trusts.

In addition, any contract for the sale or other disposition of land must be evidenced by a sufficient written note or memorandum of the agreement.

TRUSTS OF LAND

Property Act 1979, Cap 236, s 60(2) (Barbados)[1]

> A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by the person who is entitled to declare such trust, or by his will.

This subsection is similar to the Law of Property Act 1925, s 53(1)(b) (UK), the prototype for legislation on the creation of trusts of land. The application of s 53(1)(b) was in issue in *Walcott v Barclays Bank* DCO, where it was held that the Law of Property Act 1925 was in force in Trinidad and Tobago as a statute of general application by virtue of s 12 Supreme Court of Judicature Act 1962.[2] Although this must be considered to be an incorrect ruling (because only statutes of general application of the UK Parliament that were in force in England on 1 March 1848 are incorporated by the section), the case nevertheless affords a good illustration of the application of the requirement of written evidence for declarations of trust concerning land. The facts were that, in 1964, the testator purchased in his sole name the freehold reversion of a parcel of land of which he and the appellant DW, his wife, had previously been joint lessees. After the purchase, the testator made certain oral declarations of trust in relation to the land in favour of DW and, in his will made in 1966, the testator declared that he was 'seised in fee simple as joint tenant with my wife, Dora Walcott, of the freehold premises known as No 28 Carr Street. My wife is also the beneficiary named in [certain] policies of insurance . . .'. After making a number of specific bequests, the testator devised and bequeathed all his residuary estate upon trust for his daughter, N. No provision was made in the will in favour of DW. The main question to be determined was whether DW was entitled to the beneficial interest in the land, or whether it passed with the residuary estate to N. This depended upon whether a trust of the land had been validly declared and, in particular, whether the declaration contained in

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1 In other jurisdictions, Statute of Frauds, 1677, s 7 applies.
2 Under the Land Law and Conveyancing Act 1981, s 87(2), the requirement of written evidence is extended to declarations of trust 'respecting any property or interest therein'. Thus, under this provision, declarations of trust relating to pure personalty would require to be evidenced in writing. This Act, however, though enacted, has not yet been brought into force.

the will satisfied s 53(l)(b) Law of Property Act 1925, which required a declaration of trust concerning land to be evidenced in writing. The Trinidad and Tobago Court of Appeal held that the declaration in the will constituted written evidence of the oral *inter vivos* declarations of trust sufficient to satisfy s 53(l)(b), and DW was therefore beneficially entitled to the land. Phillips JA said:

> The learned trial judge rejected the submission made on behalf of the appellant (which was repeated before this court) that these pre-testamentary expressions taken in conjunction with certain declarations contained in the will were sufficient for the purpose of showing that the testator had constituted himself a trustee of the joint interest in the freehold premises in favour of his wife.
>
> The learned judge, in my opinion, stated correctly the general principles applicable to the present case in the following words:
>
> 'A trust may be created *inter vivos* or by will. It need not be created in writing. It is sufficient if the writing be evidence of the fact of the trust. It may be proved by writing which is subsequent to the creation of it. A trust can be created by any language which is clear enough to show an intention to create it. No particular form of words is necessary, but the intention to create a trust must appear—either expressly or by necessary implication. A court of equity will look at the circumstances existing at the date of the will.'
>
> It appears to me, however, that despite a correct enunciation of the relevant principles, the learned judge unwittingly slipped into the error of considering the declaration contained in cl 3 of the will separately from the *inter vivos* declarations of the testator referred to above. Having first held that cl 3 did not create a trust, either expressly or by implication, as the language was 'plain and unambiguous', the learned judge then addressed himself to the real question for decision, *viz*. whether the *inter vivos* declarations of the testator 'can be construed as declaring (or creating) a trust (which may be said to be evidenced in the words in cl 3 of the will).'
>
> As to the creation of an express trust, I consider it useful to refer to the following passage from Cheshire's *Modern Law of Real Property* (9th edn), p 320:
>
> 'There are very few rules restricting the mode in which a trust may be created. The trust is the successor of the old use, and for the raising of a use no formalities were necessary. Spoken words were as effectual as written instruments, and according to the preamble to the Statute of Uses bare signs and gestures seem to have been sufficient. The one guiding principle was that effect should be given to the intention of the settlor, no matter how it had been indicated by him. So in general is it with the modern trust.'
>
> The legal position in regard to trusts relating to land is stated in 38 *Halsbury's Laws* (3rd edn), para 1388:
>
> 'A declaration of trust respecting any land or any interest therein must be manifested and proved by some person who is able to declare the trust or by his will. The trust need not be constituted by writing; it is sufficient if the writing is evidence of the fact of the trust. The writing must, however, show its terms and not merely its existence.'
>
> This requirement for evidence in writing is stipulated by s 53(l)(b) of the English Law of Property Act 1925, replacing s 7 of the Statute of Frauds (29 Car 2, c 3), which, being a statute of general application, forms part of the law of this country by reason of the provisions of s 12 of the Supreme Court of Judicature Act 1962.
>
> When once it is predicated, as in my view the evidence clearly shows, that the testator knew that the legal estate in the freehold property was vested solely in himself, it seems to me that the declaration contained in cl 3 of the will leads to the irresistible inference that he considered the equitable estate to be vested jointly in his wife and himself. I am of opinion that support for this conclusion is to be obtained from the remaining portion of the said clause which states that the testator's wife is 'also the beneficiary' named in certain insurance policies. It appears that the word 'also' in the particular context would be meaningless unless the prevailing sentence is construed as expressing the fact that the testator regarded himself as a trustee for his wife of a joint interest in the property in question. In my opinion, other similar *indicia* contained in the will are as follows:

(a) Although it is not in dispute that the testator and his wife lived together on good terms up to the time of his death, the will makes absolutely no provision in her favour.

(b) Clause 8(a) provides *inter alia* that 'property which my wife shall inherit or become entitled to at my death by operation of law or contract shall not be free of death duties, she having sufficient funds from which to meet the same'.

In considering the nature and intention of the *inter vivos* declarations of the testator, it is necessary to have regard not only to the close bonds of affection existing between the spouses, but also to the pecuniary contribution made by the appellant towards the purchase of the dwelling house which subsequently became part and parcel of the property in question. In such circumstances, it seems to me that by those declarations the testator clearly intended to constitute himself a trustee for the appellant of a joint tenancy in the beneficial ownership of the said property. This intention, in my judgment, is 'manifested and proved' by cl 3 of the will. Accordingly, on the death of the testator the appellant became entitled by operation of law to the whole beneficial interest therein.

DISPOSITIONS OF EXISTING EQUITABLE INTERESTS

In *Timpson's Executors v Yerbury*,[3] Romer LJ stated:

> The equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways. The person entitled to it:
>
> (1) can assign it to the third party directly;
>
> (2) can direct the trustees to hold the property in trust for the third party;
>
> (3) can contract for valuable consideration to assign the equitable interest to him; or
>
> (4) can declare himself to be a trustee for him of such interest.

By Property Act 1979, s 60(3) (Barbados)[4]

> A disposition of an equitable interest, subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his agent lawfully authorised in writing, or by will.

This subsection is almost identical to s 53(1)(c) of the Law of Property Act 1925 (UK). There do not appear to be any Commonwealth Caribbean decisions on the interpretation of these provisions, but the English statute has been construed in a number of cases, which may be examined under the following heads.

Direct assignment of equitable interest

The most obvious case where s 53(1)(c) of the 1925 Act or s 60(3) of the Barbados Act would apply is where a beneficiary under a trust assigns (that is to say, transfers) his equitable interest to another person. This counts as a disposition of an equitable interest and would be void if not made in writing. The sections apply to assignments of both limited interests (such as life interests) and absolute interests held on a bare trust by a nominee. The sections apply to equitable interests in personalty as well as land. In order to comply with the sections, the disposition must be *actually* in writing; it is not sufficient that it be merely evidenced by writing. Signature by an

3 [1936] 1 All ER 186 at 194.
4 In other jurisdictions, Statute of Frauds, 1677, s 9 applies.

agent suffices. Finally, it has been held that a number of connected documents can provide the writing.[5]

Direction to trustees to hold upon trust for another

Where a beneficiary who is absolutely entitled directs his trustees henceforth to hold upon trust for another person or persons, there is a disposition and the direction must be in writing, otherwise it will be void. This was established in *Grey v IRC*[6] in which there was an ingenious attempt to avoid payment of stamp duty. Stamp duty is payable on written instruments transferring property (such as share transfers and conveyances of land), and the amount of duty payable is *ad valorem* (that is, it varies with the value of the interest transferred). If the value is nil, as where a bare legal estate only is transferred, no *ad valorem* duty is payable.

In *Grey,* a settlor made six settlements of nominal sums in favour of his grandchildren. Later, he transferred 18,000 shares to trustees to hold as nominees for himself. That transfer was of a bare legal estate and so was not dutiable. Then, on 18 February, he *orally* instructed the trustees henceforth to hold the shares upon the trusts of the six settlements. Finally, on 25 March the trustees executed written documents confirming that the trustees held the shares upon the trusts of the settlements. There was no doubt that the trusts had been validly declared. The only question was whether they had been declared by the settlor's oral instructions of 18 February, in which case the subsequent documents executed by the trustees were merely confirmatory of the previous disposition and themselves passed no beneficial interest, and so were not liable to stamp duty; or whether, as the Inland Revenue argued, it was the documents which had effected the disposition, in which case they would be liable to stamp duty.

It was held by the House of Lords that the oral instruction of 18 February amounted to an attempted disposition which, not being in writing, was void. It was the documents executed on 25 March which constituted the effective disposition, and they were liable to stamp duty.

Two final points about *Grey v IRC* may be noted. First, though not referred to in the judgments, it seems that the principle in the case applies equally to land as to personalty. Secondly, the case shows that a 'disposition' may also amount to a 'declaration' of trust.

Conveyance of legal estate by nominee

It was held in *Vandervell v IRC*[7] that s 53(1)(c) of the 1925 Act does not apply where a bare trustee transfers the entire legal and equitable estate to a third party at the direction of the beneficial owner. The facts of the case were that V wished to give money to the Royal College of Surgeons in order to establish a Chair of Pharmacology. He decided to arrange for the transfer to the College of a number of shares in a private company, Vandervell Products Ltd, which was controlled by V, subject to an option to repurchase the shares for £5,000 exercisable by another company, Vandervell Trustees Ltd, which acted as trustee for various Vandervell family trusts. V directed his bankers, who were holding the shares as bare trustees for V, to transfer the shares to the College subject to the option. Later, dividends of £250,000 were declared on the shares and the Revenue argued, *inter alia,* that V was liable to pay income tax on the dividends because there had been no written disposition of the beneficial interest in the shares in favour of the

5 Re *Danish Bacon Co Staff Pension Fund Trusts* [1971] 1 WLR 248 at 256.
6 [1960] AC 1.
7 [1967] 2 AC 291.

College, so that the beneficial interest remained in V. But the House of Lords held that s 53(1)(c) does not apply where the sole beneficial owner directs his trustees to transfer the *whole legal and equitable* estate in the property together. Lord Upjohn opined that the purpose of s 53(1)(c) was to prevent hidden oral transactions relating to *equitable* interests, 'but when the beneficial owner owns the whole beneficial estate and is in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate, there can be no possible ground for invoking the section where the beneficial owner wants to deal with the legal estate as well as the equitable estate'.[8]

Declaration of trust with consent of beneficial owner

In *Re Vandervell's Trusts (No 2)*,[9] the Vandervell saga continued. In 1961, V ordered Vandervell Trustees Ltd to exercise the option to repurchase the shares, which it did, using £5,000 from the Vandervell children's settlement. Vandervell Trustees Ltd informed the Revenue of what had been done. However, it was not until 1965 that V executed a deed formally assigning to Vandervell Trustees Ltd any right or interest he might still have in the option or the shares. The Revenue claimed that V was liable to pay income tax on the dividends paid from 1961–65, on the ground that up to 1961 there was a resulting trust of the option in favour of V, and V had not, until 1965, disposed of that beneficial interest in writing; therefore he must still have it, though now in the form of shares into which the option had been transformed.

Before the Revenue's claim came to court, V's executors intervened and claimed from Vandervell Trustees Ltd the dividends paid during 1961–65. Megarry J, at first instance, held that the claim succeeded on the ground that the resulting trust which applied to the option also applied to the shares, and there had been no valid declaration of trust in favour of the children's settlement. The Court of Appeal reversed that decision, holding that Vandervell Trustees Ltd held the dividends on the trusts of the children's settlement, on the grounds that:

(a) the trustees had used funds from the settlement in exercising the option;
(b) the trustees and V had shown an intention that the shares should be held on the settlement trusts; and
(c) the resulting trust, which had been attached to the option, terminated with the exercise of the option and was not transferred to the shares.

In the Court of Appeal's view, neither the extinction of the trust of the option nor the creation of the new trust of the shares, nor the two viewed as a whole, amounted to a disposition by V of an interest within s 53(1)(c).

Declaration by equitable owner of himself as trustee

Where a beneficiary who is absolutely entitled declares himself a trustee of his equitable interest for another, it can be argued, on the one hand, that this is not a disposition but a declaration of trust which creates a sub-trust and, unless the property is land, no writing is required. On the other hand, it was held in *Grainge v Wilberforce*[10] that 'where A was trustee for B, who was trustee for C, A holds in trust for C, and must convey as C directed'. Thus, B 'disappears from the

8 *Ibid* at 311.
9 [1974] 3 All ER 205.
10 (1889) 5 TLR 436.

picture' and C becomes the beneficiary. This would appear to be a disposition and therefore be caught by s 53(1)(c), but it has been suggested by textbook writers that it will only be a disposition if B has, under the sub-trust, no active duties to perform;[11] in other words, where it is a bare (or simple) trust. If there are duties, there will be a sub-trust.

Oral contract to assign equitable interest

It is uncertain whether there is a disposition where the equitable owner makes a contract with a third party for valuable consideration to assign his equitable interest to him. The issue arose in *Oughtred v IRC*[12] which, like *Grey v IRC*,[13] involved an attempt to avoid stamp duty on a transfer of shares. The facts were that Mrs Oughtred was tenant for life under a settlement which contained 200,000 shares in a private company. Her son, Peter, was entitled in remainder. Mrs Oughtred also owned absolutely 72,000 shares in the same company. On 18 June, an oral agreement was made between herself and Peter under which Peter would surrender his remainder interest in the settled shares and in return Mrs Oughtred would transfer her 72,000 shares to him. A deed was executed by Mrs Oughtred and Peter which recited that the settled shares were then held upon trust for Mrs Oughtred absolutely. On 26 June, the trustees executed a formal transfer of the shares to Mrs Oughtred, and she transferred the 72,000 shares to Peter. The question was whether stamp duty was payable on the document transferring the shares to Mrs Oughtred. The answer depended on whether or not Mrs Oughtred was the owner in equity of the shares *before* the formal transfer of 26 June. She claimed to have become the equitable owner by virtue of her right to specific performance of the agreement of 18 June, whereby Peter became a constructive trustee of the shares for her, in which case the document of 26 June would then be only a formal transfer of the bare legal estate and, as such, not liable to *ad valorem* duty.

A majority of the House of Lords held that Mrs Oughtred's interest, after the agreement, was similar to that of a purchaser of land between contract and conveyance, and was, in Lord Jenkins's words,[14] 'no doubt a proprietary interest of a sort which arises in anticipation of the execution of the transfer . . . but the existence of an equitable right in the purchaser had never been held to prevent a subsequent transfer, in performance of the contract, of the property . . . from constituting, for stamp duty purposes, a transfer on sale of the property'. In other words, while acknowledging the validity of Mrs Oughtred's argument, the majority of the House would not permit the argument to defeat the Revenue's entitlement to stamp duty – which perhaps may be seen as a policy decision.

Lord Radcliffe (dissenting), on the other hand, took the view[15] that Mrs Oughtred became the equitable owner of the reversionary interest in the settled shares by virtue of the specifically enforceable agreement to exchange, and at that point she became absolute owner in equity, so that the transfer of 26 June could not be treated as a conveyance of Peter's equitable reversion, and so was not liable to *ad valorem* duty. The contention of the Revenue that the oral agreement of 18 June could not, because of s 53(1)(c), effect a disposition of Peter's reversionary interest, which remained vested in him until the execution of the formal transfer on 26 June, was rejected by Lord Radcliffe on the ground that the constructive trust which arose on 18 June did not require writing (by virtue of s 53(2)).

11 Eg, where the beneficiary under the sub-trust is a minor.
12 [1960] AC 206.
13 Above.
14 [1960] AC 206 at 240.
15 *Ibid* at 228.

Other cases

In two other classes of case, it has been held that s 53(1) (c) does not apply. They are:

(a) disclaimer of an equitable interest; and
(b) nomination under a staff pension scheme.

In *Re Paradise Motor Co*,[16] a person to whom an equitable interest in shares had been given made an oral disclaimer. It was held that such a disclaimer was not caught by s 53(1)(c) and was effective, so that he was disentitled from subsequently claiming in the liquidation of the company. And in *Re Danish Bacon Co Staff Pension Fund Trusts*, Megarry J 'very much doubted'[17] that the right of an employee to nominate a person to receive moneys payable under a staff pension scheme in the event of his death in service (and before becoming entitled to a pension) was caught by s 53(1)(c), because it could not properly be described as a 'disposition' of anything belonging to the employee, nor as a 'subsisting' equitable interest.

Exclusions

Property Act 1979, s 60(5) (Barbados)

Nothing in this section affects

(a) the creation or operation of resulting, implied or constructive trusts . . .
(c) the operation of the law relating to part performance . . .
(e) trusts or interests created, declared or disposed of by will.

The effect of s 60(5)(a) is similar to that of s 53(2) of the Law of Property Act 1925 (UK), which is to exempt resulting and constructive trusts from the requirement of writing.[18] Thus, for instance, a resulting or constructive trust of land may arise without any written evidence.

TESTAMENTARY TRUSTS

A trust which is to take effect on the settlor's death must be declared in the manner required by the Wills legislation. A modern provision relating to wills in the Caribbean is the Succession Act 1981, Cap 249 (Barbados), s 61 of which provides:

> 61.(1) No will shall be valid unless–
> (a) it is in writing;
> (b) it is signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction;
> (c) the signature is made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the signature of the testator in the presence of the testator, but no form of attestation shall be necessary . . .

An issue relating to the wills legislation which has arisen in Barbados and in Trinidad and Tobago concerns nominations under staff pension schemes. The majority of such schemes

16 [1968] 1 WLR 1125.
17 [1971] 1 WLR 248 at 256.
18 In other jurisdictions, Statute of Frauds, 1677, s 8 applies.

empower an employee/beneficiary to nominate a person to receive benefits accruing on the death of the employee whilst in service. *Norris v Norris*[19] concerned a nomination under a group insurance policy, under which an employee could, by written notice in a form satisfactory to the insurance company, designate a beneficiary or beneficiaries to receive the insurance moneys on his death, and he retained the right to change his beneficiary at any time. The deceased employee had executed a designation in the presence of only one witness. Williams J, in the Barbados High Court, held that because the nomination was freely revocable and because the deceased's interest in the policy remained vested in him during his lifetime and the beneficiary only became entitled to an interest on the employee's death, the act of nomination was testamentary in character and invalid, being in breach of the requirements of the Wills Act, Cap 219.[20]

On the other hand, in *Baird v Baird*,[21] an appeal from the Trinidad and Tobago Court of Appeal, the Privy Council held otherwise. In this case, the pension scheme funds were vested in trustees, and the scheme was administered by a management committee.

It was held that the nomination was not a testamentary disposition since the member's interest in the fund was non-assignable and the member had no control over the funds to which his nomination related. The nomination was therefore valid, although it had not been executed in the presence of two witnesses.

Lord Oliver emphasised that whether the Wills legislation applied to a nomination under a pension scheme depended in each case on the provisions of the scheme, and he concluded that 'in what is now the normal case of non-assignable interests such as in the present case and, *a fortiori*, where the power of nomination and revocation requires the prior approval of the trustees or a management committee',[22] there was no reason to doubt the correctness of the approach of Megarry J (in the earlier case of *Re Danish Bacon Co Ltd Staff Pension Fund Trust*),[23] who had held that a similar nomination was effective on the ground that:

> . . . although a nomination had certain testamentary characteristics, and not least that of being ambulatory, it took effect as a contractual arrangement and not as a disposition by the deceased. The contributions and interest did not come to the deceased and then pass on from him by force of his will or nomination: they went directly from the fund to the nominee, and formed no part of the estate of the deceased . . . Despite certain testamentary characteristics, the nomination takes effect under the trust deed and rules, and the nominee in no way claims through the deceased.[24]

EQUITY WILL NOT ALLOW A STATUTE TO BE USED AS AN INSTRUMENT OF FRAUD

The statutory provisions which require written evidence of declarations of trust and contracts relating to land originate from the Statute of Frauds 1677. The objective of that statute in requiring written evidence was to prevent frauds from being perpetrated through the admission of purely oral evidence which could easily be manufactured. However, the Court of Chancery

19 It was also held in this case that the Married Women Act [now Married Persons Act] Cap 219, s 5 did not apply since the policies were not taken out by the deceased but by his employers. Williams J pointed out that in order that a policy may create a trust under the section, it must be a policy effected by a man or a woman on his/her own life.
20 Now replaced by Succession Act 1981, Cap 249 (above).
21 [1990] 2 WLR 1412. See G Kodilinye [1990] Conv 458.
22 At 1422.
23 [1971] 1 WLR 248.
24 At 256.

was equally concerned that the statute should not itself become an 'engine' or 'instrument' of fraud and, although the court could not deny the binding force of the statute, 'it nevertheless regarded itself as having power to intervene where the strict application of the statute would actually promote the fraud it was intended to prevent'.[25] Similarly, courts of equity developed the concept of the secret trust, the effect of which was to prevent a person who had been given a bequest in a will, on the faith of his promise to hold it upon trust for a secret beneficiary, from denying the trust by pleading non-compliance with the Wills Act 1837.

The main instances of equitable intervention are:

(a) the doctrine of part performance;
(b) the rule in *Rochefoucauld v Boustead*;[26] and
(c) the doctrine of secret trusts.[27]

The doctrine of part performance

A contract for the sale or other disposition of land which is unenforceable at common law because of lack of written evidence as required by statute, will be enforced in equity if there is a sufficient act of part performance by the party seeking to enforce the agreement. A Barbadian case in which there were sufficient acts of part performance is *Jackman v Jones*.[28] Here, by an oral agreement dated 14 January 1983, the plaintiff agreed to sell his house to the defendant for $18,200 and on the same date the defendant paid $18,200 to the plaintiff. The plaintiff put the defendant into possession of the property. The question to be decided by the court was whether the agreement was unenforceable on the ground of absence of written evidence thereof as required by s 47 Property Act 1979, Cap 236,[29] or whether it could be enforced against the plaintiff by virtue of an act of part performance sufficient to take the agreement out of the statute.

It was held that the payment of the sum of $18,200, coupled with the placing of the defendant in possession of the house, amounted to an act of part performance, and the court would enforce the agreement despite the lack of written evidence. Worrell J said:

Section 47 of the Property Act provides:

> '47 (1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or some other person thereunder by him lawfully authorised.
>
> (2) This section applies to contracts whether made before or after 1st January 1980 and does not affect the law relating to part performance or sales by the court.'
>
> In the case of *Steadman v Steadman*,[30] Lord Morris of Borth-y-Gest, while discussing the doctrine of part performance, observed:
>
> 'As the whole area of the law of part performance relates to contracts "for the sale or other disposition of land or any interest in land", I would have thought that it followed that on a

25 Pettit, *Equity and the Law of Trusts*, 5th edn, p 79.
26 [1897] 1 Ch 196.
27 See Chapter 5.
28 (1987) High Court, Barbados, No 495 of 1984 (unreported). Cf *McCook v Hammond* (1988) Court of Appeal, Jamaica, Civ App No 87 of 1987 (unreported). See also *Martin v Vaughan* (1971) 6 Barb LR 57 (installation of water and electricity services and expense incurred in constructing a foundation held to be sufficient acts of part performance).
29 See also, eg, Ch 27, No 12, s 4 (Trinidad and Tobago).
30 [1976] AC 536 at 547.

> consideration of alleged acts of part performance it has to be decided whether their reasonable explanation is that the parties must have made some contract in relation to land such as the contract alleged. I read the speeches in *Maddison v Alderson*[31] as having proceeded on that basis. Thus, in that part of his speech in which he said that it is settled that part payment of purchase price was not enough to amount to part performance, Lord Selborne said, at p 479, that the best explanation of that was that the payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony "indicative of a contract concerning land". It is because of this that the taking of possession of the land will often be considered to be an act having strong claims to be regarded as an act of part performance indicative of a contract concerning the land.'
>
> I turn now to the question whether the payment of the sum of $18,200 by the defendant can be regarded as an act of part performance. In my view it can, since the evidence of the defendant being placed in possession of the property rent-free would suggest the existence of a contract in relation to the land, and I find that there was a sufficient part performance of the contract by the defendant to obviate the requirement in s 47(1) of the Property Act Cap 236 for a note or memorandum in writing. Judgment is therefore entered for the defendant and it is ordered that the oral agreement made between the plaintiff and the defendant on 14 January 1983 in respect of sale of house and land at Lot 24 Edgehill in the parish of St Thomas be specifically performed and carried into execution.

The rule in *Rochefoucauld v Boustead*[32]

Equity considers it to be a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land for himself. Thus, a beneficiary under an oral declaration of trust of land may enforce the trust notwithstanding the lack of written evidence as required by statute.

The principle is illustrated by *Kunja v Bruce*.[33] In this case, the plaintiff wished to purchase a plot of land which was being offered for sale for $4,500. The plaintiff had only $3,000, so it was agreed orally between her and the defendant that:

(a) the plaintiff would pay the $3,000 to the defendant;
(b) the defendant would lend the plaintiff the balance of $1,500, to be repaid by monthly instalments; and
(c) the defendant would purchase the property on behalf of the plaintiff.

The vendor subsequently conveyed the property to the defendant.

It was held that the defendant was trustee of the property for the plaintiff. The defendant could not rely on the absence of written evidence of the declaration of trust as required by s 7 of the Statute of Frauds 1677, since equity would not allow a statute to be used as an instrument of fraud. As Persaud J explained:

> The only question that remains to be considered is whether there has been created a trust in favour of the plaintiff. By the Statute of Frauds 1677, s 7 it is provided that any declaration of trust of land must be evidenced by a memorandum in writing signed by the party creating the trust. Similar provision is made by s 4 of our Conveyancing and Law of Property Act (Ch 27,

31 (1883) 8 App Cas 467.
32 [1987] 1 Ch 196.
33 (1984) High Court, Trinidad and Tobago, No 913 of 1967 (unreported). See also *Thompson v Hulse* (1980) 1 Belize LR 399. A recent and somewhat unusual application of the rule occurred in *De Bruyne v De Bruyne* [2010] 2 FLR 1240.

No 12) as regards any contract for the sale or other disposition of land or any interest in land. But the application of the statute is subject to one very important equitable rule. It may not be used as an instrument of fraud; equity will not permit this. Fraud in this context is not confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud which the Statute of Frauds or the corresponding provisions of the Law of Property Act 1925 cannot be called in aid in cases in which no written evidence of the real bargain is available.'[34] In any event, if in this case the defence was relying on the absence of a memorandum in writing, it ought to have been so pleaded. See Ord 18 r 8 of the Rules of the Supreme Court. In *Rochefoucauld v Boustead*[35] it was said (at p 206):

'. . . it is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it is so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute, in order to keep the land himself.'

And coming nearer home, in different language but much to the same effect, Hosein J in the recent case of *Bisram v Samaroo* said:[36]

'. . . notwithstanding the absence of writing, if property is transferred absolutely to another, but at the time of such transfer/conveyance there is cogent evidence that the transferor made it clear that, notwithstanding the apparently absolute character of the transferee's beneficial interest in the land, it was to be held by the transferee upon certain trusts to which he agreed to give effect, then the transferee would be required to carry out those trusts despite the absence of writing.'

Another example of the principle that a statute may not be used as an instrument of fraud is *Bannister v Bannister*.[37] In this case the defendant was the sister-in-law of the plaintiff. She sold her two cottages to the plaintiff at a very reasonable price under an oral agreement that the plaintiff would allow her to live in one of the cottages for as long as she wished. The conveyance of the cottage did not mention this right of the defendant. The defendant gave up possession of the cottage except for one downstairs room where she lived. The plaintiff later claimed possession of the room, contending that the defendant was a tenant at will to whom he had given notice to quit. The defendant argued that the plaintiff held the cottage upon trust for her for her lifetime. Against this, the plaintiff argued that there could be no trust since the property was land, and there was no written evidence of the alleged declaration of trust as required by s 53(1)(b) of the Law of Property Act 1925. The Court of Appeal rejected the plaintiff's argument and held that he held the cottage upon a constructive trust for the defendant for as long as the defendant lived. A constructive trust arose because it would be unfair and unconscionable to allow the plaintiff to perpetrate a fraud on the defendant by refusing to honour the oral agreement; and by virtue of s 53(2) no writing was required.

34 *Bannister v Bannister* [1948] 2 All ER 133 at 136, *per* Scott LJ.
35 [1897] 1 Ch 196 at 206.
36 (1983) High Court, Trinidad and Tobago, No 3417 of 1979 (unreported).
37 [1948] 2 All ER 133.

CHAPTER 3

THE THREE CERTAINTIES

An express trust will not take effect unless the 'three certainties' are present: *viz* (a) certainty of words (or intention); (b) certainty of subject matter; and (c) certainty of objects.

CERTAINTY OF WORDS (OR INTENTION)

The fundamental principle is that an express trust is created where the settlor shows an intention to do so. It is therefore necessary that the settlor's intention to create a trust, as opposed to a mere moral obligation, be indicated with sufficient certainty. It is a question of construction of the words used in the will or trust document,[1] coupled with any admissible extrinsic evidence, as to whether the settlor intended to establish a trust. Since 'equity looks to the intent rather than the form' of words used, there is no need for any precise technical expression to be employed.

The issue of certainty of intention has most often arisen in wills where the testator has used 'precatory' words, that is to say, words such as 'wish', 'hope', 'desire' or 'in full confidence'. The use of precatory words is *prima facie* evidence that a mere moral obligation rather than a trust was intended, but a definitive answer to the question of intention can be given only after the whole will has been construed. In *Re Adams and the Kensington Vestry*[2] a testator gave all his property to his wife 'in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease.' It was held that no trust was created since, looking at the will as a whole, the words 'in full confidence' imposed a mere moral obligation and not an enforceable trust.

In the Barbadian case of *Stuart v Fields*[3] the testator's will contained the following clause:

> . . . I hope it will be possible to create a trust after I am gone to ensure that this land remains forever in the hands of the Stuarts, and that my nieces and nephews always have the above interest which can be passed on to their heirs and successors.

In two further clauses in the will, the testator expressed the desire that any proceeds derived from working the land should be distributed amongst his son, nephews, nieces and aunt in specified proportions, and that 'at no time should the land be [the son's] to sell'.

Chase J held that upon a proper construction of the will, 'the testator intended to create a trust at Blowers for the benefit of his son and of those relatives whom he identified as beneficiaries under the will'.

Three further examples of the approach of the courts in the Caribbean to the question of certainty of intention are *Rosaline v Singh, Re Codrington* and *Da Costa v Warburton*.

In *Rosaline v Singh*,[4] N made a will in which she bequeathed property to R, the father of her children and with whom she had lived in concubinage, 'to dispose of as he thinks fit for the

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1 *Barclays Bank plc v Kenton Capital Ltd* [1994–95] CILR 489, at 498, *per* Smellie J (Grand Court, Cayman Islands). The question of certainty of intention may also arise where there is no will or document to construe, ie where it is alleged that a trust was declared orally. See Chapter 5 below. Where there is no real intention to create a trust, an apparent trust may be held to be a sham and without effect: see *Midland Bank plc v Wyatt* [1995] 1 FLR 696; *Rahman v Chase Bank (C1) Trust Co Ltd* [1991] Jersey LR 103.

2 (1884) 27 Ch D 394.

3 (1991) High Court, Barbados, No 579 of 1988 (unreported).

4 (1974) 22 WIR 104 (Court of Appeal, Guyana).

benefit of himself and his children'. One question in the appeal was whether N had intended to create a trust of the property or whether R was to take beneficially. The Court of Appeal of Guyana held that a binding trust had been created. As Persaud JA explained:

> The learned judge found that the language used by the testatrix Nasiban, to wit, 'to dispose of as he thinks fit for the benefit of himself and his children', was not of a precatory nature, but imperative, and created a binding trust to the extent of one-third of the property in so far as the respondent is concerned. I agree. The court's task when it comes to the construction of a will was stated thus by Lindley LJ in *Re Williams*,[5] and quoted by Douglas CJ in *Re Codrington, USPG v AG*:[6]
>
> '. . . our task is to construe the will before us, and other cases are useless for that purpose except so far as they establish some principle of law. There is no principle except to ascertain the intention of the testator from the words he has used, and to ascertain and give effect to the legal consequences of that intention when ascertained.'
>
> In that case the words used by the testator were, 'in the fullest trust that she will carry out my wishes in the following particulars'. It was held that those words did not create a trust. And so in *Lambe v Eames*,[7] the words 'but desired her at or before her death to give the same unto and among such of his relations as she should think most deserving and approve of' were held not to create a trust.
>
> Similarly, in Re *Adams and The Kensington Vestry*[8], where the words used were, 'in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease', it was held that the widow took an absolute interest in the property, unfettered by any trust in favour of the children. But in *Malim v Keighley*,[9] the testator used the words 'hereby recommending it to my daughter', and in *Pierson v Garnet*[10] the words were 'it is my dying request'. In each case the court interpreted the words as giving rise to a trust.
>
> In the instant case, it is clear that the testatrix intended that the property should go to the benefit not only of the father but also of the children. It would be strange indeed to think that the testatrix would have been willing to pass the entire property over to her reputed husband for his sole use and benefit and overlook her two children, one of whom (the respondent) the evidence discloses was, at the time of the making of the will, only 13 years of age. I am of the opinion that the judge was right in his conclusion on this aspect of the matter.

Re Codrington[11] concerned the will of Christopher Codrington, formerly Chief Governor of the Leeward Islands, which was admitted to probate in Barbados in 1711. The will contained a bequest in the following terms:

> I give and bequeath my two plantations in Barbados to the Society for the Propagation of the Christian Religion in Foreign Parts erected and established by my late good master King William III and my desire to have the plantation continue entire and 300 Negroes at least always kept thereon and a convenient number of professors and scholars maintained there all of them to be under the vows of poverty, chastity and obedience who shall be obliged to study and practise physick chiurgency as well as Divinity that by the apparent usefulness of the former to all mankind they may both endear themselves to the people and have the better opportunity of doing good to men's souls whilst they are taking care of the bodies but the particulars of the constitution I leave to the Society composed of wise and good men.

5 [1897] 2 Ch D 12.
6 (1970) 16 WIR 87 at 90.
7 (1871) 6 Ch App 597.
8 (1884) 27 ChD 394.
9 (1795) 2 Ves 529.
10 (1786) 29 ER 126.
11 *Re Codrington, USPG v Attorney General* (1970) 16 WIR 87, High Court, Barbados. See also *Re Bannochie* (1994) High Court, Barbados, No 893 of 1991 (unreported), p 132 below.

From 1712 onwards the Society applied the whole of the income from the estates towards carrying out the testator's wishes. From 1830, Codrington College was maintained by the Society as an institution of higher learning and students received instruction in theology and classical studies. However, the Society's income from the Codrington estates had become insufficient to maintain the College in its present form and to provide the instruction contemplated by the testator. The Society therefore sought the directions of the court.

The main question to be answered was whether the will created binding trusts or not, particularly in view of the fact that the testator had used the precatory word 'desire' rather than an imperative one.

Douglas CJ held that a binding trust had been created. He said:[12]

> Perhaps it would be appropriate at this stage to state one or two general principles which seem to apply in the construction of this will. Firstly, it must be construed in accordance with the law as it stood in 1702 when it was made. As Lindley LJ put it in *Re March, Mander v Harris:*[13]
>
> '. . . for the purposes of construction, those rules which prevailed when the will was made, with reference to which wills may be fairly presumed to have been passed, must be observed.'
>
> Secondly, the will must be construed according to its language in view of the surrounding circumstances known to the testator when he made his will; *Re Williams*.[14]
>
> Thirdly, a court will not look at a particular clause of a will and construe it by itself, but rather it will look at the whole will to find out the testator's intention; see the judgments of Lindley and Lopes LJJ in *Re Hunter*.[15]
>
> In *Eales v England* the Master of the Rolls, Sir George Trevor, stated:[16]
>
> '. . . words of recommendation and desire in a will are always expounded a devise, and here B is but a trustee . . . if the trustee dies without heir, the lord by escheat will have the land at law, yet subject to the trust here.'
>
> The whole doctrine of precatory trusts was reviewed in the case of *Re Williams* referred to above. Lindley LJ, in the course of his judgment in the Court of Appeal, expressed the view that an expression may be imperative in form. He also observed:[17]
>
> '. . . our task is to construe the will before us, and other cases are useless for that purpose except so far as they establish some principle of law. There is no principle except to ascertain the intention of the testator from the words he has used, and to ascertain and give effect to the legal consequences of that intention when ascertained.'
>
> Before turning again to the will to be construed in the instant case, I will try to summarise the rules I shall apply in determining the testator's intention as set out in the will:
>
> (a) the will must be read in accordance with the law as it stood in 1702;
>
> (b) its language must be construed in the light of the surrounding circumstances known to the testator when he made his will;
>
> (c) it must be looked at as a whole.

His Lordship examined various clauses in the will and concluded that the testator had 'envisaged a collegiate society, regulated in the manner of a religious community, performing the function of training clergy for service in the colonies' and that the testator's scheme 'was the result of consideration of the needs of those whom he sought to benefit'. He continued:

12 (1970) 16 WIR 87 at 89, 90.
13 (1884) 27 Ch D 166 at 169.
14 [1897] 2 Ch 12.
15 [1897] 2 Ch 105.
16 (1702) 24 ER 96 at 97.
17 [1897] 2 ChD 12 at 22.

> In my judgment, the bequest which I am asked to construe meets the requirement of certainty of subject matter demanded by the law. The subject matter here is the Codrington estates. It also achieves certainty as to intention. I have come to the conclusion that the testator intended that the Society should hold the estates in trust to maintain a residential institution of higher learning for the training of scholars in the arts of medicine and theology for service in those territories beyond the seas owing allegiance to his sovereign. The third certainty – that relating to beneficiaries – does not apply in as much as I construe this bequest as a charitable gift, enforceable as such in favour of the objects of the testator's bounty.

The third example is *Da Costa v Warburton*,[18] a decision of the Jamaican Court of Appeal. Here, by his will, the testator made certain devises and bequests to his wife, whom he also appointed executrix. One of the gifts was in the following terms: 'I give and bequeath to my wife, Josephine Lucille, my property known as 52 North Street, Kingston.' The will also contained the following direction: 'I direct my said executrix Josephine Lucille that in the event of her selling the property known as 52 North Street she must give my grandchildren by my daughter Thelma Kelly one quarter of the proceeds from such sale after expenses have been paid. I direct that after my decease and in the event of the decease of my wife . . . before the property . . . is sold, the said property shall revert to my grandchildren by my daughter Thelma Kelly.' At the testator's death his daughter Thelma Kelly was still living and was the mother of eight children.

The executrix sought a ruling of the court as to whether, upon the true construction of the will, she was the absolute beneficial owner of 52 North Street, or whether she took as trustee for the grandchildren.

It was held that the property was given to the widow/executrix in fee simple for her own benefit, and she took the fee simple free from the directions given by the testator in favour of the grandchildren, which were repugnant and void. According to Fox JA:[19]

> The subject matter in this case is identified. It is 52 North Street. But this is the only one of the three essential certainties which has been established. Construing the words employed by the testator, it is impossible to conclude that he intended to create a trust. Undoubtedly he wished to benefit his grandchildren. Nevertheless, if he desired further, and intended that this wish was to be carried out by the imposition upon his widow of the imperative obligations of a trustee, this intention should have been expressed in mandatory form or with otherwise sufficient clarity. As it is, considering the will as a whole, there is every indication that the testator intended that the plaintiff should have complete freedom of action with regard to the enjoyment, disposition and management of the property. These are the recognised incidents of absolute ownership. There is nothing in the will to show that these incidents were meant to be cut down by those burdens and limitations which are intrinsic to a trust.
>
> The requirement of certainty of objects is also missing. If the property is sold during the lifetime of the plaintiff, one quarter of the proceeds of sale must be given to the grandchildren. There is no direction as to the destination of the balance. The beneficiaries are not specified. These could be the plaintiff, or the testator's daughter, Thelma Kelly, or both. The onus of showing that the objects are certain is on the party who alleges the validity of the trust: *Re Saxone Shoe Co Ltd's Trust Deed*.[20] That certainty may appear on a balance of probabilities. Proof to such a standard is not available in this case, and for this reason the argument in favour of a trust is untenable. Where words attached to a gift fail to create a trust, the gift takes effect as an absolute gift: *Lambe v Eames*.[21]

18 (1971) 17 WIR 334 (Court of Appeal, Jamaica).
19 At 337, 338.
20 [1962] 1 WLR 943.
21 (1871) 6 Ch App 597.

CERTAINTY OF SUBJECT MATTER

There are two aspects to the requirement of certainty of subject matter, *viz:*

(a) certainty as to the property to be held upon trust; and

(b) certainty as to the beneficial interests which each beneficiary is to receive.

With respect to (a), the will or other instrument creating the trust must make it clear as to what property is to be bound by the trust. In *Sprange v Barnard*,[22] a testatrix gave property by her will to her husband 'for his sole use', and directed that 'at his death, whatever is left that he does not want for his own use' was to be divided between her sister and brother. It was held that there was no trust, since it was uncertain what would be left at the death of the husband. The husband accordingly took absolutely. And in *Palmer v Simmonds*,[23] where the testator gave 'the bulk of my residuary estate' upon trust, it was held that the trust failed because there was uncertainty as to the amount to be held on trust.

With respect to (b), the beneficial interests to be taken by each beneficiary must be sufficiently certain. If they are not, they will fail, and the trustees will hold on a resulting trust for the testator's estate. Thus, in *Boyce v Boyce*,[24] a testator devised two houses to trustees upon trust to convey one to Maria, 'whichever she may select', and the other to Charlotte. Maria predeceased the testator without making a choice. It was held that Charlotte had no claim under the trust because there was uncertainty as to the beneficial interests which each was to take. There was therefore a resulting trust to the testator's estate. On the other hand, in *Re Golay*[25] where a testator directed his executors to permit his widow to 'enjoy one of my flats during her lifetime and to receive a reasonable income from my other property', it was held that the words 'reasonable income' were not uncertain because they directed an objective determinant of the amount which the court could, if necessary, apply, and the gift therefore did not fail for uncertainty.

Re Golay can be compared with *Re Kolb's Will Trusts*,[26] where a testator by his will directed his trustees *inter alia* to invest the proceeds of sale of the trust property in such 'blue chip' stocks as the trustees should select. It was held that the direction was void for uncertainty, since by specifying 'blue chip' securities, the testator had shown an intention to adopt a purely subjective standard – which was unclear – for identifying the kind of investments required.

There is no failure for uncertainty where the trustees are given a discretion as to the precise amount each beneficiary is to receive. First, these are valid as discretionary trusts. Secondly, where property is given upon trust for a principal beneficiary, subject to the rights of other beneficiaries to an uncertain part of it, the uncertain trusts will fail and the principal beneficiary will be entitled to the whole.[27] Thirdly, in the case of uncertainty as to beneficial interests, especially in family trusts, the court may apply the maxim 'equality is equity' and divide the property equally between the beneficiaries.

In *Hunter v Moss*,[28] M declared himself a trustee of a 5% holding in the issued share capital of a company totalling 1,000 shares. M was the registered owner of 950 shares. It was held that a trust of 50 of M's 950 shares had been created. M's argument that the trust was void for uncertainty of subject matter, in that there was a failure to identify the particular shares to be

22 (1789) 29 ER 320.
23 (1854) 51 ER 704.
24 (1849) 60 ER 959.
25 [1965] 2 All ER 660.
26 [1961] 3 All ER 811.
27 *Lassence v Tierney* (1849) 41 ER 1379.
28 [1993] 1 WLR 934.

held upon trust, was rejected. The court took the view that the test for certainty of subject matter does not necessarily require segregation or appropriation of the trust property. It was sufficient if, immediately after the declaration of trust, the court was able to order the execution of the trust; and since all the shares were of the same category and thus equally capable of fulfilling the trust obligation, the test of uncertainty of subject matter was satisfied by quantifying the trust shareholding. Rimer J explained his decision thus:[29]

> Although I have been referred to no English authority dealing specifically with the point, it was, however, the subject of a decision of the Supreme Court of Missouri in *Rollestone v National Bank of Commerce in St Louis*.[30] In that case the court found that a Mr Milliken had purported to declare himself trustee for the plaintiff, Mr Rollestone, of 10,000 shares with a par value of $1 each in a mining company, such shares forming part of a larger holding held by Mr Milliken. The 10,000 shares were not specifically identified.
>
> With regard to the argument that this rendered the trust void for uncertainty as to its subject matter, Regland J said:[31]
>
> 'It is next contended that, as the evidence does not show that any particular portion of the stock was set apart for Rollestone and a certificate issued therefor, the alleged trust must fail for lack of a definitely ascertained subject. But it clearly appears from Milliken's statements that he was carrying Rollestone for 10,000 shares of the capital stock of the Golden Cycle Mining Company. Now Milliken at that time had more than 1,000,000 shares standing in his name on the corporation's books, all of which were exactly alike in kind and value. There was no earmark by which any one of them could be distinguished from the others, so as to give it additional value or importance. They were like grain of a uniform quality, where one bushel is of the same kind and value as another: *Caswell v Putman*.[32] The words "10,000 shares of capital stock" embodied, therefore, an accurate description of definite property rights in the corporation. A certificate of the same number of shares would have evidenced nothing more: *Richardson v Shaw*.[33] Appellants' contention under this head is disallowed.'
>
> Save that, with respect, I do not wholly agree that it was appropriate to answer the question there in point by analogy with tangible assets such as bushels of grain, I find those observations persuasive and convincing, and I agree with them. They appear to me to be directly in point in the present case . . .
>
> In my judgment, the decision in *Rollestone*[34] reflected the correct principle and I approach the present case in the same way. In the result, I conclude that the trust which I have found the defendant to have declared was not void for lack of certainty as to its subject matter.

CERTAINTY OF OBJECTS

The 'objects' of a trust are the persons who are to benefit from it, that is to say, the beneficiaries. The requirement of certainty of objects means that the identity of the beneficiaries of a (non-charitable) trust must be sufficiently ascertainable. If the particular beneficiaries are mentioned by name (for example, 'upon trust for my Aunt Alice and my Uncle George'), then the requirement is clearly satisfied. Equally, where the settlor does not name the beneficiary but describes him, for example, 'upon trust for my first son to become an attorney-at-law', there is sufficient certainty, even though the identity of the beneficiary may not be immediately known. But

29 *Ibid* at 947.
30 (1923) 252 SW 394.
31 *Ibid* at 398.
32 120 NY 153, 157 NE 287.
33 (1908) 209 US 365, 28 Sup Ct 512.
34 (1923) 252 SW 394.

difficulties may arise where the trust is in favour of a class of persons, such as 'my dependants', or 'my old friends'. If it is not possible to ascertain who are dependants or old friends, then there will be uncertainty of objects and the trust in favour of the class will fail.

The test for certainty of objects differs according to whether the trust is 'fixed' or 'discretionary'. A fixed trust is one in which each beneficiary is allocated a particular beneficial interest by the settlor, for example, where $50,000 is given to trustees 'upon trust for my nephews and nieces in equal shares'. A discretionary trust is one in which the trustees have a discretion as to which members of a class of beneficiaries are to benefit from the trust property and/or in what shares (for example, where $100,000 is transferred to trustees 'upon trust for such of my employees and ex-employees and in such shares as my trustees shall, in their absolute discretion, determine').

In the case of a fixed trust, the trust will fail unless it is possible for the trustees to draw up a complete list of all the beneficiaries, since without such a list the trust property could not be distributed in accordance with the settlor's directions. The same rule used to apply to discretionary trusts, so that if property were held upon trust, for example, for 'such of my employees and their relations as my trustees shall in their absolute discretion determine', the trust would fail unless it were possible to draw up a complete list of all the employees and their relations.[35] But in the leading case of *McPhail v Doulton*,[36] the House of Lords held that this strict test of certainty should not apply to discretionary trusts, and that the rule to be applied to discretionary trusts should be that which applied to powers of appointment, *viz* that it was sufficient if it could be said with certainty that any given claimant was or was not a member of the discretionary class.

In *McPhail's* case the settlor wished to establish a trust for the benefit of the staff of Matthew Hall and Co Ltd and their relatives and dependants. He did this by way of a discretionary trust for the benefit of 'any of the employees or ex-employees of [the company] or any relatives or dependants of such persons in such amounts and on such conditions as the trustees should think fit'. It was argued that the trust should be declared void unless it were possible to make a complete list of all the employees, ex-employees and their relatives and dependants – which, of course, was not possible. It was argued that a complete list was necessary because:

- a trustee's duty to distribute could be performed only if he were able to consider every possible claimant; and
- if the trustees failed to carry out the distribution, the court would be called upon to do so, and it would only do so on the basis of 'equality is equity', which would require a complete list.

The court rejected both arguments. As for the first, it was true that in the case of a trust power (or discretionary trust), a wider and more comprehensive range of inquiry was necessary than in the case of a mere power, but the difference was only one of degree, and it was not necessary for the trustees to be able to make up a complete list of names. As for the second argument, the court could execute the trust, if the trustees failed to do so, without needing a complete list, for, as Lord Wilberforce emphasised:[37]

> . . . it does not follow that execution is impossible unless there can be equal division. As a matter of reason, to hold that a principle of equal division applied to trusts such as the present is certainly paradoxical. Equal division is surely the last thing the settlor ever intended; equal division among

35 *IRC v Broadway Cottages Trust* [1954] 3 All ER 120.
36 [1971] AC 424.
37 *Ibid* at 451.

> all may, probably would, produce a result beneficial to none. Why suppose that the court would lend itself to a whimsical execution? And as regards authority, I do not find that the nature of the trust, and of the court's powers over trusts, calls for any such rigid rule. Equal division may be sensible, and has been decreed, in cases of family trusts for a limited class. Here there is life in the maxim 'equality is equity', but the cases provide numerous examples where this has not been so, and a different type of execution has been ordered, appropriate to the circumstances.

His Lordship continued by suggesting that the court, if called upon to execute a discretionary trust or trust power, would do so 'in the manner best calculated to give effect to the settlor's or testator's intentions' by, for instance, appointing new trustees, or by directing representatives of the classes of beneficiaries to prepare a scheme of distribution, 'or even, should the proper basis for distribution appear, by itself directing the trustees so to distribute'.

CONCEPTUAL (LINGUISTIC OR SEMANTIC) UNCERTAINTY AND EVIDENTIAL DIFFICULTY

We have seen that, after *McPhail v Doulton*,[38] the test for certainty of objects in relation to discretionary trusts and trust powers is that it must be possible to say 'with certainty whether any given individual is or is not a member of the class', and the trust will 'not fail simply because it is impossible to ascertain every member of the class'. This test is sometimes referred to as 'the given postulant test'. Lord Wilberforce added[39] that a distinction must be drawn between linguistic or semantic uncertainty which, if unresolved by the court, renders the gift void', and evidential uncertainty, which is 'difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions'. Thus, in applying the 'given postulant' test, the description of the class must not be so obscure as to preclude the trustees from determining whether any given claimant is within the class. Examples given of obscurity amounting to conceptual uncertainty are the expressions: 'any persons having a moral claim on' the settlor; and 'any old friends' of the settlor. On the other hand, a class of 'first cousins' of the settlor would clearly not be uncertain in this sense.[40]

So long as there is conceptual or linguistic certainty, a discretionary trust will be valid even though there may be evidential uncertainty, in the sense that it may be difficult or impossible to establish the fact that a person is within the concept. Thus, for instance, it may be difficult in certain situations to establish whether or not particular claimants are first cousins, but that will not affect the validity of the trust.

Administrative unworkability and capriciousness

Lord Wilberforce in *McPhail* imposed another limitation on the 'given postulant test'. It is that a discretionary trust will be invalid if 'the definition of the beneficiaries is so hopelessly wide as not to form anything like a class, so that the trust is administratively unworkable',[41] for example, a discretionary trust for 'all the residents of Greater London'. Such a trust would also fail on the ground of capriciousness, because the terms of the trust 'negative any sensible intention on the

38 *Ibid.*
39 *Ibid* at 457.
40 *Ibid.*
41 *Ibid* at 457.

part of the settlor', the 'residents of Greater London' being 'an accidental conglomeration of persons who have no discernible link with the settlor or with any institution'.

In *R v District Auditor, ex p West Yorkshire Metropolitan County Council*,[42] the Council, being threatened with abolition by the central government, settled £400,000 upon trust to spend the capital and income within two years for the purposes of benefiting 'any or all or some of the inhabitants of West Yorkshire' by, *inter alia*, assisting their economic development, providing assistance for youth, ethnic and minority groups, and informing interested persons of the consequences of the proposed abolition of the Council. It was not contended that the trust was charitable, so it was subject to the requirement of certainty of objects which applies to private trusts. It was held that since the number of potential beneficiaries was 2,500,000, the trust was void for administrative unworkability; though it was not 'capricious' because the Council had every reason for wishing to benefit the inhabitants of West Yorkshire, and had a detailed plan for doing so.

Application of the *McPhail* test

In *Re Baden's Deed Trusts (No 2)*,[43] the sequel to *McPhail v Doulton*, the Court of Appeal was asked to declare, on the basis of the *McPhail* test, whether the words 'dependants' and 'relatives' in *McPhail* were sufficiently certain. All three Lords Justices in the Court of Appeal answered the question in the affirmative, but each interpreted the *McPhail* test in a different way. Sachs LJ took the view that a claimant must show that he is within the class, which must be conceptually certain. If he cannot do so, he will be presumed not to be within it:

> Once the class of persons to be benefited is conceptually certain, it then becomes a question of fact to be determined on evidence whether any postulant has on enquiry been proved to be within it; if he is not so proved, then he is not in it. That position remains the same whether the class to be benefited happens to be small (such as 'first cousins') or large (such as 'members of the X Trade Union' or 'those who have served in the Royal Navy'). The suggestion that such trusts could be invalid because it might be impossible to prove of a given individual that he was not in the relevant class is wholly fallacious.[44]

Megaw LJ, on the other hand, said:[45]

> To my mind, the test is satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within the trust; even though, as regards a substantial number of other persons, if they ever for some fanciful reason fall to be considered, the answer would have to be, not 'they are outside the trusts', but, 'it is not proven whether they are in or out'. What is a 'substantial number' may well be a question of common sense and of degree in relation to the particular trust: particularly where, as here, it would be fantasy, to use a mild word, to suggest that any practical difficulty would arise in the fair, proper and sensible administration of this trust in respect of relatives and dependants.

Stamp LJ disagreed with Sachs and Megaw LJJ and adopted a strict approach, holding[46] that it must be possible in the case of any individual to say positively whether he *is* or whether he *is not* within the class, for only then could the trustees make a survey of the range of possible beneficiaries. If it were not possible to do this, in Stamp LJ's view, the trust would be void. On the facts

42 (1986) 26 RVR 24.
43 [1973] Ch 9.
44 *Ibid* at 20.
45 *Ibid* at 24.
46 *Ibid* at 28.

of the present case, Stamp LJ was able to satisfy his strict test by defining 'relations' as 'next-of-kin' rather than as 'descendants from a common ancestor'.[47]

Of the three tests propounded in *Re Baden (No 2)*, that of Stamp LJ seems the least likely to be followed in future cases, since it appears almost to return to the discarded 'complete list' formula. That of Megaw LJ may also be criticised on the ground that it is a diluted version of the given postulant test which creates a 'class within a class' by, as it were, varying the class laid down by the settlor to include only a 'substantial number' of objects. It is arguable that such a reduced class would not accord with the intention of the settlor. As Lord Upjohn put it:[48]

> The trustees have a duty to select the donees of the donor's bounty from among the class designated by the donor; he has not entrusted them with any power to select the donees merely from among known claimants who are within the class, for that is constituting a narrower class, and the donor has given them no power to do this.

Nor is Sachs LJ's viewpoint beyond reproach, for it could possibly lead to a trust being upheld where there was only one qualifying beneficiary within the class—an approach which had been rejected by the House of Lords in *Re Gulbenkian's Settlements*.[49]

An example of the application of the *McPhail v Doulton* test in the Caribbean is the Bahamian case of *Re Butler, Oakes v Oakes*.[50] Here, the testatrix's will contained the following provision:

> 4(a) I Give and Bequeath unto my Trustees to divide amongst such of my friends and relatives living at the time of my death the jewellery fine art and other personalty then owned by me in such shares and quantities as my Trustees may select and appoint to them. Any such jewellery not so appointed by my Trustees shall be disposed of as part of my residuary estate. It is my hope that in making said selections and appointments my Trustees will be guided by such suggestions I have made to them during my lifetime.

Malone Snr J had no difficulty in finding that the word 'relatives' was sufficiently certain. A relative of X was a person who could trace descent from a common ancestor with X. The argument that the word 'relative' failed the *Gulbenkian* and *McPhail v Doulton* tests because, whilst it was possible to say of a given individual that he was a relative of X, it could not be said with certainty that a person was not a relative of X, was rejected since, as Brightman J had said at first instance in *Re Baden's Trusts (No 2)*:[51]

> In my view this argument is fallacious. In practice, the use of the expression 'relatives' cannot cause the slightest difficulty. A supposed relative to whom a grant is contemplated would, in strictness, be bound to produce the relevant birth and marriage certificates or other sufficient evidence to prove his or her relationship to an officer or ex-officer or employee or ex-employee. If the relationship is sufficiently proved, the trustee will be entitled to make a grant. I do not see why the court should be constrained to hold the trust void merely because countless persons exist who are

47 Similarly, in *Elias v Matouk* (1993) 3 TTLR 5, where a trustee was directed to use the testator's residuary estate at his discretion 'to assist those who are in need and for the sole purposes of family use', Rajack J stated, citing *Pigg v Clarke* (1876) 3 Ch 672, that the word 'family' could be used in three senses: (i) as meaning the whole household, including servants and perhaps lodgers; or (ii) to mean everybody descended from a common stock, ie all blood relations and possibly the spouses of such persons; or (iii) to mean children only. The third, meaning 'children', was the primary meaning, and it was held that if that interpretation were put on the word 'family', 'then the court will have no difficulty in ascertaining whether at any given time a person is or is not a member of the class of persons intended to benefit under the trust'.

48 *Re Gulbenkian's Settlements* [1970] AC 508 at 524.

49 *Ibid*.

50 (1987) Supreme Court, The Bahamas, No 539 of 1987 (unreported).

51 [1972] Ch 607 at 626.

not able to prove their relationship, who are not even interested in proving their relationship and whom the trustees have no intention of benefiting.

With respect to the word 'friends', notwithstanding that, as Roxburgh J had commented, 'friendship draws a picture particularly blurred in outline',[52] it was possible to define friends by applying the guidelines suggested by Browne-Wilkinson J in *Re Barlow's Will Trusts*, as follows:[53]

(a) the relationship must have been a long-standing one;
(b) the relationship must have been a social one as opposed to a business or professional one; and
(c) although there may have been long periods when circumstances prevented the testator and the applicant from meeting, when circumstances did permit they must have met frequently.

Malone Snr J concluded by suggesting that if in any case the trustees entertained any real doubt as to whether a claimant qualified, they could apply to the court to decide the issue.

52 *Re Coates* [1955] Ch 495 at 499.
53 [1979] 1 All ER 296 at 300. It has been argued that since *Re Barlow* concerned a gift subject to a condition precedent and not a discretionary trust, the less strict approach to certainty taken in that case is inapplicable to trust cases. See Hanbury and Martin, *Modern Equity*, 15th edn, pp 109, 110.

CHAPTER 4

CONSTITUTION OF TRUSTS

We have seen that in order to create an express trust there must be an intention on the part of the settlor to create a trust,[1] and any necessary statutory formalities, such as writing, must be complied with.[2] There is, however, another requirement, *viz* that the trust must be completely constituted. This means that the legal estate in the trust property must be properly vested in the trustees. There are two methods of doing this:

(a) by the legal owner transferring the legal title in the property to trustees, with a direction that they should hold the property for the benefit of the beneficiaries; or

(b) by the legal owner of the property declaring himself a trustee of it for the benefit of the beneficiaries.

There must accordingly be not only a declaration of the trust, in the sense of a statement as to what property is to be held upon trust and for whom, but also a vesting of the property in the trustee or trustees.

TRANSFER OF LEGAL TITLE TO TRUSTEES

In order to accomplish this, the method of transfer appropriate to the particular type of property must be used. For example, in the case of a transfer of land, a deed of conveyance would be necessary; in the case of chattels, there must be physical delivery or a deed of gift; in the case of a bill of exchange, there must be endorsement; and in the case of shares, there must be execution of a share transfer form followed by registration of the new legal owner in the company's register. In the leading case of *Milroy v Lord*[3] there was a failure to vest the legal title in trustees.

In *Milroy v Lord* the settlor executed a voluntary deed purporting to transfer, to Lord, 50 shares in the Bank of Louisiana upon trust for the plaintiffs. The legal title to the shares could be transferred only by registration of the transferee in the books of the bank. Lord held a power of attorney, executed by the settlor, which would have entitled him to transfer the shares. The settlor handed over the share certificates to Lord and directed him to procure the registration of the shares in his (Lord's) name, but Lord failed to exercise the power and the transfer was never registered. The question was whether a trust of the shares had been created in favour of the plaintiffs.

It was held that no trust had been created. There was no gift of the shares to the plaintiffs, nor was there any transfer of the shares to the intended trustee. Further, the court would not infer that the settlor was trustee for the plaintiffs. Turner LJ said:

> I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be

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1 See above, p 31 *et seq*.
2 See above, Ch 2.
3 [1861–73] All ER Rep 783.

> equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried.
>
> Applying, then, these principles to the case, there is not here any transfer either of the one class of shares or of the other to the objects of the settlement, and the question therefore must be, whether a valid and effectual trust in favour of those objects was created in the defendant Samuel Lord or in the settlor himself as to all or any of these shares. Now it is plain that it was not the purpose of this settlement, or the intention of the settlor, to constitute himself a trustee of the bank shares. The intention was that the trust should be vested in the defendant Samuel Lord, and I think therefore that we should not be justified in holding that by the settlement, or by any parol declaration made by the settlor, he himself became a trustee of these shares for the purposes of the settlement. By doing so we should be converting the settlement or the parol declaration to a purpose wholly different from that which was intended to be effected by it, and, as I have said, creating a perfect trust out of an imperfect transaction.

Settlor or donor doing everything within his power to transfer

It seems to be established that if the donor has done everything in his power to transfer the legal title of shares to a donee, and the remaining formalities are outside his authority, the property will be regarded as effectively transferred *in equity*, and the donor will be deemed to hold the legal title upon trust for the transferee. Thus if a donor intends to make a *gift* of shares, in order to transfer the legal title he must execute a share transfer and the company must then enter the transferee's name in the register as the new legal owner. If the donor executes a proper transfer but the directors of the company refuse to enter the transferee's name in the register (as the directors of a private company are entitled to do) there will be no valid transfer of the shares at law; but in equity, according to *Re Rose*, the donor becomes a trustee of the shares for the donee as soon as the share transfer is lodged with the company, and the transferee thereupon becomes the equitable owner of the shares. The same principle applies where a settlor intends to transfer the legal title of property *to trustees to be held upon trust* for a beneficiary. Thus, if the settlor (S) executes a share transfer in favour of a trustee (T) and lodges the transfer with the company, having declared trusts in favour of a beneficiary (B), T becomes equitable owner, holding the property on a sub-trust for the benefit of B. If the transfer is later registered, T becomes the legal owner, holding upon trust for B, and S drops out of the picture.

The case from which these principles are derived is *Re Rose, Rose v IRC*[4] where, on 30 March 1943, the settlor executed a transfer of 20,000 shares in an unlimited company to his wife. The transfers were in the form required by the company's articles of association. The directors had power under the articles to refuse to register a transfer, but the transfer was in fact registered on 30 June 1943. When the settlor died, the question arose as to whether the effective date of the transfer was 30 March or 30 June, as estate duty would be payable on the shares if it were the latter, but not if it were the former. It was held that the transfer was complete and effective on 30 March, as the settlor had by then done everything in his power to transfer the shares.

4 [1952] 1 All ER 1217.

Evershed MR reasoned that:

> . . . if a man executes a document transferring all his equitable interest, say, in shares, that document, operating and intended to operate as a transfer, will give rise to and take effect as a trust, for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest.[5]

The reasoning of Evershed MR in *Re Rose* has been persuasively criticised[6] on the ground that there must be either:

(a) an effective transfer of the shares at law; or
(b) a declaration of trust,

otherwise the purported transfer will have no effect.

On this view, if, as in *Re Rose*, it is clear that the donor or settlor did not intend to declare himself a trustee, there can be no question of any equitable title passing, for equity will not perfect an imperfect gift.

Re Rose may be contrasted with *Re Fry*.[7] In this case the intending donor, who was resident in the USA, executed transfers of shares in an English company, partly by way of gift to his son and partly to a trust, and sent the transfers to the company for registration. The company was unable to register the transfers because the consent of the Treasury had not been obtained under the Defence (Finance) Regulations, which prohibited the transfer of any securities by a person resident outside the sterling area unless Treasury consent was first obtained. The forms required for obtaining this consent were forwarded to the donor, who signed and returned them, but died before the consent was given.

It was held that the trust was not completely constituted and so the shares did not pass either to the son or to the trust but instead formed part of the residuary estate. In order to perfect the transaction, it would have been necessary for the donor to effect confirmatory transfers after the consent had been given, and his death had made this impossible. It could not therefore be said that the donor had done everything required of him to effect the transfer of the shares.

An interesting application of these principles is to be found in a Jamaican case, *Re Desulme*.[8] Here, D made a settlement comprising, *inter alia*, shares in two private companies in which he had a majority shareholding, and executed forms of transfer of the shares in favour of the trustees, but he died before the trustees could be registered as legal owners. One of the issues in the case was whether D, as settlor, had done everything in his power to transfer the legal title so as to vest an equitable title in the trustees under the principle in *Re Rose*. Clarke J, after concurring with the criticisms made of Evershed MR's reasoning in that case,[9] went on to hold that the settlor in the instant case had not in any event done 'everything in his power to see that the transfers were properly registered', since, bearing in mind that he had a controlling interest in both companies, he had failed to ensure that properly constituted meetings of the boards of directors had been held in order to approve registration of the transfers. Clarke J said:

5 *Ibid* at 1222.
6 See Hanbury and Martin, *Modern Equity*, 15th edn, p 118.
7 [1946] Ch 312.
8 (1997) Supreme Court, Jamaica, No E352 of 1994 (unreported).
9 See above.

> The settlor, who had it in his power to make appropriate arrangements for the registration of the transfers of his shares . . . failed to do all that was necessary within his powers to vest the legal title to the shares in the trustees . . . There was accordingly, thanks to him, no effective transfer of property to the trustees of the settlement prior to his death, and the cardinal principle that there is no equity to perfect an imperfect gift renders the purported trusts of the voluntary settlement incompletely constituted and so void and unenforceable.

In the context of voluntary transfers of registered land, the transferee does not become legal owner until his name is entered on the Register as the new proprietor. *Mascall v Mascall*[10] is authority for the proposition that where this final step has not taken place but the transferor has done everything in his power to effect the transfer (such as by executing the transfer form and delivering it to the transferee together with the land certificate or duplicate certificate of title), the transferor will be regarded as holding the property on a trust enforceable by the transferee. In *Mascall*, a father executed a transfer of a house to his son, a volunteer, and handed over the land certificate to the son. The transfer was sent to the Inland Revenue for stamping, and returned. One further step remained, which was that the documents needed to be sent to the Land Registry, so that the son could be registered as proprietor and obtain the legal title. Before this had been done, a dispute arose between the two, and the father sought a declaration that the transfer was ineffective. It was held that the gift was complete; the father had done everything within his power to effect the transfer and the remaining step – the application to the Registry – could be taken by the son, from whom the father had no right to recover the transfer documents.

An attempt to rely on the *Mascall* principle failed in the Cayman case of *Millwood v Brown*,[11] where a transfer form relating to registered land had been executed by the transferor, but was never delivered to the transferee. Murphy J held that the failure to hand the transfer form to the transferee in this case distinguished it from *Re Rose* and *Mascall v Mascall*. He explained:[12]

> It must be borne in mind that this purported transfer was a gift, not a contract. The gift could be revoked at any time before delivery. The difficulty is in identifying the point of no return. That is a matter of the donors' intention and actions. The respondents' counsel's view is that the gift was perfected when the donors signed the transfer form. I do not agree. The gift could not be perfected until the transfer form was at least delivered to the donee. The law has steadfastly provided an objective test of intent in this context . . . The situations in cases like *Re Rose* and *Mascall v Mascall* are quite different, given either the clear intent of the donor (in *Rose*), or the fact that the donor had objectively delivered the title *indicia* by putting it beyond his power to recover or reclaim them (in *Mascall*).

The concept of 'a donor's having done everything within his power' to effect a transfer has more recently been reviewed by the English Court of Appeal in *Pennington v Waine*,[13] a controversial decision which has seemingly introduced a greater measure of uncertainty into this area. Here the donor, A, wished to transfer 400 shares in a private company to her nephew, H, in order that he could qualify for a directorship. A completed a share transfer form which she sent to her accountant, P, but P failed to forward the form either to the company or to H. Owing to the failure to deliver the form, no transfer of the shares was made to H. A later signed a form consenting to H becoming a director of the company but by her will she gave him insufficient shares for him to acquire a controlling shareholding in the company. If A had transferred the 400 shares to H before her death, H would have obtained such control.

10 (1984) 50 P&CR 119.
11 [1998] CILR 344.
12 *Ibid* at 354.
13 [2002] 4 All ER 21.

Arden LJ, with whom Schiemann LJ concurred, reasoned that a gift is complete in equity if a stage has been reached where it would be unconscionable for the donor to retract. In the instant case, an equitable interest in the shares had passed to H because it would have been unconscionable for A to have refused to transfer the 400 shares to him. Arden LJ continued:[14]

> There must be, in the interests of legal certainty, a clearly ascertainable point in time at which it can be said that the gift was completed, and this point in time must be arrived at on a principled basis. There are countervailing policy considerations which would militate in favour of holding a gift to be completely constituted. These would include effectuating, rather than frustrating, the clear and continuing intention of the donor, and preventing the donor from acting in a manner which is unconscionable . . . There is next the pure question of law: was it necessary for [the donor] to deliver the form of transfer to [the nephew]? . . . The ratio of *Re Rose* was, as I read it, that the gifts of shares in that case were completely constituted when the donor executed share transfers and delivered them to the transferees, even though they were not registered in the register of members of the company until a later date. . .Even if I am correct in my view that the Court of Appeal took the view in *Re Rose* that delivery of the share transfers was there required, it does not follow that delivery cannot in some circumstances be dispensed with. Here, there was a clear finding that [the donor] intended to make an immediate gift. [The nephew] was informed of it. Moreover, I have already expressed the view that a stage was reached when it would have been unconscionable for [the donor] to recall the gift. It follows that it would also have been unconscionable for her personal representatives to refuse to hand over the share transfer to [the nephew] after her death. In those circumstances, in my judgment, delivery of the share transfer before her death was unnecessary so far as perfection of the gift was concerned.

The decision in *Pennington* has been persuasively criticised on the grounds, first, that the 'unconscionability' test introduces uncertainty as to the stage at which a failed absolute gift can take effect in equity, and as to whether and when a beneficial interest has passed (a question which may be critical for taxation purposes), and, second, that since on the facts the donor had clearly not done everything in her power to effect the transfer, the decision seems to fly in the face of the principle that a donor is entitled to change her mind and to refuse to transfer the property.[15]

Where settlor or donor is equitable owner

If the donor is not the owner both at law and in equity, but has merely an equitable interest in the property, a trust of that equitable interest can be completely constituted by an assignment of the interest to trustees in writing, in conformity with LPA 1925, s 53(1)(c) (UK); Statute of Frauds 1677, s 9; and Cap 236 (Barbados), s 60(3). There is no need for the equitable owner to procure a transfer of the legal title from the existing trustees to the new trustees. Thus in *Kekewich v Manning*,[16] where trustees held shares upon trust for A for life, remainder to B, and B assigned his equitable interest to C upon trust for D, it was held that a valid trust of the equitable interest was created, though the legal title remained vested in the original trustees. C thus held on a sub-trust for D. Alternatively, B could have assigned his equitable interest in writing directly to D, or he could have directed the original trustees in writing to hold it henceforth for the benefit of D.

14 *Ibid* at 230, 231.
15 See M Halliwell [2003] Conv 192; H Tjio and T Yeo [2002] LMCLQ 296.
16 (1851) 21 LJ Ch 577.

DECLARATION OF SELF AS TRUSTEE

The owner of property may validly declare himself henceforth a trustee of the property for the benefit of a beneficiary. All that is required is the *intention* to declare himself a trustee. There is no need for any express words such as, 'I hereby declare myself a trustee', so long as the intention to declare a trust is clear.[17] No writing is required, unless the property is land, in which case written evidence is required by LPA 1925, (UK), s 53(1)(b); Statute of Frauds 1677, s 7; Cap 236 (Barbados), s 60(2).

In *Paul v Constance*,[18] C left his wife and went to live with Miss P. C received nearly £1,000 in damages in a personal injury claim, and he used the money to open a deposit account at the bank. The account was put in the sole name of C, in order to avoid embarrassment. On many occasions, C told Miss P that the money in the account was as much hers as C's. After C's death, it was held that, in the circumstances, there was sufficient evidence of an intention on C's part to declare himself a trustee of half of the money in the account for the benefit of Miss P, and she was accordingly entitled to a half share.

Another instance of a valid declaration of self as trustee by a legal owner occurred in a Canadian case, *Shabinsky v Horwitz*,[19] where it was held that service charges added to customers' bills in a hotel were received by the proprietors of the hotel upon trust for the hotel catering staff. Fraser J explained the position thus:

> I have no hesitation at all in finding the 15% or other percentages charged for gratuities was paid into the hands of the defendant by people deliberately given the impression they were paying into a fund for gratuities in lieu of individual tips and paid by them for that purpose. It does not matter how one describes it. This is not a matter for highly technical wording, but in substance they thought they were being charged to obviate the necessity of tips. It is not an uncommon practice to add such charges to a hotel bill. There was ample evidence that it is not an uncommon practice in the trade to do this and dispose of it among staff that are concerned in the functions for which the amounts were paid. I am speaking particularly of the areas with which we are concerned here where there are functions in which people are not tipping individually and something is given to cover the help. I also find it was paid in. It is a well understood practice in the trade in these matters and was intended not to give any beneficial interest to the defendants, but for distribution among the members of their staff concerned in the function on an equitable basis. I find that the defendant caused or permitted people to think they were paying for that purpose. They were billed as if they were, and then the moneys were simply used to take care of ordinary expenses for wages and that sort of thing, and I can see nothing in the evidence that warranted the defendant in taking what amounts to a beneficial interest in those funds paid in to him and using them for a different purpose than that for which they were paid.
>
> In the present case, the subject matter of the trust is clear. The amount is agreed on, and the books show what went in on these gratuities during the period in question. It is equally clear in my opinion that the persons paying into that fund did not intend that the defendant should take any beneficial interest in it, and the defendant, Horwitz, was perfectly well aware of this. Unfortunately, the objects of the trust were not spelled out with much precision, but in my opinion, on the evidence before me, I am satisfied that they can be ascertained and a proper distribution made in accordance with normal practice under such circumstances without any serious difficulty. It may be a bit of a tedious job, but I am satisfied it can be done and the persons intended to be benefited can be easily ascertained, and I must therefore find that the defendants

17 *Richards v Delbridge* (1874) LR 18 Eq 11 at 14,15.
18 [1977] 1 All ER 195.
19 (1973) 32 DLR (3d) 318.

> hold these moneys in trust for what I may somewhat loosely describe as catering staff or those persons who worked on the catering staff during the period in question.

On the other hand, in *Jones v Lock*,[20] J, the father of a nine month old baby, produced a cheque for £900 payable to himself and said, in the presence of witnesses: 'Look you here; I give this to baby', and put the cheque into the baby's hand. J's wife feared that the baby might tear up the cheque, and J added: 'Never mind if he does; it is his own, and he may do what he likes with it.' J then took the cheque back and locked it in his safe. Six days later, he died, and the cheque was found among his personal effects. The question was whether the baby was entitled to the cheque. J had not validly transferred the title to the cheque to the baby because he had not endorsed it. Nor could it be said that he had declared himself a trustee of it, because he had intended an outright gift, and there was no evidence that he had intended to burden himself with the duties of trusteeship, which would have required him, *inter alia*, to invest the money. Thus, the money represented by the cheque formed part of J's estate. This case illustrates the principle that an imperfect gift will not be construed as a declaration of trust.

The Caribbean cases of *Surejpaul v Ramdeya* and *Ross v The Royal Bank Trust Co (Barbados) Ltd* also illustrate this principle. In *Surejpaul v Ramdeya*,[21] G, the owner of a house by transport, had let one of the rooms to a tenant. G served the tenant with a notice in these terms: 'I hereby give you notice that the house situated at Lot 3, Barr Street, Kitty Village, is now the property of my son-in-law Surejpaul. You are therefore requested to pay all house rent to him in future as he is the present owner and landlord of the above property.' Surejpaul was not present when the notice was served.

Having held that the service of notice upon the tenant did not in law operate as a delivery of the house to Surejpaul, since no transfer of immovable property could be validly made unless perfected by transport, Duke J refused to construe the notice as a declaration of trust. He said:

> The document shows that the question of a trust was entirely absent from the mind of Gejadhar, and that it purported to effect a gift to be completed, whenever the plaintiff was ready, by transport.
>
> In *Richards v Delbridge*,[22] Sir George Jessel MR said: 'A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by these acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of legal title, may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words "I declare myself a trustee", but he must do something which is equivalent to it, and use expressions which have that meaning, for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning . . . The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.'
>
> Sir George Jessell MR in *Richards v Delbridge* stated that the following remarks of Turner LJ in *Milroy v Lord*[23] contain the whole law on the subject:

20 (1865) LR 1 Ch App 25.
21 [1942] LRBG 309, Supreme Court, British Guiana.
22 (1874) LR 18 Eq 11 at 14, 15.
23 [1861–73] All ER Rep 783.

> If a settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.'
>
> When these pronouncements by Sir George Jessel MR and by Turner LJ are applied to the document of 14 March 1940, and to the facts and circumstances of this case, it will be seen that this court cannot construe that document as a declaration of trust. There was an incomplete gift, and there is nothing in the document from which there can be inferred an intention on the part of Gejadhar to become a trustee.

In *Ross v The Royal Bank Trust Co (Barbados) Ltd*,[24] the deceased, shortly before his death, deposited the sum of $31,008 at a branch of the Royal Bank of Canada. After the grant of probate of the deceased's will, his executor took possession of a safe deposit box at another branch of the same bank which contained an envelope with the appellant's name written on it and marked 'personal'. The envelope contained a deposit receipt for the $31,008 in the deceased's name. The executor sought the directions of the court as to whether the amount belonged to the appellant or to the deceased's estate. Evidence was adduced which showed that the deceased intended that the $31,008 should belong to the appellant.

The OECS Court of Appeal, affirming the trial judge's decision, held that the $31,008 formed part of the estate as there was no completed gift of the amount, nor any declaration of trust nor *donatio mortis causa*. In the words of Peterkin JA:

> It has been submitted on behalf of the appellant that the facts constituted a valid trust. Counsel argued that, apart from statute, there are no requirements as to writing or other formalities in connection with the creation of trusts or dealings with equitable interests, whether *inter vivos* or testamentary, and whether relating to real or personal property. He referred to the evidence, and asked the court to draw the necessary inference in the instant case.
>
> In dealing with this issue, the trial judge has stated:
>
> 'The law then is clear that an imperfect gift will not be construed as a declaration of trust because equity will not interfere to perfect an imperfect gift, and for the donor to be a trustee he must have expressly declared himself to be such, or done something or used expressions which are equivalent to it. The facts in this instant matter certainly do not point to that conclusion unequivocally.'
>
> I would agree.

A novel situation arose in the recent case of *Choithram (T) International SA v Pagarani*,[25] a Privy Council appeal from the British Virgin Islands. T, a wealthy entrepreneur, had shortly before his death executed a trust deed establishing a foundation for charitable purposes. T was one of the trustees of the foundation. Immediately after signing the deed, T stated orally that he was giving all his assets in the BVI, consisting of deposit balances and shares, to the foundation. No transfers of the shares were executed by T during his lifetime. The trial judge and the BVI Court of Appeal held that T had intended to make an immediate absolute gift to the foundation, but had failed to vest the property in the trustees; therefore, there was an incomplete gift which could not be enforced against T's estate; nor could such an imperfect gift be construed as a declaration of trust. Lord Browne-Wilkinson, however, delivering the judgment of the Privy Council, exposed the fallacy of this reasoning. After alluding to the novelty of the situation, he pointed out that, although equity would not aid a volunteer, it would not strive officiously to defeat a gift. In the present case, since the foundation had no legal existence apart from the trust

24 (1979) 1 OECSLR 29 (St Kitts, Nevis and Anguilla).
25 (2000) *The Times*, 30 November.

declared by the foundation trust deed, the words 'I give to the foundation' could only mean 'I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed'. Thus, although T's words were apparently words of outright gift, they were essentially words of gift on trust, and since T was himself one of the trustees, the trust had been completely constituted. There could in principle be:

> . . . no distinction between the case where the donor declared himself to be sole trustee for a donee or a purpose, and the case where he declared himself to be one of the trustees for that donee or purpose. In both cases, his conscience is affected, and it would be contrary to the principles of equity to allow such a donor to resile from his gift.

Covenants to settle

If a settlor has not validly declared himself a trustee, nor validly transferred the trust property to trustees, but has only covenanted (that is to say, promised by deed) with the trustees that he will transfer the property to them upon trust at some time in the future, there is no completely constituted trust of that property. As Maudsley and Burn put it, 'the question commonly arises in connection with family settlements, either where the covenantor has failed to comply with a covenant to establish a settlement, or where a spouse, being a beneficiary under a marriage settlement, covenants to settle after-acquired property and fails to do so'.[26]

Here a distinction is drawn between (a) persons who have given consideration for the promise, and (b) volunteers. The rule is that a *volunteer* beneficiary cannot enforce such a covenant nor, as we shall see, can the trustees enforce it on his behalf. But a beneficiary who has given consideration can enforce it. 'Consideration' here means either money or money's worth or, in a marriage settlement, the consideration notionally given by persons 'within the marriage consideration', *viz* the husband, wife and issue of the marriage. Persons outside the marriage consideration, such as next of kin, and children of a former or subsequent marriage, are volunteers. On the other hand, where a trust has been completely constituted by vesting the legal title of the trust property in the trustees, any beneficiary may enforce the trust, and it is irrelevant whether he is a volunteer or not. Furthermore, where property is given by will, the rules relating to constitution of trusts do not apply, since on the death of the testator his property vests in his executors who are bound to carry out the provisions of the will in favour of volunteer beneficiaries.

The distinction between the position of beneficiaries who have given consideration for a covenant and that of volunteer beneficiaries is illustrated by *Pullan v Koe*[27] and *Re Plumptre's Settlement*.[28] In the former case, a marriage settlement made in 1859 contained a covenant by the wife that she would settle upon the same trusts any property she might later acquire of £100 and above. In 1879 she received a gift of £285 but did not transfer that sum to the trustees. She spent part of it, and the rest was invested in bearer bonds in her husband's name until his death in 1909. The trustees of the marriage settlement claimed the bonds from the husband's executors on behalf of the children of the marriage. It was held that any action by the trustees on the covenants at common law had by then become statute-barred, but that the money received by the wife had been subject to the trusts of the marriage settlement from the moment it was received; consequently, the children of the marriage had an equitable right to procure the transfer of the bonds by the executors to the marriage settlement trustees.

26 *Trusts and Trustees: Cases and Materials*, 5th edn, 1996, p 124.
27 [1913] 1 Ch 9.
28 [1910] 1 Ch 609.

In *Re Plumptre's Settlement*[29] a husband and wife, on their marriage, covenanted with their trustees to settle the wife's after-acquired property for the benefit of herself and her husband successively for life, then for the issue of the marriage, and then for the wife's next of kin. The husband purchased some stock in the wife's name and the wife later sold it and invested the proceeds in other stock. She then died without issue, and her husband became administrator of her estate. It was held that the next of kin, being volunteers, could not enforce the wife's covenant against her husband as administrator; nor could the trustees sue for damages for breach of covenant because the claim was statute-barred.

On the other hand, in *Cannon v Hartley*,[30] a deed of separation executed in 1941 by the husband, his wife and daughter provided that the husband would settle, in favour of the wife and daughter, half of what the husband would receive under the will of either of his parents, being worth more than £1,000. In 1944 the husband inherited property worth more than £1,000, but failed to settle the property. The wife died in 1946. The daughter brought an action for damages against the father for breach of the covenant and was successful, on the ground that she was a party to the covenant. Had she not been a party to the deed, she would, being a volunteer, have been unable to compel the father to settle the property.

Action for damages by trustees

Volunteer beneficiaries cannot, as we have seen, directly enforce a covenant to settle property upon trust. The next question is whether the trustees, with whom the covenant was made, can sue at common law for damages for breach of covenant and hold the damages upon trust for the beneficiaries. The authorities answer a resounding 'no' to this question. In *Re Pryce*[31] there was a marriage settlement made in 1887 in which the wife had covenanted to settle her after-acquired property. The husband died in 1907 and there were no issue of the marriage. There was an ultimate remainder in favour of the wife's next of kin, who were volunteers. The wife did not wish the covenant to be enforced. Eve J held that the trustees ought not to take any steps to compel the wife to transfer her after-acquired property since the court would not give [the volunteers] by indirect means what they could not obtain by direct procedure.[32] In *Re Kay's Settlement*[33] the court went further and actually directed the trustees not to sue to enforce a covenant to settle after-acquired property in favour of volunteers, nor to recover damages for breach of the covenant.

Another obstacle to recovery by the beneficiaries through the medium of an action for damages for breach of covenant by the trustees is that, even if the trustees could sue on the covenant, it is not clear whether they could recover substantial damages or whether their damages would be nominal only, because they themselves would have suffered no loss. In *Re Cavendish-Browne's Settlement Trusts*[34] there was a voluntary settlement containing a covenant to settle real and personal property to which the covenantor was entitled under the wills of two persons. When the covenantor died she had not conveyed to the trustees a share of unconverted real estate in Canada to which she had become entitled under the wills. The question was whether the value of the land ought to be paid to the trustees by way of damages for breach of

29 *Ibid*. See also *Jefferys v Jefferys* (1841) 41 ER 443.
30 [1914] 1 All ER 50.
31 [1917] 1 Ch 234.
32 *Ibid* at 241.
33 [1939] 1 All ER 245.
34 [1916] WN 341.

covenant. It was held that the trustees were entitled to recover from the covenantor's personal representatives substantial damages for breach of the covenant, and that the measure of damages was the value of the property which would have come into the hands of the trustees if the covenant had been duly performed.[35] It may be noted, however, that *Re Cavendish-Browne* concerned a covenant to settle specific property and not after-acquired property as in *Re Pryce* and *Re Kay*, so that it must remain an open question whether substantial damages could be recovered by the trustees in the latter type of case.

Trust of the promise

It has been contended by several commentators that *Re Pryce* and *Re Kay* were wrongly decided because in those cases there was a completely constituted trust of the benefit of the promise which was enforceable by the trustees or by the volunteer beneficiaries themselves.[36] Under this concept, the trustees are trustees not of the property itself – because that has not been transferred to them – but of the *promise*, which is a chose in action. The authority cited is *Fletcher v Fletcher*.[37] In this case, Ellis Fletcher, by voluntary deed, covenanted to pay his trustees £60,000 to be held upon trust for, ultimately, his illegitimate son, Jacob. He died without fulfilling his promise. The trustees refused to sue for the amount. It was held that Jacob could enforce the covenant himself, joining the trustees as co-defendants, because there was a completely constituted trust of the promise for his benefit.

However, *Fletcher's* case is a weak authority. In the first place, it was decided in 1844, before the rule became established that in order to have a trust of the benefit of a contract it must be shown that the trustees intended to enter into the contract specifically as trustees for the benefit of the third party.[38] Such intention was completely lacking in *Fletcher* because the trustees did not learn of the existence of the covenant until after Ellis Fletcher's death, and when they did learn about it they wished to have nothing to do with it. Secondly, in *Re Cook's Settlement Trusts*,[39] Buckley J denied the possibility of a trust of a promise to settle after-acquired property. He took the view that the principle in *Fletcher* applied only where there was 'a debt enforceable at law' which was 'capable of being made the subject of an immediate trust'.[40] In *Re Cook's Settlement*, Sir Francis Cook had entered into a voluntary settlement in which he covenanted with his father and the trustees that if certain valuable paintings which had been transferred to him by his father should be sold by him, during his lifetime, he would pay over the net proceeds of sale to the trustees to be held on the trusts of the settlement. He subsequently gave one of the paintings (a Rembrandt) to his wife, who wished to sell it. It was held that as the beneficiaries under the settlement had given no consideration for the promise, they could not require the trustees to take steps to enforce it; nor were they beneficiaries of a trust of the promise, since in this case:

> . . . the covenant with which I am concerned did not, in my opinion, create a debt enforceable at law, that is to say, a property right, which, although to bear fruit only in the future and upon a contingency, was capable of being made the subject of an immediate trust, as was held to be the case in *Fletcher v Fletcher*. Nor is this covenant associated with property which was the subject of an immediate trust as in *Williamson v Codrington*. Nor did the covenant relate to property which then

35 *Ibid*.
36 Eg, D Elliott (1960) 76 LQR 100; JA Hornby (1962) 78 LQR 228; WA Lee (1969) 85 LQR 213; J Barton (1976) 91 LQR 236.
37 (1844) 67 ER 564.
38 See above, pp 6–9.
39 [1965] Ch 902.
40 *Ibid* at 913, 914.

> belonged to the covenantor, as in *Re Cavendish-Browne's Settlement Trusts*. In contrast to all these cases, this covenant upon its true construction is, in my opinion, an executory contract to settle a particular fund or particular funds of money which at the date of the covenant did not exist and which might never come into existence. It is analogous to a covenant to settle an expectation or to settle after-acquired property. The case, in my judgment, involves the law of contract, not the law of trusts.[41]

On the other hand, it seems that the distinction drawn by Buckley J in *Cook*, between a covenant to settle a specific sum of money ('a debt enforceable at law', as in *Fletcher*) and a covenant to settle after-acquired property is wide of the mark, as it fails to take into account that the subject matter of the trust in both cases is not the property promised but the promise itself, the chose in action, and it should be immaterial whether that chose in action concerns a specific sum or after-acquired property.

EXCEPTIONS TO THE MAXIMS 'EQUITY WILL NOT ASSIST A VOLUNTEER' AND 'EQUITY WILL NOT PERFECT AN IMPERFECT GIFT'

Donatio mortis causa

A donatio mortis causa is an *inter vivos* gift which is conditional on death. It has been called an 'amphibious'[42] gift, in the sense that it is made *inter vivos* but does not take effect until the donor dies. There are three requirements:[43]

- the gift must have been made by the donor in contemplation of death;
- the subject matter of the gift must have been delivered to the donee; and
- there must have been an intention on the part of the donor that the property should revert to him in the event that he did not die.

Contemplation of death

The donor must have made the gift at a time when he was contemplating death in the near future, for instance where he had a serious illness and was about to go into hospital;[44] or possibly where he was a serviceman about to go to war;[45] or where he was about to embark on a particularly hazardous journey (for example, a climber about to climb Mount Everest).[46] A general contemplation of the risks of air, sea or road travel is not sufficient,[47] however; nor, on grounds of public policy, is a gift in contemplation of suicide valid.[48]

It was established in *Wilkes v Allington*[49] that a *donatio mortis causa* will be valid even though the donor dies from a different disease than that contemplated. In this case the donor was suffering from cancer and believed he did not have long to live. In fact he died even earlier than

41 *Ibid*.
42 *Re Beaumont* [1902] 1 Ch 889 at 892, *per* Buckley J.
43 *Cain v Moon* [1896] 2 QB 283 at 296, *per* Lord Russell CJ; *Re Craven's Estate* [1937] Ch 423 at 426.
44 *Greenidge v Bank of Nova Scotia* (1984) 38 WIR 63.
45 *Agnew v Belfast Banking Co* [1896] 2 IR 204 at 221.
46 Hanbury and Martin, 14th edn, p 140.
47 *Thompson v Median* [1958] OR 357.
48 *Re Dudman* [1925] 1 Ch 553.
49 [1931] 2 Ch 104.

expected, from pneumonia. It was held that the *donatio* was good. As to whether a *donatio* will be good where the donor dies from a totally different cause, this must be regarded as an open question. For instance, as in the hackneyed examination question, suppose the donor takes seriously ill and, believing himself to be *in extremis*, makes a gift before being taken to hospital, but the ambulance taking him there is involved in an accident and he is killed on the spot: would the *donatio* be valid? There seems to be no reason why the principle in *Wilkes v Allington* should not be extended to such a case, but there appears to be no firm authority on the point.

Delivery

The donor must have physically delivered to the donee either the subject matter itself or the means of getting at it. The fundamental principle here is that the handing over of the property must be accompanied by the necessary intent to part with the dominion or control over the property during the lifetime of the donor, and it is a question of fact as to whether the intention to transfer dominion has been shown. Handing over for safe-keeping will not suffice.[50]

Delivery of a chattel will be effected by handing over the thing itself, or by handing over the key to the receptacle where it is kept;[51] and the same procedure applies to negotiable instruments which are transferable by delivery. Where the chattel is too bulky to be physically handed over, it is sufficient for the donor to hand over the means whereby the donee may take possession, so long as the donor effectively deprives himself of the power of dealing with the thing. Where the donor wishes to give a car, for instance, the handing over of the car keys to the donee will be sufficient delivery;[52] but if the donor retains a duplicate set of keys, this may be construed as evidence of an intention on the donor's part not to part with the dominion.[53]

This issue arose in the Barbadian case of *Neblett v Bentham*, where the plaintiff, as administrator of the estate of W (deceased), claimed a Daihatsu car on behalf of the estate. The car was in the possession of the defendant, who alleged that it belonged to her by virtue of a *donatio mortis causa* made by W before his death. Williams CJ (Ag) referred to a number of authorities which established that delivery of a car by way of *donatio mortis causa* could be effected by handing over the car keys, but that where the donor retained a duplicate set of keys, there would not be a parting with the dominion. In the present case, there was evidence that W had given the defendant a set of keys while he was in hospital, but he had retained a duplicate set, and 'irrespective of anything that he might have told the defendant when he was in hospital, he would not have transferred dominion over the car to the defendant and no effective *donatio mortis causa* would have been made'. The learned judge continued:

> Whether Wilton in fact made a gift of the car to the defendant in contemplation of his death is a question to be decided on the evidence. The burden is on the defendant to show that the gift was made and it is a burden which she must discharge with clear and unambiguous evidence. The words of Lord Chelmsford in *Cosnahan v Grice*[54] must be borne in mind:
>
> 'Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these deathbed donations, that there is always a danger of having an entirely fabricated case set up. And without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal

50 *Hawkins v Blewitt* (1798) 170 ER 489.
51 *Re Lillingston* [1952] 2 All ER 184; *Sen v Headley* [1991] 2 All ER 636.
52 *Woodland v Woodland* (1991) 21 Fam. Law 470; *Shebaylo v Crown Trust and Guarantee Co* [1948] 2 WWR 1.
53 *Re Craven's Estate* [1937] Ch 423 at 428.
54 (1862) 15 ER 476.

> illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character.'

[Williams Ag CJ then considered all the evidence before him and concluded:]

> The defendant's claim to the car fails because in my judgment it is based on fabricated evidence which I reject. The defendant had and used the car when Wilton was in hospital and thus had keys to the car during that period. But I do not accept that, when in hospital, he made any gift of the car to the defendant or, when at home subsequently, he made any statement about the car or gave any keys to the defendant.

The rule in Birch v Treasury Solicitor

Where the subject matter of the *donatio* is not capable of delivery, the position is more complex. Where the donor wishes to make a deathbed gift of choses in action such as money in a bank savings account, shares or an insurance policy, the legal title to the money or property represented by a bank passbook, share certificates, or an insurance policy document respectively cannot be transferred merely by the delivery of those documents. However, it was established in *Birch v Treasury Solicitor*[55] that, where the title to a chose in action does not pass by mere delivery of a document, it is sufficient for a valid *donatio mortis causa* that there is delivery of 'the essential *indicia* or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given'.[56] On this basis, it has been held that the choses in action represented by the following documents can be validly given by way of *donatio mortis causa* by handing over the documents: a cheque payable to the donor and unendorsed;[57] an insurance policy;[58] savings certificates;[59] and a mortgage.[60] It is here that *donatio mortis causa* constitutes an exception to the maxim 'equity will not perfect an imperfect gift', since, on the death of the donor, his personal representatives will hold the property upon trust for the donee, and the donee can compel the personal representatives to perfect his title.

In order to constitute the essential *indicium* of title, it must be shown that production of the document is essential to enable its possessor to have access to the property. This requirement was not satisfied in the Barbadian case of *Greenidge v Bank of Nova Scotia*.[61] In this case, the deceased had handed to the plaintiff his savings account passbook shortly before going into hospital, saying that 'if anything should happen' to him, whatever was in the account was to be the plaintiff's absolutely. He also told the plaintiff that he had made arrangements with the bank so that she could withdraw money in the same way as himself; however, the procedure for making the account a joint one was not in fact carried out. On the deceased's death there was a balance of $22,464 in the account. The plaintiff claimed that there had been a *donatio mortis causa* of the amount in her favour.

Williams J held that there was no *donatio mortis causa* of the amount, since:

(a) by maintaining the right to deal with the money in the account after handing over the passbook, the deceased had shown an intention to retain dominion over the money; and

55 [1950] 2 All ER 1198.
56 *Ibid* at 1207.
57 *Clement v Cheesman* (1885) 27 Ch D 631.
58 *Witt v Amis* (1861) 121 ER 655.
59 *Darlow v Sparks* [1938] 2 All ER 235.
60 *Duffield v Elwes* (1827) 4 ER 959.
61 (1984) 38 WIR 63 (High Court, Barbados).

(b) the passbook was not the essential *indicium* of title to the money, since a depositor could withdraw money from an account without producing his/her passbook.

Conditional nature of gift

The donor must have intended to make the gift conditional on death, so that it will be automatically revoked if, for instance, he recovers from his illness within a reasonable time.[62] In addition to this automatic revocation, the donor can revoke the gift expressly, which may be by the donor recovering control or dominion over the subject matter;[63] though recovery of the property for safe custody will not amount to revocation;[64] nor can the donor revoke by his will, because the donee's title is complete the moment the donor dies.[65] Another consequence of the gift being conditional on death is that the gift will lapse if the donee predeceases the donor.[66] The conditional nature of the gift will most often be expressed, such as by the words: 'If I die', or: 'If anything should happen to me', but it may also be implied from the circumstances and from the fact that the donor is seriously ill.[67]

Property incapable of passing by donatio mortis causa

Certain types of property are not capable of being the subject matter of a *donatio mortis causa*. Among them are:

(a) The donor's own cheque[68] or promissory note,[69] because the former is merely a mandate to the donor's bank to pay a sum of money which can be revoked by 'stopping' the cheque, and the latter is merely a gratuitous promise. But a gift of the donor's own cheque may be effective if presented and paid before the bank has been informed of the donor's death, or if it has been negotiated for value.[70] A cheque drawn by a third party and payable to the donor can be the subject matter of a *donatio mortis causa*, whether or not it has been endorsed by the donor.[71]

(b) Stocks and shares. It is doubtful whether such property is capable of being the subject matter of a *donatio mortis causa*. In *Staniland v Willott*,[72] it was held that shares in a public company could be transferred by *donatio mortis causa*; on the other hand, it has been held that railway stock,[73] building society shares[74] and South Sea annuities[75] could not be so transferred.

(c) Land. Before 1991 it had been generally accepted that land could not be the subject matter of a *donatio mortis causa*. This view was supported particularly by dicta of Lord Eldon in

62 *Staniland v Willott* (1852) 42 ER 416.
63 *Bunn v Markham* (1816) 129 ER 90.
64 *Re Hawkins* [1924] 2 Ch 47.
65 *Jones v Selby* (1710) 24 ER 138, 143.
66 *Tate v Hubert* (1793) 30 ER 548.
67 *Re Lillingston* [1952] 2 All ER 184.
68 *Re Beaumont* [1902] 1 Ch 889.
69 *Re Leaper* [1916] 1 Ch 579.
70 *Tate v Hilbert* (1793) 30 ER 548.
71 *Clement v Cheesman* (1885) 27 Ch D 631.
72 (1852) 42 ER 416.
73 *Moore v Moore* (1874) LR 18 Eq 474.
74 *Re Weston* [1902] 1 Ch 680.
75 *Ward v Turner* (1752) 28 ER 275.

Duffield v Elwes,[76] although in that case it was held that there could be a valid *donatio* of money secured by a mortgage of land. Lord Eldon's view, which was based on the obvious difficulty in parting with the dominion of land, was followed in several Commonwealth jurisdictions, but in *Sen v Headley*[77] the English Court of Appeal, reversing Mummery J, decisively rejected that view and held that land was capable of passing by way of a *donatio mortis causa*.

In this case, the deceased, H, while in hospital during his last illness, had told the plaintiff, with whom he had lived as man and wife for many years, 'The house is yours, Margaret. You have the keys. They are in your bag. The deeds are in the steel box'. After the deceased's death, the plaintiff discovered in her possession a bunch of keys which H had apparently slipped into her handbag, without her noticing, during one of her visits to the hospital. One of the keys was the only key to the steel box containing the title deeds. The plaintiff also had a set of keys to the house, and H had retained his own set of house keys. The plaintiff claimed that a valid *donatio mortis causa* of the house had been effected in her favour by constructive delivery of the title deeds. The next of kin of H defended the claim. In the lower court,[78] Mummery J held in favour of the next of kin on the grounds:

(a) that it could not be said that dominion over the land could be effected by handing over the title deeds; and
(b) that, following *Duffield v Elwes*,[79] land cannot be the subject matter of a *donatio mortis causa*.

However, the Court of Appeal reversed Mummery J, holding that:[80]

(a) there was a sufficient parting with dominion since the handing over of the title deeds to unregistered land was sufficient to transfer, and did transfer, dominion over the house; the retention of a set of house keys by H was, in the circumstances, insufficient evidence of retention of ownership; and
(b) land was capable of passing by way of *donatio mortis causa*, which gave rise to the implication of a constructive trust.

The rule in *Strong v Bird*

If a person attempts to make an immediate gift of property, real or personal, but fails to pass a good title because he does not use the proper formalities for vesting the legal estate in the donee, the donee will receive nothing and equity will not perfect the imperfect gift. However, under the rule in *Strong v Bird*,[81] if the intended donee subsequently becomes the executor or administrator of the donor's estate, he acquires the legal estate and his title will be perfected. This rule constitutes an exception to the maxims 'equity will not perfect an imperfect gift' and 'equity will not assist a volunteer' in that the intention of the donor to benefit the donee is carried out by equity as against the beneficiaries under the deceased's will or intestacy.

The rule in *Strong v Bird* also applies where D owes a debt to C, and C appoints D executor of his will. In such a case (as happened in *Strong v Bird* itself) the appointment of D as executor releases the debt.

76 (1827) 4 ER 959.
77 [1991] 2 All ER 636.
78 [1990] Ch 423.
79 (1827) 4 ER 959.
80 See M Halliwell [1991] Conv 307; G Kodilinye (1991) 1 Carib LR 100; JWA Thornely (1991) 50 CLJ 404.
81 (1874) LR 18 Eq 315; as explained in *Re Stewart*. See G Kodilinye [1982] Conv 14.

For the rule to apply, it must be shown:

(a) that the donor intended to make an immediate *inter vivos* gift of specific property; and
(b) that the intention to give continued up to the donor's death.

Immediate gift

The donor must have intended to make an immediate gift, which failed to take effect only because the legal formalities for passing title were not observed. Thus the rule will not apply if the donor's intention was that the gift should take effect only at some later date during his life or on his death. Most of the earlier cases concerned purported testamentary gifts, and they were decided on the basis that a person cannot be allowed to dispose of his property after his death without observing the prescribed formalities for testamentary disposition. In *Vavasseur v Vavasseur*[82] a father told his two daughters (the plaintiffs) that they would be entitled on his death to the proceeds of certain assurance policies effected on his life. The father's will, of which the plaintiffs were appointed executrixes, did not mention the policies. Channell J held that the plaintiffs could not rely on the rule in *Strong v Bird* in order to claim the proceeds of the policies as against the residuary legatees since 'the testator expressed a personal wish that something should be done after his death; and if a man acted in that way he was bound, in order to effect his object, to express his wish by means of the ordinary form of will'.[83]

Later cases have established the wider principle that *Strong v Bird* does not apply where the donor has no intention to make an immediate gift but only promises to give on a future occasion. In *Re Freeland*,[84] X promised during her lifetime to give the plaintiff a car. She did not do so, but she appointed the plaintiff an executor of her will. The plaintiff's claim that his title had been perfected by his being appointed as executor failed, since it was clear that there had been no attempted immediate gift but only a promise to give in the future.

The requirement of an attempted immediate gift is further illustrated by two Commonwealth Caribbean cases, *Broadbent v French-Mullen* and *Burke v Jones*.

In the first, *Broadbent v French-Mullen*,[85] in 1951 WVT, the testator, agreed to sell two properties to Reynolds Jamaica Mines Ltd for £45,000. The terms of the agreement were that the purchasers should pay £20,000 to WVT immediately and the balance six months after his death. It was also agreed that the purchasers would pay to WVT 2.5% interest on the balance under certain conditions and that WVT should be entitled to remain in possession of the properties until his death. The purchasers were also given an option to purchase the cattle on the land. There was also evidence that during his lifetime WVT had expressed the intention that his daughter, MB, should have the £25,000 and the proceeds of sale of the cattle for her own use beneficially. MB was appointed executrix of WVT's will, which did not specifically dispose of the £25,000 or the proceeds of sale of the cattle. After WVT's death MB claimed to be entitled beneficially to the £25,000 and £2,800, the purchase price of the cattle, on the ground that WVT had made immediate gifts of the properties and the cattle to MB during his lifetime and that, if these gifts were ineffective, they had been perfected under the rule in *Strong v Bird* by the appointment of MB as executrix of the will. Phillips J, in the Jamaican Supreme Court,

82 (1909) 25 TLR 250.
83 *Ibid* at 252.
84 [1952] 1 Ch 110.
85 (1961) 4 WIR 247, Supreme Court, Jamaica.

held that the rule in *Strong v Bird* did not apply since the fact that the testator had received the interest on the purchase money during his lifetime showed that his intention was to make a future and not an immediate gift. He said:

> The short point in this matter is whether the testator had made immediate gifts to his daughter, the plaintiff, the legal title to which was incomplete but which became complete upon the appointment of the donee as one of the executors of his will. This matter involves the application of the settled rule in *Strong v Bird*[86] as extended by *Re Stewart, Stewart v McLaughlin*[87] and subsequent cases.
>
> The principle laid down by Jessel MR in *Strong v Bird* is:
>
> '. . . where a testator has expressed in his lifetime an intention to give personal estate belonging to him to one who becomes his executor, the intention to give continuing, the donee is entitled to hold the property for his own benefit whether the donee is the only executor or one of several. . .'
>
> In my view, the facts of the present case show no similarity to the handing over of the furniture and title deeds and the residence of the donee on the same premises rent-free. In my judgment the gift of the £25,000 was a testamentary disposition and ought to have been effectuated by the formalities required by the Wills Act. If a man at the time of making his will says, 'I give to my son John my motor car', that is a clear intention to give, but the donee could not immediately before the testator's death go and take the motor car away, because that gift is not to take effect until after the testator's death. If the same words are used, but not in a testamentary document, the intention to give is clear, but if it is to be immediate there must be something from which it could be inferred that the testator then and there made an outright gift, as it is sometimes said, without any strings attached. Unless this is clear and unambiguous, the rule in *Strong v Bird* cannot be applied because to do so it would then be not merely a matter of perfecting the legal title but the creation of a new title to what did not exist before. There is an obvious distinction between a promise to give in the future and an attempted actual gift in the present: it is the latter which can be perfected by the application of the rule in *Strong v Bird*.

In *Burke v Jones*,[88] CB, an employee of Banks Barbados Breweries Ltd, died in a drowning accident at the age of 35. At the time of his death he was unmarried and residing with his parents. CB's father, AB, was granted letters of administration of CB's estate. Under his employer's group life insurance policy, $96,000 became payable on CB's death. CB had named AB as beneficiary in respect of these death benefits and there was evidence that, during his lifetime, CB had on several occasions told AB that should he predecease AB, he wished AB to 'draw the money' arising from the policy, but that if he (CB) were to marry, he would 'change up everything' into his wife's name. AB sought the directions of the court as to whether the coincidence of AB being both beneficiary under the group life policy and administrator of CB's estate entitled him to hold the proceeds for his own benefit absolutely, or whether he held the proceeds upon trust for CB's estate.

Williams CJ, in the Barbados High Court, held that AB could not claim the money under the rule in *Strong v Bird*, as the circumstances showed that CB's intention was not to make an immediate *inter vivos gift* of the money to AB. He explained:

> The decision in this case rests on whether the rule in *Strong v Bird*,[89] as extended by *Re Stewart, Stewart v McLaughlin*[90] and subsequent cases, applies. In *Strong v Bird* a testator attempted to forgive a debt by telling his debtor that the debt was forgiven, which could not in law operate as a release. The debtor was subsequently appointed as the executor of the testator's estate and Sir George

86 (1874) LR 18 Eq 315.
87 [1908] 2 Ch 251.
88 (1987) High Court, Barbados, No 1219 of 1968 (unreported).
89 (1874) LR 18 Eq 315.
90 [1908] 2 Ch 251.

> Jessel MR stated that whether the testator actually gave the amount of the debt in law or not, at all events he intended to give it in law, and held that the subsequent appointment of the debtor as executor had the effect of releasing the debt in law.
>
> In *Re Stewart*, Neville J extended the principle, making it applicable not only to the release of a debt but in order to perfect an imperfect gift of specific property.
>
> It seems to me, and is apparently generally accepted, that the words used by the son did not constitute a declaration of trust. He was expressing no more than a wish that his father (and mother) would benefit from the policy if he were to die before he got married. Moreover, he contemplated that if he did marry, he would change things, and this in my view is inconsistent with a conclusion that he intended to make himself a trustee of the policy moneys for his father. A trustee cannot be made and be unmade like that.
>
> Did the son make a gift to his father? It seems to me that his intention to change everything in his wife's name if he got married makes it impossible to say that the son had intended to make an *inter vivos* gift of the policy moneys to his father. He could not have intended a gift to his father if he had it in mind to change everything to his wife's name if he married. A man cannot give and later take back what he has given. In *Re Freeland*, Evershed MR said:[91]
>
> '. . *prima facie*, if I make an absolute gift of some chattel or purport to do so, and then assert a right to use it for such purposes, on such terms and for such a time as I think fit, it seems to me that the assertion of that right is not consistent with an absolute gift, though it may well be consistent with a promise to give at some future date.'
>
> How can it possibly be consistent with an absolute gift and how can it be said that an absolute gift was intended to be given when the purported donor was contemplating and asserting that he would change the disposition of the policy moneys if he got married?
>
> What the son had in mind here in respect of the proceeds of the policy payable on his death was that his father and mother should have them so long as he remained unmarried. But he contemplated that he would wish to alter that arrangement if he got married. In the words of Neville J in *Re Stewart*, he had an intention of testamentary benefaction and, that being so, the prescribed formalities for testamentary disposition should have been observed. The rule in *Strong v Bird* cannot assist the plaintiff.
>
> Accordingly, the answer to the question raised in the summons is that the plaintiff holds the proceeds of the policy in trust for the estate of his son, Colin Kirkpatrick Burke.[92]

Continuing intention to give

It is a question of fact as to whether a continuing intention to make a gift to the donee existed, the onus of proof being on the alleged donee. Thus a continuing intent was held not to have existed where a testatrix, having purported to settle certain investments, later forgot about the settlement and treated the investments as still her own;[93] and where, having made an ineffective gift of property to X, the donor subsequently made a will in which he specifically bequeathed the property to Y.[94] On the other hand, a continuing intent was established where a testator, having forgiven a debt, repeatedly informed the debtor that he owed the testator nothing;[95]

91 [1952] 1 Ch 110 at 113.
92 There was no discussion in the case as to whether the deceased's nomination of AB as beneficiary of the benefits under the life policy was valid—in which case AB could have claimed the $96,000 as nominee—or whether it was void as a testamentary disposition that did not comply with the Succession Act 1981, Cap 249 (Laws of Barbados). See above, pp 26, 27.
93 *Re Wale* [1956] 3 All ER 280.
94 *Morton v Brighouse* [1927] SCR 118.
95 *Renwick v Renwick* (1962) 33 DLR (2d) 649.

where a testator orally forgave portions of a debt at regular intervals;[96] and where various documents inscribed by the testator, which stated that the property in question belonged to the claimant, were discovered in a deed box after the testator's death.[97]

Ineffective transfer to trustees

An unresolved question is whether the rule in *Strong v Bird* applies to the situation where there is a defective transfer not to a donee directly but to a trustee upon trust for a beneficiary. Thus where a settlor, having ineffectually transferred property to a trustee upon trust for a third person, appoints the trustee his executor, does this have the effect of completely constituting the trust on the settlor's death? In a Canadian case, *Re Halley Estate*,[98] Winter J answered this question in the negative.[99] In his view, the rule in *Strong v Bird* applies only where the person appointed executor is the donee of the beneficial interest, and not where he is a trustee of that interest for another person. In reaching this conclusion, Winter J relied on a statement of Neville J in Re *Stewart* to the effect that 'the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor'.[100]

However, there seems to be no reason why *Strong v Bird* should not apply to an ineffective transfer to a trustee, at any rate where the donor has manifested an intention to make an immediate *inter vivos* transfer which for some technical reason fails to take effect. On the other hand, it should not apply to a voluntary covenant to settle after-acquired or specific property, for in such a case there is a mere promise to give in the future.

Proprietary estoppel

Under the doctrine of proprietary estoppel (or estoppel by acquiescence), where P has incurred expenditure in building on D's land under the belief that he (P) has or will acquire a good title to that land, and where D has encouraged or acquiesced in such expenditure, the court will satisfy P's 'equity' by making such order as it deems appropriate, for example, an order that D must convey the fee simple to P, or that P should have a charge or lien on the land for the amount of his expenditure, or that P should have a perpetual licence to occupy the land.

The doctrine is an exception to the rule that equity will not perfect an imperfect gift in the sense that where D has made an imperfect transfer of the land to P, or where he has promised to convey the land to P in the future and P incurs expenditure in building on the land, equity may compel D to perfect the transfer or to carry out his promise.[101]

There are many examples of the application of the doctrine of proprietary estoppel in the Caribbean, though most of these are not cases of imperfect gifts but cases of licences to occupy land and therefore outside the scope of this chapter. Two examples of the doctrine as applied to imperfect gifts are *Sealy v Sealy* and *Khan v Khan*.

96 *Re Ariell (No 2)* [1974] Qd R 293.
97 *Re Hince* [1946] SASR 323.
98 (1959) 43 MPR 79.
99 *Ibid* at 83.
100 [1908] 2 Ch 251 at 254. The report of *Re Halley Estate* erroneously attributes this statement to Jessel MR in *Strong v Bird*.
101 *Dillwyn v Llewellyn* [1861–73] All ER Rep 384; *Chalmers v Pardoe* [1963] 3 All ER 552.

In *Sealy v Sealy*,[102] the defendant had invited and encouraged his son (the plaintiff) to erect a dwelling house on half an acre of the defendant's land, and promised that when the building reached a certain stage, he would convey the land to the plaintiff by way of gift. The defendant failed to carry out his promise.

King J (Ag) held that an equity had arisen in the plaintiff's favour, which would be satisfied by the court's ordering the defendant to convey the plot to the plaintiff. He stated:

> Lord Westbury in *Dillwyn v Llewellyn* [said]:[103]
>
> 'If A puts B in possession of a piece of land, and tells him, "I give it to you that you may build a house on it", and B, on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made.'
>
> It is clear from the above that, once an equitable right has arisen, the donee may call on the donor to complete his promise. In other words, the plaintiff in this instant case may sue for the promise to be made good and this court has jurisdiction to hear and determine the matter.

After stating that ss 47 and 60 of the Property Act, Cap 236 had no application to the case, King J (Ag) continued:

> The defendant not only invited and encouraged the plaintiff, but worked on building the house. . . The defendant failed to carry out his promise after falling out with the plaintiff.
>
> What relief is the plaintiff entitled to? The defendant had offered to execute a declaration, at the plaintiff's expense, that he holds 809.70 sq metres of land on trust for the plaintiff. The plaintiff had made his final plea for a conveyance of the fee simple in half an acre of land.
>
> In *Chalmers v Pardoe*, Sir Terence Donovan said:[104]
>
> 'There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that part of the land will be made over to the person so expending his money, a court of equity will *prima facie* require the owner by appropriate conveyance to fulfil his obligation: and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.'
>
> I have given careful consideration to all of the cited authorities and have chosen to be guided by the above, together with *Pascoe v Turner*[105] in which a considerable number of cases were commented on, and approaches to be adopted in these matters recommended. All those authorities point to the conclusion that this plaintiff is entitled to a conveyance of the fee simple by the defendant.

In *Khan v Khan*,[106] the plaintiffs were the son and daughter-in-law of the defendant. The plaintiffs purchased a parcel of land on which they had intended to build their matrimonial home, but the defendant persuaded them instead to come and live with him in his house, which they did, having been assured by the defendant that he would leave his share of the house to them in his will. The plaintiffs subsequently spent their money on repairing and renovating the defendant's house and building a garage, with the encouragement of the

102 (1990) High Court, Barbados, No 1492 of 1987 (unreported).
103 *Ibid* at 387.
104 [1963] 3 All ER 552 at 555.
105 [1979] 2 All ER 945.
106 (1994) High Court, Trinidad and Tobago, No 1022 of 1993 (unreported).

defendant. Later, a dispute arose between the parties and the defendant ordered the plaintiffs to leave the house.

Shah J held that the plaintiffs had acquired an equity in the defendant's house by estoppel, which would be satisfied by the court's ordering the defendant to convey his share in the house to himself for life, and after his death to the plaintiffs in fee simple.

CHAPTER 5

SECRET TRUSTS AND MUTUAL WILLS

SECRET TRUSTS

Secret trusts are normally employed where a testator wishes to provide for a secret beneficiary, such as a mistress or an illegitimate child, but does not want to name such person as a beneficiary under his will, since a will once admitted to probate becomes a public document, and there would be no secrecy. The testator may therefore during his lifetime arrange with T, a trusted relative or friend, that he will leave property to T in his will, but that the property is to be held upon trust for the secret beneficiary, whose identity will be disclosed to T. If T agrees to the testator's proposal, then a secret trust will arise, and will be enforceable against T after the testator's death. So long as there is sufficient evidence of the secret trust, equity will not allow T to claim the property beneficially but will compel him to hold it on trust. Viscount Sumner explained the doctrine thus:[1]

> A court of conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction. The facts commonly but not necessarily involve some immoral and selfish conduct on the part of the legal owner. The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by a tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out.

The wills legislation, such as Wills Act 1837, s 9 (UK), Wills and Probate Act, Ch 9:03, s 42 (Trinidad and Tobago), Succession Act, Cap 249, s 61 (Barbados) and Wills Act 1840, s 6 (Jamaica) require testamentary dispositions to conform with the formal requirements of the legislation: that is to say, any gift or trust to arise on the death of a testator must be contained in a written document signed by the testator and attested by two witnesses. Any purported testamentary disposition which does not comply with the legislation is void. At one time it was thought that the doctrine of secret trusts flouted the wills legislation, but was justified on the ground that a statute should not be used as an instrument of fraud,[2] in the sense that it would be a fraud on the testator for the 'secret trustee' to plead that the secret trust was invalid because it did not comply with the statute, and claim the property for himself.

The original rationale for the secret trust doctrine has been superseded by the notion that the doctrine does not flout the wills legislation since it operates *dehors* (that is to say, outside) the will.[3] According to this theory, it is not a testamentary but an *inter vivos* trust which the testator has validly declared during his lifetime, but which only becomes completely constituted by the vesting of the property in the secret trustee (the 'beneficiary' under the will) on the testator's death. Thus the trust is to some extent dependent on the will but nevertheless outside it. The 'secret trustee' acquires the legal title under the will, but his conscience is bound in equity to hold upon the trusts to which he has agreed.

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1 *Blackwell v Blackwell* [1929] AC 318 at 334.
2 *McCormick v Grogan* (1869) LR 4 HL 82.
3 *Re Snowden* [1979] 2 All ER 172 at 177, per Megarry VC.

A secret trust may be either *fully secret* or *half secret*.

A fully secret trust arises where property is given by will to a donee apparently absolutely, but in reality upon trust for a secret beneficiary. For example, 'I bequeath $50,000 to my good friend, Jack Jones', where Jones has agreed to hold the money upon trust for Cindy Smith.

A *half secret* trust arises where property is given by will expressly on trust, but the identity of the beneficiary under the trust is kept secret. For example, 'I bequeath $50,000 to my good friend, Jack Jones, for the purpose which I have communicated to him' (and that purpose is to hold upon trust for Cindy Smith).

The essential ingredients of a secret trust have recently been restated as follows:[4]

(a) an intention by the testator to create a trust, satisfying the traditional requirements of the three certainties (that is, certain language in imperative form, certain subject matter and certain objects);
(b) the communication of the trust to the legatee(s); and
(c) the acceptance of the trust by the legatee(s), which acceptance can take the form of silent acquiescence.

Communication and acceptance

In the case of a *fully secret* trust, the trust must be communicated to and accepted by the secret trustee *during the testator's lifetime*.[5] If the 'secret trustee' only learns of the trust intended by the testator after the latter's death, he will take beneficially.[6] On the other hand, if the 'secret trustee' accepts the trust during the testator's lifetime but the *identity of the beneficiaries* is not disclosed to him until after the testator's death, he will hold the property on a resulting trust for the testator's estate.[7]

In *Re Boyes*,[8] a testator left all his real and personal estate to his solicitor, who agreed to hold the property in accordance with the directions contained in a letter which he would receive. The letter did not come into his hands until after the testator's death. The solicitor admitted that he held the property as trustee, and he wished to carry out the secret trust if he were permitted to do so. The next of kin were opposed to the trust being carried out. They argued that the secret trust was void on the ground that the identities of the beneficiaries were not disclosed until after the testator's death. They contended that there was a resulting trust to the estate and the property accordingly belonged to them. It was held that the next of kin's argument succeeded.

There must be sufficient evidence that the property given by the will was intended to be held upon trust, and oral or written evidence as to the terms of the trust must be available. In *McCormick v Grogan*[9] Lord Westbury stated that the 'clearest and most indisputable evidence' was needed in order to uphold a secret trust contrary to the absolute terms of a disposition by will, but it seems that the very high standard of proof implied by those words is no longer necessary, for in *Re Snowden*[10] Megarry VC considered that, in the absence of fraud or other special

4 *Marguiles v Marguiles* [2000] 2 ITELR 641 at 658, 659.
5 It is open to the testator or the legatee accepting the secret trust to change his mind before the gift takes effect on the testator's death: *ibid.*
6 *Wallgrave v Tebbs* (1855) 69 ER 800.
7 *Re Boyes* (1884) 26 Ch D 531.
8 *Ibid.*
9 (1869) LR 4 HL 82 at 97.
10 [1979] 2 All ER 172. See also *Marguiles v Marguiles* [2000] 2 ITELR 641.

circumstances, the standard of proof required was the ordinary civil standard, namely, balance of probability. In *Re Snowden*[11] the testatrix, an 86 year old widow, was uncertain how to dispose of her residuary estate. She accordingly left all her residue to her brother on the basis that 'he would know how to deal with it'. She died six days after executing the will, and shortly afterwards the brother also died leaving all his property to his only son. It was clear that the testatrix's will was made on the basis of some arrangement between her and her brother, but the questions were:

(a) whether that arrangement imposed a binding trust or a mere moral obligation; and
(b) if it did impose a trust, what were the terms of the trust?

It was held that the arrangement amounted only to a moral obligation which was not intended to be binding in a court of law. Accordingly, the brother took the residue free from any secret trust and his son had acquired an absolute interest. It has been argued,[12] however, that the true intention in this case was to create a secret trust in favour of a class of persons—the testatrix's nearest relations—with a power of selection in the brother, as in *Burrough v Philcox*,[13] and that although the brother could not have been compelled to distribute the property during his lifetime, on his death the property ought to have been distributed equally amongst the testatrix's near relations and the title ought not to have passed to the brother's son.

Obligation to hold secret trustee's own property upon trust

A secret trust will normally be imposed on property bequeathed or devised to the secret trustee under the testator's will. However, in the Guyanese case of *Nisa v Khan*, which is the only Commonwealth Caribbean case on secret trusts which has come to hand, the promise made by the secret trustee was to hold upon trust, not the property devised to her by the will, but other property which already belonged to her. On the facts, it may have been preferable to treat the arrangement as a devise by will which was conditional on the performance of an obligation (*viz* to hold the devisee's own property upon trust) by the devisee, rather than as a secret trust. Indeed, such a construction seems to have been in the contemplation of Boland J when he cited *dicta* from *Norris v Fraser*.[14]

In *Nisa v Khan*,[15] the testator was the father of two daughters, the appellant being the elder, and the respondent the younger. He was the owner of several properties, one of which, known as Lot 21, Peters Hall, he had transferred to the appellant as an *inter vivos* gift. After the testator made his will he obtained from the appellant a promise that she would transfer Lot 21 to the respondent after the testator's death, emphasising that if she did not agree to do this he would change his will. Relying on the appellant's promise, the testator refrained from making a new will or codicil. In the testator's will the appellant received substantial benefits including a life interest in one of the testator's plantations and a half share in his residuary estate. The appellant repudiated her obligation to carry out the promise she had given to the testator.

It was held by the West Indian Court of Appeal that the appellant was guilty of fraud in refusing to honour her promise in reliance upon which the testator had left his will unaltered. The appellant was bound in equity by a secret trust to transfer Lot 21 to the respondent. It was

11 *Ibid*.
12 See D Hodge [1980] Conv 341.
13 (1840) 41 ER 299.
14 (1873) LR 15 Eq 318.
15 [1947] LRBG 170, West Indian Court of Appeal, on appeal from the Supreme Court, British Guiana.

immaterial that the subject matter of the secret trust was not, as in the usual case, the testator's property, but that of the secret trustee herself. According to Boland J.[16]

> The learned trial judge held that the facts found by him brought the case within the rule in equity relating to the enforcement of secret trusts. It is of the essence of this rule, and indeed the very foundation of it, that equity will not permit a statute, such as the Statute of Frauds or the Wills Act, whose provisions were designed for the purpose of preventing fraud, to be itself used as an instrument of fraud. Accordingly, when a testator makes a will or leaves a will unrevoked, in which he gives property to another who has undertaken *dehors* the will to act as a trustee thereof for certain purposes not illegal, equity will not allow such a person to retain the beneficial interest in the property for himself and to ignore the trust by putting forward successfully the fraudulent plea that the testator's directions in this regard were void because they were not set out in writing or in the form prescribed by the Statute. It has been held also in accordance with the same principle that the heir at law who takes realty in his own right by devolution under an intestacy, is bound by a declaration of trust, though not in writing, if the deceased, relying on his promise to discharge the trust, refrained from making his will by which he could have provided for the objects of the trust.
>
> Usually the property which on the face of the instrument—it may be a deed or a will—is given without the trusts being expressed therein, is property belonging to the donor which he is free to dispose of as he thinks fit. The relief granted by equity in such cases, at the instance of the person intended to be benefited, takes the form of a declaration of trust in his favour. Equity acts on the conscience of the donee named in the instrument and will not allow him to take the donor's property free from the trust and so benefit by his own fraud.
>
> It was contended by counsel for the appellant that this rule cannot be invoked in a case like the present, where, as the trial judge found, the appellant made a promise in regard to her own realty and not in regard to property belonging to the testator. Counsel for the appellant conceded that it may be possible to enforce such a trust as affecting funds or other personal property of the donee by the creation by way of security for the due performance of the trust of a controlling charge over land granted by the instrument to the owner of the funds or personalty sought to be given in trust. This would seem to be the view of Vice-Chancellor Bacon as expressed in his judgment in *Norris v Fraser*,[17] where the learned Vice-Chancellor said in respect of promises to the testator made by the donee to pay an annuity of £300 a year to a third party:
>
> 'The fund out of which it is to be paid is a matter of indifference. If he had said "I will give you my estate on condition that you will pay £300 a year out of another estate', supposing she was a *feme sole*, that would not give her a right to retain the estate so given to her without performing the condition of paying the £300 a year out of some other estate; nor would it deprive the donee of the annuity of the right to say "You shall not enjoy the estate without satisfying out of it my demand".'
>
> We appreciate that difficulties may arise when a secret trust is impressed upon realty not owned by the donor, inasmuch as such a trust cannot be satisfied otherwise than from the same land. It might be inequitable in some instances to enforce such a trust. For example, during the period between the date of the declaration of the trust and the death of a testator, changes may take place both in respect of the donee's property as well as the property given under the will. This might conceivably happen when the death of the testator occurs long after the promise or undertaking of the donee. We are clearly of the opinion, however, that a court of equity is not powerless to prevent the perpetration of a fraud by a donee under a will although the trust he undertook relates to real property of which he is himself the owner. The nature of the remedy to be accorded by equity must depend upon the facts in each particular case.

16 At p 172.
17 (1873) LR 15 Eq 318 at 330.

> In the case now before us the testator died just a month after the undertaking by Kudratun Nisa to carry out his wishes. It is unlikely, in the circumstances, that the value of the properties changed before his death.

Obligation to dispose of property by will

In the vast majority of cases of secret trusts, the obligation undertaken by the secret trustee is to hand over the property to the secret beneficiary in his (the secret trustee's) lifetime, and generally as soon as practicable after the testator's death. However, in *Ottaway v Norman*,[18] the obligation undertaken by the secret trustee was to dispose of the property by her will in favour of the secret beneficiary. The facts were that the testator had lived in his home with a woman, called Eva, who had formerly been his housekeeper. The testator devised the house and its contents 'absolutely' to Eva, but they had agreed privately that Eva would devise the house by her will in favour of the plaintiff, who was the testator's son. On Eva's death it was found that, contrary to the undertaking she had given, she had left the property to the defendants. The question was whether the house was held on a fully secret trust for the plaintiff, or whether it passed to the defendants under Eva's will.

Brightman J held that the secret trust doctrine applied. This was a novel case in that the secret trustee (also referred to as the 'primary donee') had not agreed to hold the property on an immediate trust for the plaintiff, but only to dispose of it to the plaintiff by her will, but it was nevertheless within the secret trust doctrine, the basis of which was the obligation imposed on the conscience of the secret trustee, and the machinery by which the testator intended the obligation to be carried out was immaterial.

It will be noted that there was no question of 'fraud' in *Ottaway v Norman*, because the secret trustee, Eva, was not claiming an absolute interest for herself. The competition was between the secret beneficiary and the beneficiaries under Eva's will.

One problem raised by cases like *Ottaway* concerns the status of the trust property during the secret trustee's lifetime.[19] The testator made an *inter vivos* declaration that the house was to be held upon trust for the plaintiff after Eva's death, and the trust was constituted by the vesting of the house in Eva under the testator's will. Did the trust arise on the testator's death? Or did it arise on Eva's death? It seems that the trust must have arisen on the testator's death, for if that were not so, Eva would have been free to dispose of the property as she wished since it would not be subject to any trust during her lifetime. On the other hand, there are problems associated with finding that the trust arose on the testator's death, for then Eva would become a life tenant of the house, in which case she would presumably be able to sell the house under her Settled Land Act powers. This would clearly be contrary to the intention of the testator, for it would mean that his son would not receive the house *in specie* on Eva's death but only the proceeds of sale.

Bequests to joint tenants and tenants in common

It was established in *Re Stead*[20] that, in the case of a fully secret trust:

(a) where property is given by the will to persons as tenants in common (for example, 'to Jack Jones and Jill Johnson in equal shares') a fully secret trust will bind the one to whom it was

18 [1971] 3 All ER 1325. See S Bandali (1973) 36 MLR 210; J Hackney [1971] ASCL 382.
19 A similar problem arises under mutual wills. See below, pp 75, 76.
20 [1900] 1 Ch 237.

communicated (and by whom it was accepted) during the testator's lifetime, but it will not bind the other if he or she did not accept it; and

(b) where property is given by the will to persons as joint tenants:
- if one accepted the trust before the will was made, then both are bound by the trust, whereas
- if the acceptance by one came after the making of the will, only the acceptor is bound.

Communication of half secret trusts

Two rules peculiar to half secret trusts appear to have become settled:

(a) evidence as to the terms of the trust is inadmissible if it contradicts the express terms of the will; and

(b) communication and acceptance of the trust must come *before* or be *contemporaneous with* the making of the will.

These rules were established in *Re Keen*,[21] where a testator bequeathed £10,000 to his executors 'to be held on trust for such persons or charities as may be notified by me to them during my lifetime'; otherwise the money was to fall into residue. [As a matter of construction, the will referred to a *future* communication.] Shortly *before* the making of the will, the testator had given the executors a sealed envelope containing the name of the intended beneficiary and had directed that it was not to be opened until after the testator's death. It was held that the handing over of the sealed envelope was the communication of the trust, and that since this had taken place before the making of the will, it was inconsistent with the express terms of the will, which pointed to a future communication. The half secret trust therefore failed.

Lord Wright went on to hold[22] that, even if the words of the will could have been construed as pointing to a previous as well as a future communication, the half secret trust would be equally ineffective, on the ground that, as Viscount Sumner had stated in *Blackwell v Blackwell*,[23] 'a testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards'.

The second rule in *Re Keen, viz* that communication of a half secret trust must come before or be contemporaneous with the making of the will was later adopted in *Re Bateman's Will Trusts*[24] by Pennycuick VC, who considered the position to be 'clear', but it has been criticised[25] on the grounds that:

(a) if it were correct, it should apply equally to fully secret trusts; yet it is clear from *Re Boyes*[26] that communication of a fully secret trust is good at any time before the testator's death; and

(b) it fails to take into account that secret trusts operate outside the will.

It has been suggested[27] that the second rule in *Re Keen* is a flirtation with the rules relating to the incorporation of documents in wills by reference, whereby if a testator, in a duly executed

21 [1937] 1 All ER 452.
22 *Ibid* at 459.
23 [1929] AC 318 at 339.
24 [1970] 3 All ER 817 at 820.
25 See Hanbury and Martin, *Modern Equity*, 14th edn, pp 159–61.
26 (1884) 26 Ch D 531.
27 Hanbury and Martin, above, p 160; Pettit, above, p 123.

testamentary paper, refers to an *existing* unattested document, the latter becomes incorporated in the will. In order to be incorporated, the unattested paper must be already in existence at the time of the execution of the will, and must be referred to as an existing document.[28] The similarity between this principle and the rule in *Re Keen* is obvious, but arguably there is no justification for transplanting it into the rules relating to secret trusts, which are supposed to operate outside the law of wills.

Increase in legacy

A testator must communicate to the secret trustee any increase or addition to the property originally agreed to be held upon trust; otherwise, the increased amount will not be subject to the secret trust. Thus, in *Re Colin Cooper*,[29] a testator bequeathed £5,000 to two trustees 'upon trusts already communicated to them'. He had in fact communicated the terms of the trust to them. By a later codicil he purported to increase the sum to be held on the secret trust to £10,000, the trustees 'knowing my wishes regarding that sum'. He did not inform the trustees of the increase. It was held that the first £5,000 was bound by the secret trust, but the second was not, and therefore fell into residue. The decision in *Re Colin Cooper* concerned a half secret trust, but the principle seems to be equally applicable to fully secret trusts.[30]

Secret trusts operate outside the will

This principle has already been mentioned in comparison with the theory that secret trusts are imposed to prevent fraud.[31] Two cases which illustrate the application of the principle are *Re Young* and *Re Gardner (No 2)*.

In *Re Young*[32] the testator made a bequest to his wife with a direction that on her death she should leave the property for the purposes which he had communicated to her. One of the purposes was that she should leave a legacy of £2,000 in her will to the chauffeur. The chauffeur had witnessed the will and it was argued that he had thereby forfeited his interest by virtue of s 15 of the Wills Act 1837, which provides that a legacy given to an attesting witness or his spouse is ineffective. It was held that the chauffeur, as secret beneficiary, did not lose his beneficial interest because he acquired that interest not under the will but outside the will by virtue of the equitable obligation imposed on the wife.

In *Re Gardner (No 2)*[33] the question was whether the interest of a beneficiary under a secret trust lapsed where the beneficiary predeceased the testator. Under s 25 of the Wills Act 1837, where a legatee or devisee *under a will* predeceases the testator, there is a lapse of the gift, and the deceased legatee's or devisee's estate has no claim. Romer J held that a beneficiary *under a secret trust* acquires an interest as soon as the trust is communicated to and accepted by the legatee/secret trustee. Thus the secret beneficiary had acquired an interest before his death outside the testator's will, and that interest passed to his personal representatives. There was accordingly no lapse, and his estate could claim the interest.

28 *In b Smart* [1902] p 238.
29 [1939] Ch 811.
30 Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 53.
31 See above, p 64.
32 [1950] 2 All ER 1245.
33 [1923] 2 Ch 230.

The decision in *Re Gardner (No 2)* has been heavily criticised by academic writers[34] on the ground that a beneficiary under a trust acquires no interest until the trust has been completely constituted, and this could not have occurred until the title to the trust property became vested in the legatee/secret trustee on the testator's death. Thus the secret beneficiary could not have acquired an interest at the time of *his* death. It seems that the decision can be justified only if it is possible to completely constitute a trust in favour of a dead person.[35]

On the other hand, there seems no doubt that where the legatee/secret trustee predeceases the testator there will be a lapse of the gift under s 25 and the trust, *if fully secret*, will fail 'because the devise or bequest on which the trust is based has itself failed'.[36] However, it seems that where the trust is half secret, it will take effect 'because a gift to a person who takes as trustee on the face of a will never lapses by reason of his predecease',[37] and equity will not allow a trust to fail for want of a trustee.

Can a secret trustee claim a benefit under the will?

In the case of a half secret trust, a legatee who is directed by the will to hold upon trust for a secret beneficiary cannot claim the legacy for himself in the event that the half secret trust fails. Where there is such failure he holds upon trust for the residuary legatee or devisee if there is a gift of residue in the will; or, if there is no residuary gift, he holds upon trust for the persons entitled on intestacy. In other words, there will be a resulting trust for the testator's estate.

Where there is a fully secret trust which fails, or where there is a surplus remaining after either a fully secret or a half secret trust has been carried out, it might be argued that the secret trustee should be entitled to claim the property or the surplus for himself. Whether he can do so or not will depend upon the answers to two questions.

- Was it the testator's intention that the secret trustee should take the benefit?
- To what extent may the secret trustee adduce evidence of such an intention?

With respect to the first question, the language of the will must be construed in order to discover whether the testator's intention was:

(a) to make the legatee/secret trustee a trustee of the whole of the property given; or
(b) to make a beneficial gift to him, subject to his carrying out certain obligations.

If (a) is the case, any surplus will be held on a resulting trust for the estate; if (b) is the case, the secret trustee will be entitled to keep the surplus for himself.

With respect to the second question, courts of equity are ever watchful lest a secret trustee may commit a fraud on the testator. In *Re Rees' Will Trusts*[38] the testator appointed his friend and his solicitor as his executors and trustees, leaving his entire estate 'unto my trustees absolutely, they well knowing my wishes concerning the same'. The testator had told the trustees that, after making certain payments, they could keep any surplus for themselves. It was held, however, that the trustees were not entitled to the surplus which did remain, because the will, on its true construction, imposed a trust on the whole estate and evidence was not admissible to show that

34 See, eg, Hanbury and Martin, *Modern Equity*, 14th edn, pp 166, 167.
35 See Oakley, *Constructive Trusts*, 2nd edn, p 121.
36 Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 47; *Re Maddock* [1902] 2 Ch 220 at 231.
37 *Ibid; Re Smirthwaite's Trusts* (1871) LR 11 Eq 251.
38 [1950] Ch 204.

the trustees were to take a benefit. Furthermore, it was stated that a half secret trustee can never take beneficially.

However, it seems from *Re Tyler*[39] that evidence may be admissible as to all the terms of the trust, including those in favour of the trustees; though the court will be reluctant to admit such evidence.

Are secret trusts express or constructive?

This is a largely theoretical question. An express trust is one declared by the settlor, whereas a constructive trust is imposed by the court. Most writers (such as Pettit,[40] Underhill[41] and Snell[42]) regard secret trusts as express. The difficulty with treating them as express is that an express trust of land must be evidenced by writing, under Statute of Frauds, 1677, s 7, LPA 1925, s 53(1)(b)(UK), and Cap 236, s 60(2)(Barbados). In *Ottaway v Norman*[43] there was a secret trust relating to land, but there was no written evidence thereof. The court, in upholding the trust, made no mention of the requirement of writing. It seems, therefore, that the court must have regarded the trust as constructive, which did not require writing (LPA 1925, s 53(2); Cap 236, s 60(5)(a)).

Other writers (such as Sheridan[44]) regard fully secret trusts as constructive, but half secret trusts as express, on the ground that half secret trusts appear on the face of the will whereas fully secret trusts do not. On the other hand, Nathan and Marshall[45] regard both fully secret and half secret trusts as constructive. Hanbury and Martin[46] argue that, whereas half secret trusts are express and therefore must be evidenced by writing if they concern land, fully secret trusts can be considered either as express or as constructive. Their reasoning is that fully secret trusts were originally enforced on grounds of prevention of fraud, long before the theory emerged that they operated outside the will. Thus they can claim to be constructive, so that no written evidence would be required for a fully secret trust of land, as in *Ottaway v Norman.*[47] This reasoning is weak, however, in relation to *Ottaway*, since in that case there was no question of fraud, as it was not a case of the secret trustee claiming a benefit for himself. Fraud was not an element in *Ottaway*, unless 'fraud' is defined in a wider sense to mean 'defeating the testator's objective'. According to this definition, it is a fraud both on the deceased, where his confidence is betrayed, and on the secret beneficiary, who is deprived of the benefit; for if the secret trustee had not indicated his willingness to perform the trust, the testator would no doubt have made alternative arrangements to benefit the secret beneficiary.

MUTUAL WILLS

Mutual wills arise 'where two persons, usually but not essentially husband and wife, have made an agreement as to the disposal of their property, and each has, in accordance with the

39 [1967] 1 WLR 1269.
40 *Equity and The Law of Trusts*, 7th edn, p 118.
41 *Law of Trusts and Trustees*, 14th edn, p 195 *et seq.*
42 *Principles of Equity*, 29th edn, p 108 *et seq.*
43 [1971] 3 All ER 1325.
44 (1951) 67 LQR 314.
45 *Casebook on Trusts*, 7th edn, p 453. See also R Burgess (1972) 23 NILQ 263.
46 *Modern Equity*, 14th edn, p 167.
47 [1971] 3 All ER 1325.

agreement, executed a will, the two wills containing *mutatis mutandis* similar provisions'.[48] Alternatively, the parties may agree to make a joint will, which 'takes effect not as one will but as the separate wills of each party, and is admitted to probate successively as the will of each testator'.[49]

Under the mutual wills or joint will, each party may give to the other an absolute interest in his/her property, or a life interest, or no interest at all, with remainders over to other persons, usually the children of the marriage. For example, Jack and Jill, a married couple, may agree to make wills in substantially similar terms, each giving a life interest in his/her property to the survivor, with remainder to the children of the marriage in equal shares.

Necessity for agreement

There must be sufficient evidence of an agreement between the parties not merely to make similar wills but also *not to revoke them*. The best evidence of such agreement is a recital in each will to that effect.[50] In the absence of recitals, extrinsic evidence may be adduced to show that the parties intended their wills to be irrevocably binding. This evidence may consist, for example, of family conversations showing such intention,[51] and the court may infer an agreement from the conduct of the parties and the circumstances surrounding the making of the wills.[52] But the mere fact that two wills are made in similar form is not in itself sufficient to show an intention not to revoke.[53] In *Re Oldham*,[54] a husband and wife made wills in similar form, each giving an absolute interest in his property to the other with the same alternative provisions in the event of the other's predecease. After the husband's death, the wife remarried,[55] and made a new will which was completely different from the original one. Although it was clear that the parties had agreed to make similar wills, there was no evidence of an agreement that they should be irrevocable, and the court declined to infer such an agreement. It was therefore held that the second will should take effect. As Astbury J explained:[56]

> The fact that the two wills were made in identical terms does not necessarily connote any agreement beyond that of so making them . . . There is no evidence . . . that there was an agreement that the trust in the mutual will should in all circumstances be irrevocable by the survivor who took the benefit.

It was significant that the parties had left their estates to each other 'absolutely'. They may have thought it quite safe to trust each other, but:

> . . . that is a very different thing from saying that they bound themselves by a trust that should be operative in all circumstances and in all cases.

48 Pettit, *Equity and The Law of Trusts*, 7th edn, p 124.
49 Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 286.
50 *Ibid*.
51 *Re Cleaver* [1981] 1 WLR 939; *Charles v Fraser* [2010] EWHC 2124 (Ch).
52 *Re Green* [1951] Ch 148. See also the extraordinary decision of the Court of Appeal in *Fry v Densham–Smith* [2010] EWCA Civ 1410, where there was little evidence that mutual wills had actually been made.
53 *Re Cleaver*, above.
54 [1925] Ch 75.
55 It was held by Carnwath J in *Re Goodchild* [1996] 1 All ER 670, at 677, that after the death of the first mutual testator, the 'floating trust' which comes into being is not affected by the subsequent remarriage of the survivor. However, it may be possible to construe an agreement not to revoke as relating to revocation *otherwise than by marriage: Williams on Wills*, 7th edn, vol 1, p 22; *Re Marsland* [1939] 3 All ER 148.
56 *Ibid* at 88. See also *Re Goodchild*, above.

Contractual remedies

An agreement to make and not to revoke mutual wills is binding at common law. If it is broken by the first party to die (X), his estate will be liable to the survivor (Y) in damages.[57] If the breach is by Y, it has been suggested[58] that it may be possible for the estate of X to obtain a decree of specific performance against Y on the *Beswick v Beswick*[59] principle.

If the breach of contract occurs whilst both parties are living and the innocent party has notice of the breach, the latter will be discharged from the agreement and he may revoke his will.[60]

Automatic revocation of a will by marriage does not *per se* amount to a breach of the agreement, so that no action for damages will lie,[61] but the trust remedy (below) will lie, just as if the will had been intentionally revoked.

Imposition of a trust

In addition to contractual liability, if Y revokes his mutual will (which he is entitled to do at common law) equity will intervene and, on his death, will compel his personal representatives to hold his property *upon trust* to perform the agreement, on the ground that it would be a fraud on X if Y could flout the agreement, since X, being dead, cannot now revoke *his* will.[62] Put in another way, the agreement followed by the death of X, relying on Y's promise to observe the agreement, creates a trust in favour of the intended beneficiaries.

Until the modern case of *Re Dale*,[63] it was uncertain whether, for the doctrine of mutual wills to apply, the survivor must have obtained a benefit under the will of the first to die, as where he was given an absolute interest or a life interest under the will. *Re Dale* has now established that such benefit is not necessary. In this case, a father and mother made similar wills which they had agreed should be irrevocable, in which all their respective property was bequeathed to their two children in equal shares. The father died without altering his will. Later, the mother made a new will which gave £300 to one child, and the residue of her estate to the other. Morritt J held that the wife was bound by the trust under which she was to leave her property to the two children in equal shares. It was immaterial that she did not personally benefit from the deceased's will. He explained the position thus:[64]

> As all the cases show, the doctrine applies when the second testator benefits under the will of the first testator. But I am unable to see why it should be any the less a fraud on the first testator if the agreement was that each testator should leave his or her property to particular beneficiaries, for example, their children, rather than to each other. It should be assumed that they had good reason for doing so and in any event that is what the parties bargained for. In each case there is the binding contract; in each case it has been performed by the first testator on the faith of the promise of the second testator; and in each case the second testator would have deceived the first testator to the detriment of the first testator if he, the second testator, were permitted to go back on his agreement.

57 *Robinson v Ommanney* (1883) 23 Ch D 285.
58 See Hanbury and Martin, *Modern Equity*, 14th edn, p 313.
59 [1968] AC 58.
60 *Stone Hoskins* [1905] P 194.
61 *Robinson v Ommanney*, above.
62 *Re Hagger* [1930] 2 Ch 190 at 195.
63 [1993] 3 WLR 652.
64 *Ibid* at 665.

> I see no reason why the doctrine should be confined to cases where the second testator benefits, when the aim of the principle is to prevent the first testator from being defrauded. A fraud on the first testator will include cases where the second testator benefits, but I see no reason why the principle should be confined to such cases. In my judgment so to hold is consistent with all the authorities, supported by some of them, and is in furtherance of equity's original jurisdiction to intervene in cases of fraud.

When does the trust arise?

It has been suggested[65] that there are three possible dates on which the trust may arise:

(a) when the agreement is made;
(b) when the first testator dies; and
(c) when the survivor dies.

In the first place, it is clear that the trust cannot arise from the date of the agreement, because the parties can agree to release one another, and either party can revoke before the other dies, on giving notice to the other.[66] If the first to die (X) has revoked, the survivor (Y) cannot establish any trust as against the estate of X, since he will have had an opportunity to revoke his will if he wished.[67] He can only sue the estate of X for breach of contract. Furthermore, even if no notice of revocation is given during the joint lives, where X has revoked by making a new will which departs from his mutual will, Y is deemed to have had notice of the revocation, and no trust will arise.[68]

It seems also that the trust does not arise in the death of the survivor (Y), because it was held in *Re Hagger*[69] that where a beneficiary died between the date of X's death and that of Y's death, the estate of the beneficiary could claim his interest, on the ground that the interest was vested and had not lapsed. This means that the trust must have arisen on X's death. It seems, therefore, that a trust arises under the doctrine of mutual wills when the first testator dies.

What property is subject to the trust?

The answer to this question depends, in the first place, on the proper construction of the mutual wills. In *Re Green*,[70] the agreement expressly provided that each party would leave his property to the other absolutely and, at the death of the survivor, half his residuary estate was to be treated as his property and half as the property received under the will of the first to die. It was held that, as a matter of construction of the express agreement, only the property received under the will of the first to die (and not the survivor's own property) was subject to the trust.

Where the intention of the parties as to what property is to be subject to the trust is not clear from the wording of the wills, it seems that there are the following possibilities:[71]

65 J Mitchell (1951) 14 MLR 137.
66 *Dufour v Pereira* (1769) 21 ER 332.
67 *Stone v Hoskins* [1905] P 194.
68 *Dufour v Pereira*, above.
69 [1930] 2 Ch 190.
70 [1951] Ch 148.
71 See Hanbury and Martin, *Modern Equity*, 14th edn, p 315.

(a) That the trust attaches to the property which Y received under X's will.
(b) That it attaches to all the property which Y owned at the time of X's death, including the property received under X's will.
(c) That it attaches to all the property which Y owned at the time of his (Y's) death.
(d) That it attaches to all the property which Y owned at any time since X's death.

Clearly the property received by Y under X's will is subject to the trust. If the will gave Y a life interest only, Y cannot dispose of the capital, which will be held on trust for the remainderman. If the will gave Y an absolute interest, the trust imposed by equity in favour of the ultimate beneficiaries will in effect reduce that interest to a life interest.[72]

But what about Y's own property, that is to say, property acquired by Y otherwise than under X's will? *Re Hagger*[73] suggests that all the property which Y owned at the time of X's death is subject to the trust, since in that case the beneficiary was held to have obtained a vested interest immediately on X's death. This would mean that any alienation by Y of property she owned at the time of X's death would amount to a breach of trust.

The next question is whether property acquired by Y after X's death through her own efforts is subject to the trust. It is arguable that even this property should be subject to the trust, since the property acquired by X's own efforts subsequently to the making of the mutual wills was included in *his* estate, so Y's after-acquired property should also be subject to the trust.[74] The effect of this reasoning would be to reduce Y to a life tenant of *all* her property, so that she may use the income for her own benefit, but the capital is to be held upon trust for the ultimate beneficiaries. It seems that this result would not accord with the parties' intentions, which would be that Y should have a right to deal as she wished with her own property, and perhaps also with the property left to her absolutely by X under the terms of the agreement.

The difficulty with the latter interpretation of the parties' intentions is that the trust becomes so uncertain as to be virtually useless, since Y can destroy the subject matter of the agreement by alienating or dissipating it. One suggestion for rationalising the position was made by Dixon J in the Australian case of *Birmingham v Renfrew*.[75] He suggested that the object of mutual wills is to enable Y to enjoy for her own benefit the full ownership of both her own property and the property given to her by X's will, so she may sell it or spend it as she wishes. But she is required to bequeath whatever is left, after she has enjoyed it, in her will in the manner agreed. During Y's lifetime, her obligation is 'floating' or 'suspended', but on her death it crystallises into a trust.

The reasoning of Dixon J was adopted by Nourse J in *Re Cleaver*,[76] where it was held that the survivor could enjoy the property as absolute owner during his lifetime 'subject to a fiduciary duty which crystallised on his death and disabled him only from making voluntary dispositions *inter vivos*', that is to say, dispositions which were calculated to defeat the agreement. There was no objection to the survivor making ordinary gifts of small value. It seems, however, that any such duty not to dissipate the assets *inter vivos* will be unenforceable if the beneficiaries do not discover their rights until after the survivor's death.

72 *Ibid*.
73 [1930] 2 Ch 190.
74 Hanbury and Martin, *Modern Equity*, 14th edn, *ibid*.
75 (1936) 57 CLR 666.
76 [1981] 1 WLR 939.

CHAPTER 6

RESULTING TRUSTS

Resulting trusts are so called because in them the beneficial interest 'results', that is to say, goes back, to the settlor. They differ from express trusts in that:

(a) they arise from the implied or presumed intention of the settlor and not from his express words;

(b) their creation does not depend upon formalities such as writing;

(c) their objects do not need to be immediately identifiable; and

(d) a minor may not be an express trustee, but he can be a resulting trustee.[1]

In *Re Vandervell's Trusts (No 2)*[2] Megarry J drew a distinction, which has since become established, between an 'automatic' and a 'presumed' resulting trust. In the former, as occurred in *Vandervell v IRC*,[3] the resulting trust does not depend on any intention on the part of the settlor but is the automatic consequence of the settlor's failure to dispose of the beneficial interest in the property. A 'presumed' resulting trust, on the other hand, arises in the case of a voluntary conveyance by the settlor of his property to a 'stranger', or in the case of a purchase of property in the name of a stranger, where it can be presumed that the settlor intended the beneficial interest to reside in himself.

AUTOMATIC RESULTING TRUSTS

According to Diplock LJ, 'equity abhors a beneficial vacuum'.[4] Accordingly, if a settlor conveys property to trustees, but fails to declare the trusts upon which it is to be held, or where an express trust fails on the ground of uncertainty of the beneficial interests or objects, or because of failure to comply with statutory requirements as to writing;[5] or where only part of the beneficial interest is disposed of, or where a surplus of money remains after an express trust has been carried out, in all such cases there will be an automatic resulting trust to the settlor or, if he is dead, to his estate. In the latter case, if there is a residuary gift, the property will pass to the residuary legatee or devisee; if there is no residuary gift, or if the gift which fails is a gift of residue, then the property will pass to the persons entitled on intestacy.

Failure of express trust

A resulting trust will arise where an express trust, for any reason, fails. Thus, for instance, where property is given to trustees upon trust, but no trusts are declared, there will be an automatic resulting trust to the settlor, as in *Vandervell v IRC*,[6] where the trustees held the option to

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1 *Re Vinogradoff* [1935] WN 69.
2 [1974] 3 All ER 205.
3 [1967] 1 All ER 1.
4 *Vandervell v IRC* [1965] 2 All ER 37 at 46.
5 As under LPA 1925, s 53(1)(b) (UK); Cap 236, s 60(2) (Barbados).
6 [1967] 1 All ER 1. See p 23, above.

repurchase the shares on a resulting trust for Vandervell. Another example is *Barclays Bank v Quistclose Investments Ltd*[7] where, upon failure of the trust to pay dividends on Rolls Razor's shares because of the liquidation of Rolls Razor, an automatic resulting trust arose in favour of Quistclose, which had lent the money for the express purpose of paying the dividends. A third example is *Re Ames' Settlement*,[8] where a marriage settlement was declared void after a decree of nullity of the marriage had been pronounced. Since the effect of the decree was that there had never been any marriage, the consideration had totally failed and the funds of the settlement were held on a resulting trust for the settlor's estate.

Surplus remaining after private trust has been carried out

A typical example of this situation is *Re Abbott*.[9] In this case a fund had been raised by subscription for the maintenance of two deaf and dumb ladies. When they had both died, a portion of the money remained in the trustees' hands. It was held that the surplus was held on a resulting trust for the donors.

Another example of a resulting trust of a surplus of funds is *Re Gillingham Bus Disaster Fund*,[10] where the consequences of finding a resulting trust were far from satisfactory. In this case, 24 Royal Marine cadets had been killed and many others injured when a bus ran into them as they marched along the street. A memorial fund was established and an appeal advertised in a national newspaper for 'defraying the funeral expenses, caring for the boys who may be disabled, and then for such worthy causes in memory of the boys who lost their lives as the [Mayor of Gillingham] may determine'. Members of the public contributed about £9,000, partly in identifiable sums from individual subscribers, but mostly in street collections. The trustees spent about £2,500, then asked for the court's directions as to what to do with the surplus. Harman J rejected the argument that the surplus should be paid to the Crown as *bona vacantia*, and held that it was subject to a resulting trust for the subscribers on the ground that each 'donor did not part with his money absolutely out-and-out, but only *sub modo* to the intent that his wishes . . . should be carried into effect',[11] and an anonymous donor should no more be presumed to have intended to part with his money out-and-out than a donor who was identifiable.

The decision in *Re Gillingham* was obviously inconvenient since it was impossible to trace the anonymous donors who had put money into collecting boxes in the street; and ultimately that money had to be paid into court. Had the trust fund been established for exclusively *charitable* purposes, it might have been possible to apply the surplus to similar charitable objects under the *cy-près* doctrine,[12] but the purposes in this case were not exclusively charitable.

In *Re West Sussex Constabulary's Benevolent Fund Trusts*,[13] on the other hand, where a fund was established to provide benefits for the widows and dependants of deceased police officers, Goff J refused to follow *Re Gillingham* with regard to surplus money obtained from collecting boxes. In his view, the proceeds of street collections should not be held on a resulting trust for the anonymous donors, but should go as *bona vacantia* to the Crown, since such donors intended to

7 [1968] 3 All ER 651 (see above, pp 10, 11).
8 [1946] 1 All ER 694.
9 [1900] 2 Ch 326.
10 [1958] 2 All ER 749 (CA), affirming the decision of Harman J [1958] 1 All ER 37.
11 [1958] 1 All ER 37 at 41.
12 See below, Chapter 9.
13 [1970] 2 WLR 848.

part with their money out-and-out. Moreover, he held that money raised from entertainments, raffles and sweepstakes should not be held on a resulting trust for the participants for two reasons:

(a) because a person who pays money for an entertainment, raffle or sweepstake does so under a contract with the organisers. He does not give his money on trust, but only in return for what he receives; and

(b) in such cases there is no direct contribution to the fund at all—it is only the profit, if any, from the event which is ultimately received on trust. Such receipts therefore passed as *bona vacantia*.

On the other hand, Goff J went on to hold that identifiable donations and legacies were held on a resulting trust.

Dissolution of unincorporated associations

Where an unincorporated association is dissolved, its surplus funds may be treated as being held on a resulting trust for the members of the association in proportion to their contributions to the funds. This solution was applied in *Re Printers' and Transferrers' Society*,[14] where weekly contributions had been paid by members for the purpose of providing, *inter alia*, strike and lock-out benefits. On the dissolution of the society, it was held that the surplus funds were to be divided between those who were members at the time of dissolution, in proportion to their contributions.

Another method of dealing with surplus funds of a dissolved association is to treat the funds as being subject to the contractual rights and liabilities of the members *inter se*. In *Cunnack v Edwards*[15] a society was founded to provide benefits for the widows of members. On its dissolution, it was held that the personal representatives of members could not claim a share in the surplus funds since the members who had contributed had received all that they had contracted for in the form of pensions for the widows. The Crown therefore took the surplus as *bona vacantia*, a solution which was later adopted by Goff J in the *West Sussex* case[16] with regard to the direct contributions of past and present members of the society.

It has been suggested by Hanbury and Martin[17] that if entitlement is on a resulting trust basis, the distribution of surplus funds should be made amongst all members of the society, past and present, in shares proportionate to their contributions, but that past members will be excluded if the calculation would prove to be too difficult. However, they and other commentators are of the view that the resulting trust solution is not favoured by the courts today.

It seems that the current approach is that adopted by Walton J in *Re Bucks Constabulary Funds Friendly Society (No 2)*,[18] where there was a fund established to provide benefits for the members and dependants of members of a police force which had been amalgamated with other forces. Walton J criticised the *bona vacantia* solution in the *West Sussex* case and held that it is only where the association has become moribund, in that all or all but one of the members have died or resigned, that the funds will go as *bona vacantia*; in all other circumstances, the funds should be divided equally between the existing members at the time of dissolution, except where the rules

14 [1899] 2 Ch 184.
15 [1891] 2 Ch 699.
16 [1970] 2 WLR 848, above.
17 *Modern Equity*, 14th edn, p 244.
18 [1979] 1 WLR 936.

of the society provide for distribution in some other way. In the present case, the funds were to be divided equally among the members.

Distribution of surplus among beneficiaries

In some cases, the courts have held that when a trust fund is set up for certain beneficiaries, it is the intention of the contributors that the beneficiaries should be entitled to the surplus, so that there will be no resulting trust to the contributors or subscribers. This was the solution applied in *Re Andrew's Trust*,[19] where a fund was created for the education of the children of a deceased clergyman. When the children had reached their majority and completed their education there was a surplus. It was held that the surplus should be given to the children beneficially. No resulting trust for the subscribers arose because the purpose of the fund was to benefit the children generally, though with particular reference to their education, and the subscribers had intended to part with their money out-and-out when they gave it. A similar approach was taken in *Re Osoba*.[20] In this case the testator left property to his widow upon trust to be used 'for her maintenance and for the training of my daughter, Abiola, up to university grade, and for the maintenance of my aged mother'. The mother predeceased the testator; the widow died in 1970; and the daughter completed her university education in 1975. It was held that the testator's intention was to provide absolute gifts for the beneficiaries, and the references to education and maintenance were merely expressions of motive. In the absence of words of severance, the beneficiaries took as joint tenants, so that the daughter was entitled by the right of survivorship to the whole fund on her mother's death. Buckley LJ explained the position thus:[21]

> If a testator has given the whole of a fund, whether of capital or income, to a beneficiary, whether directly or through the medium of a trustee, he is regarded, in the absence of any contraindication, as having manifested an intention to benefit that person to the full extent of the subject matter, notwithstanding that he may have expressly stated that the gift is made for a particular purpose, which may prove to be impossible of performance or which may not exhaust the subject matter. This is because the testator has given the whole fund; he has not given so much of the fund as a trustee or anyone else should determine, but the whole fund. This must be reconciled with the testator's having specified the purpose for which the gift is made. This reconciliation is achieved by treating the reference to the purpose as merely a statement of the testator's motive in making the gift. Any other interpretation of the gift would frustrate the testator's expressed intention that the whole subject matter shall be applied for the benefit of the beneficiary. These considerations have, I think, added force where the subject matter is the testator's residue, so that any failure of the gift would result in intestacy. The specified purpose is regarded as of less significance than the dispositive act of the testator, which sets the measure of the extent to which the testator intends to benefit the beneficiary.

It is not easy to reconcile the decisions in *Re Osoba* and *Re Andrew's Trust* with *Re Abbott*,[22] but one possibility suggested by Pettit[23] is that a distinction may be drawn between cases where the beneficiaries are dead (as in *Re Abbott*) and where they are still living. In the former case, the court will more readily hold that there is a resulting trust, since the major purpose of the trust can no longer be carried out. However, if the beneficiaries are still alive, the major purpose of

19 [1905] 2 Ch 48.
20 [1979] 2 All ER 393.
21 *Ibid* at 402.
22 [1900] 2 Ch 326.
23 *Equity and The Law of Trusts*, 6th edn, p 143.

providing a benefit for them can still be accomplished, and so they may be held to take beneficially.

Pension scheme surpluses

Where a company pension scheme is terminated, whether on winding up or otherwise, the question may arise as to whether any surplus funds in the scheme are held on a resulting trust for the employee members, or for the company. It has been pointed out that there is no consensus on the question of the ownership of pension scheme surpluses.[24] One view is that pension funds are to be regarded as trusts established as the result of contracts between the company and the employees which guarantee a defined benefit but, unless the terms of the scheme expressly allocate the ownership of surplus funds to employees, the latter do not obtain any interest in the surpluses which therefore are the property of the company as plan sponsor. Another view is that pension funds are trusts established for the benefit of employees, so that the company has no claim to ownership of surpluses.[25]

In determining the destination of pension scheme surpluses, the terms of the particular trust deed must first be construed. In *Rees v Dominion Insurance Co of Australia Ltd*,[26] for instance, Waddell J held that, as a matter of construction of the trust deed, both the members and the company were excluded from participation in the surplus on winding up, and so there was no room for a resulting trust in favour of the members or the company. The surplus therefore passed to the Crown as *bona vacantia*.

In *Wilson v Metro Goldwyn Mayer*[27] one of the issues was whether the trust deed could be amended so as to entitle the company to surplus pension funds. Here the assets of the fund were valued at $355,000, and entitlements of members totalled $80,000. The company proposed to wind up the fund in accordance with the terms of the trust deed, which provided that during the lifetime of the trust, surplus funds could, at the discretion of the company, be applied towards the company's contributions or in the payment for such benefits to members, former members or dependants as the company might, in its discretion, direct. The trust deed further provided that, upon winding up, the trustees were obliged to apply surplus moneys for the provision of benefits to such members as the company might then direct. Therefore, while the company was empowered to give itself a 'contribution holiday' during the lifetime of the trust, it was excluded from participation in surplus moneys on winding up. However, the trust deed also gave the company and the trustees a joint power to amend the trust deed in any respect which would, in the opinion of the company, not prejudice any 'benefits secured' for the members. The trustees sought the directions of the court as to whether the company could amend the trust deed by altering the provision concerning entitlement to surplus on winding up, so as to provide for payment of surplus moneys to the company. Kearney J held:

(a) that, as a matter of construction of the trust deed, the reference to 'benefits secured' in the amending power included both defined benefit entitlements and the members' entitlements with respect to surplus. Therefore, there was no power to amend the trust deed in

24 Report of the Task Force on Inflation Protection for Employment Pension Plans (Government of Ontario, 1988).

25 *Ibid*. See Austin, 'The role and responsibilities of trustees in pension plan trusts: some problems of trust law', in *Equity, Fiduciaries and Trusts*, p 115 *et seq*.

26 (1981) 6 ACLR 71.

27 Supreme Court, New South Wales, 26 November 1980 (unreported). See also *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294; *Re Reevie and Montreal Trust Co of Canada* (1986) 25 DLR (4th) 312; *Re National Trust Co and Sulpetro Ltd* (1990) 66 DLR (4th) 271.

such a manner as to prejudice the members' entitlement to participate in surplus on winding up; and

(b) that the amending power was a *fiduciary* one and so could not be exercised by the company so as to benefit itself.

In *Re Courage Group's Pension Schemes*[28] it was not necessary for Millett J to decide the 'wider and controversial issue whether . . . surpluses should be regarded as available to the employer or as belonging wholly or partly to the members'.[29] However, he made the following observations as to the nature of the rights of employers and employees to surpluses:[30]

> Employees are obliged to contribute a fixed portion of their salaries or such lesser sum as the employer may from time to time determine. They cannot be required to pay more, even if the fund is in deficit; and they cannot demand a reduction or suspension of their own contributions if it is in surplus. The employer, by way of contrast, is obliged only to make such contributions, if any, as may be required to meet the liabilities of the scheme. If the fund is in deficit, the employer is bound to make it good; if it is in surplus, the employer has no obligation to pay anything. Employees have no right to complain if, while the fund is in surplus, the employer should require them to continue their contributions while itself contributing nothing. If the employer chooses to reduce or suspend their contributions, it does so *ex gratia* and in the interests of maintaining good industrial relations.
>
> From this, two consequences follow. First, employees have no legal right to 'a contribution holiday'. Secondly, any surplus arises from past overfunding, not by the employer and the employees *pro rata* to their respective contributions, but by the employer alone to the full extent of its past contributions and only subject thereto by the employees.

The crux of Millett J's reasoning is that, where the employer is under an obligation to make good any deficit in the fund, any surplus is to be regarded as an over-funding by the employer, which is accordingly entitled to such amount as it has contributed to the fund; and it is only after such entitlement has been satisfied that the employees will be entitled to any surplus. Millett J also noted, however, that for an employer to acquire a legal right to repayment, an amendment to the trust deed will normally be required.[31]

In *Davis v Richards and Wallington Industries Ltd*,[32] surplus funds in a pension scheme were derived from three sources:

(a) the employees, by 5% deduction from their salaries by way of contractual obligation;

(b) transfers from other pension schemes; and

(c) the employers, by contractual obligation to pay whatever was necessary to fund the scheme.

The main issue in the case was whether the surplus was to be applied by way of resulting trust, or whether it was to be treated as *bona vacantia*. It was argued that rights under the pension scheme lay in contract, not in trusts, so that the resulting trust solution was inappropriate. Scott J took the view, however, that the contractual origin of the rights under the scheme did not preclude a resulting trust; nor was a resulting trust excluded by the fact that contractors had obtained all that they had bargained for under the contract. However, in the present case, the resulting trust solution was inappropriate for two reasons:

28 [1987] 1 WLR 495. See also D J Hayton [1993] Conv 283.
29 *Ibid* at 514.
30 *Ibid* at 515.
31 *Ibid*.
32 [1990] 1 WLR 1511. See J Martin [1991] Conv 364, 366.

(a) it would be unworkable, since each employee had paid in return for specific benefits, which were all different, depending on length of service, age, etc, and some employees had exercised an option to have their contributions refunded; and

(b) the pension scheme was based on legislation which placed a maximum on the financial return to which employees would be entitled.

For these reasons, it was not possible to impute an intention that the employees should have the surplus by way of resulting trust. Accordingly, it was held that any part of the surplus which was derived from the employees was *bona vacantia*.

In the more recent case of *Air Jamaica Ltd v Charlton*,[33] the airline's staff pension scheme was funded by deductions from employees' salaries and by matching contributions by the company. The trust deed provided, *inter alia:*

(a) that no money contributed by the company was, in any circumstances, to be repayable to the company (cl 4);

(b) that the company had power to amend the scheme from time to time (cl 13.1); and

(c) that the company could discontinue the scheme at any time, but not so that any part of the fund could be used other than for the exclusive use of members and others entitled to benefits under the scheme (cl 13.2).

More specifically, cl 13.3 provided that, in the event of discontinuance of the scheme, any balance was to be applied first in purchasing annuities for existing and future pensioners, then for providing additional benefits for members, their widows or designated beneficiaries, at the trustees' discretion. In 1994, the Jamaican Government decided to dispose of its controlling interest in the company. Having made the employees redundant and paid all benefits due to them, the company proposed to use the $400 million surplus in the pension fund to settle its outstanding debts. Members of the scheme sought a declaration that the pension plan had been discontinued and that the fund ought to be dealt with according to cl 13.2. The company proceeded to amend the trust deed under its cl 13.1 power so as to enable the surplus to be paid to the company. The Privy Council, upholding the decision of the Jamaican Court of Appeal, held:

(a) that the company was obliged to use its power to amend the scheme in good faith, and could not do so in order to give any interest in the trust fund to the company, which was in any event expressly prohibited by cl 4; and

(b) that the balance in the trust fund after discontinuance of the scheme did not revert to the Crown as *bona vacantia* but was held on a resulting trust. Clause 4 of the trust deed merely prevented the repayment of contributions to the company under the terms of the scheme, and did not preclude the company from retaining a beneficial interest by way of general resulting trust principles. Accordingly, so much of the surplus as was attributable to contributions made by the company reverted to the company. On the other hand, so much of the surplus as was attributable to employees' contributions was held on a resulting trust for those members, and should be divided *pro rata* among the members and the estates of deceased members in proportion to their respective contributions, and without regard to the value of the benefits they had received.[34]

33 [1999] 1 WLR 1399.

34 A similar direction was made by the Privy Council in *Scully v Coley* (2009) PC Appeal No 51 of 2008 (unreported) [Carilaw JM 2009 PC 7].

PRESUMED RESULTING TRUSTS

A presumed resulting trust arises in favour of B where B pays for property but has it conveyed into the name of T, or into the joint names of himself and T, or where B voluntarily conveys his own property to T. And where two or more persons pay for property, which is conveyed into the name of one only, a resulting trust arises in favour of those paying the money in proportion to their contributions. In all such cases equity presumes that the intention of the person or persons providing the money was that he or they should enjoy the beneficial interest, and the court will give effect to such intention by requiring T to hold upon trust. Such equitable interest will take priority over any equitable interest subsequently created, such as an equitable mortgage created by the trustee in favour of a bank.[35]

The presumption of a resulting trust is rebuttable by evidence of the real intention of B, for example by evidence that he intended to make a gift to T. Moreover, where B is the father or husband of T, there is a presumption of advancement (or gift) in favour of T. This presumption is also rebuttable by evidence that a gift was not intended.

Voluntary conveyance

It appears that a distinction must be drawn between a voluntary conveyance of *personalty* and one of *land*.

As regards personalty, there is a presumption of a resulting trust where B voluntarily (that is to say, without consideration) transfers property to T without any declaration of trust or gift, or where B voluntarily transfers property into the joint names of himself and T. Thus, in *Re Vinogradoff*,[36] certain stock was transferred by V into the joint names of herself and her four year old granddaughter. After V's death it was held that a resulting trust had arisen in favour of V's estate. This presumption is, however, easily rebutted by evidence that a gift was intended.

As regards land, the position is less clear. A voluntary conveyance of land which is intended to be by way of gift must be expressed to be made for the use or benefit of the grantee, otherwise there will be a resulting trust of the equitable interest, and the legal estate will be carried back to the grantor by virtue of the Statute of Uses 1535. The Law of Property Act 1925, s 60(3) (UK) now provides that in a voluntary conveyance of land (including leaseholds) a resulting trust for the grantor shall not be implied *merely* by reason that the property is not expressed to be conveyed for the use or benefit of the grantee. However, there seems to be nothing in the section which prevents a resulting trust from being implied for other reasons or by the ordinary application of equitable principles, so that if the transferor wishes to make a gift of the land he should, for the avoidance of doubt, expressly provide in the conveyance that a resulting trust is not to be implied.[37] On the other hand, s 64(3) of the Property Act, Cap 236 (Barbados) goes further in excluding a resulting trust on a voluntary conveyance of land by providing that 'a resulting trust for the grantor is not implied merely by reason of the absence of valuable consideration or of a substantial consideration or of any words expressly rebutting a resulting trust, or by reason that the property is not expressed to be conveyed for the use or benefit of the grantee'.

35 *Mapp v Barclays Bank International Ltd* (1992) Court of Appeal, Barbados, Civil Appeal No 8 of 1986 (unreported).
36 [1935] WN 68.
37 See Hanbury and Martin, *Modern Equity*, 14th edn, pp 249, 250; Underhill and Hayton, *Law of Trusts and Trustees*, 14th edn, p 290.

The position thus appears to be that in those jurisdictions in which the pre-1926 English rules apply, there will be a resulting trust on a voluntary conveyance of land, unless the express words 'to the use or benefit of the grantee' are used; whereas in Barbados there will be no presumption of a resulting trust merely on the ground that the conveyance is voluntary.

Where, on the other hand, it is shown that there was an intention on the part of the transferor that there should be a resulting trust in his favour, then the court will uphold the resulting trust. This is illustrated by *Hodgson v Marks*[38] where Mrs H, an elderly lady, voluntarily conveyed her home to E, her lodger, whom she relied upon to manage her affairs. It was orally agreed that Mrs H would remain beneficial owner. E later sold the house to M, who was a *bona fide* purchaser without notice of Mrs H's interest. The question was whether Mrs H was protected as against M. It was held that Mrs H remained beneficial owner in equity, and she had an overriding interest within the Land Registration Act 1925. The express oral declaration of trust as between Mrs H and E was unenforceable for lack of written evidence, but a resulting trust did arise in her favour by virtue of her intention to remain beneficial owner. Section 60(3) Law of Property Act 1925 was not discussed in the case.

Purchase in the name of another

It has been established since *Dyer v Dyer*[39] that where B pays for real property and has it conveyed or registered in the name of T, or in the joint names of T and B, T is presumed to hold on a resulting trust for B. The principle has since been extended to personalty. In *Re Howes*,[40] for instance, a testatrix put £500 into her niece's deposit account at a bank, without telling the niece what she had done. She retained the deposit note, and purported to dispose of the money in her will. It was held that, even though this was not strictly a purchase, a resulting trust arose in favour of the testatrix and her estate.

The principle in *Dyer v Dyer* also applies where there is a joint purchase by two or more persons, but the conveyance is taken in the name of one only. In *Bull v Bull*,[41] a son advanced two-thirds of the purchase price of a house, and his mother advanced one-third: the conveyance was taken in the son's name alone. It was held that a resulting trust arose in favour of the mother in proportion to the one-third share she had provided. But it must be shown that the money was advanced by way of *purchase*. If it is advanced merely by way of loan, there is no resulting trust and the person lending the money is a mere creditor.

Another case (in which it was held that there was no resulting trust) is *Savage v Dunningham*,[42] in which there was an informal flat sharing arrangement. The tenancy was in the sole name of the defendant, but the rent and other expenses were shared equally between him and the other flat sharers (the plaintiffs). It was held that 'purchase money' does not include rent, so there was no resulting trust in favour of the plaintiffs.

An example of the application of the principle in *Bull v Bull* is the Trinidadian case of *Rampaul v Mohammed*.[43] Here, three brothers, K, F and S, decided to pool their resources in order

38 [1971] Ch 892.
39 [1775–1802] All ER Rep 205. There must be sufficient evidence of payment of the purchase price by the person claiming the beneficial interest: *Olton v Olton* (1991) High Court, Trinidad and Tobago, No 117 of 1974 (unreported).
40 (1905) 21 TLR 501.
41 [1955] 1 QB 234; followed by the Jamaican Court of Appeal in *Forbes v Bonnick* (1968) 11 JLR 67. See also *Gibson v Walton* (1992) 28 Barb LR 113 (High Court, Barbados).
42 [1974] Ch 181.
43 (1975) High Court, Trinidad and Tobago, No 854 of 1971 (unreported).

to purchase certain premises, each contributing approximately one-third of the purchase price. It was arranged that the purchase would be partially financed by means of a loan from the Bank of Nova Scotia and that, in order to facilitate this, K and F would pay their contributions into S's account at the bank. The premises were ultimately purchased and the legal title was conveyed into the sole name of S. On S's death, K and F sought a declaration that S had been a trustee of the premises for himself, K and F as beneficial tenants in common, and that S's administrator should execute a memorandum of transfer to K and F of two one-third shares in the premises.

Des Iles J held, following *Bull v Bull*, that a resulting trust of the premises had arisen in favour of K and F in proportion to their contributions, and they were entitled to a memorandum of transfer.

Another Caribbean example of a purchase-money resulting trust is *Griffith v Griffith (No 1)*,[44] where the plaintiff and the defendant, a married couple, decided to acquire a house in Barbados. They found a suitable property, which was conveyed into their joint names. The evidence showed that the wife (the plaintiff) provided all of the purchase money other than a small sum paid by the husband to clear the mortgage, and that the intention of the parties, at the time of the decision to acquire, was that the property should be the plaintiff's.

Rocheford J (Ag) held that the parties held the legal estate in the property as trustees, with the beneficial ownership being in the wife alone. He explained:

> I have found that the true intention of the parties at the time of the decision to purchase was that the plaintiff would be the purchaser, I have therefore found that there is no evidence of a contrary intention to rebut the presumption of a resulting trust in favour of the plaintiff.
>
> Counsel for the defendant has drawn my attention to this statement of Lord Upjohn in *Pettitt v Pettitt*:[45]
>
> 'In the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her, but if he puts it into joint names then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy. If a wife puts property into her husband's name it may be that, in the absence of all other evidence, he is a trustee for her, but in practice there will in almost every case be some explanation (however slight) of this (today) rather unusual course. If a wife puts property into their joint names I would myself think that a joint beneficial tenancy was intended, for I can see no other reason for it.
>
> But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, and this is so whether the purchase be in the joint names or in the name of one. This is the result of an application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of evidence enabling the wife to claim an advancement to her, for it is against all the probabilities of the case unless the husband's contribution is very small.'
>
> As I have found that both spouses did not contribute to the acquisition of the property, but the wife only, the second paragraph of the statement quoted above is not relevant. With respect to the first paragraph, I have accepted the wife's explanation for allowing the property to be put into their joint names and I find that a joint beneficial tenancy was not intended. There is also never a presumption of advancement in favour of a husband.[46] The parties therefore hold the legal estate as trustees, the beneficial ownership being in the plaintiff alone.

44 (1981) 16 Barb LR 291(High Court, Barbados).
45 [1969] 2 All ER 385 at 407.
46 In Barbados, section 192(2) of the Property Act, Cap 236, now provides that there is a presumption of advancement where a wife purchases property in her husband's name or makes a voluntary conveyance to him. See p. 97, below.

Rebutting the presumption of resulting trust

The presumption of resulting trust may be rebutted or partially rebutted by evidence that a gift to the transferee was intended, or by showing that money was advanced by way of loan and not upon trust. In the Commonwealth Caribbean, rebuttal of the presumption of a resulting trust has most often occurred in the context of joint bank accounts.

In *Bank of Nova Scotia Trust Co (Caribbean) Ltd v Smith-Jordan*,[47] the testator, shortly before his death, had opened a joint bank account in the names of himself and the defendant, who was his 'companion, personal servant and caretaker'. One of the terms of the agreement between the bank and the depositors was that on the death of one of the depositors all money in the account might be withdrawn by the survivor. All the money in the account was provided by the testator. Before the testator's death, the defendant had made several withdrawals from the account for his own benefit, and on the testator's death there was a credit balance of $103,460. The defendant withdrew the entire amount. The plaintiff, as executor of the testator's will, claimed the the defendant was a trustee of the amount for the testator's estate.

Douglas CJ held that the resulting trust which had arisen in favour of the testator had been rebutted by the defendant, since it was clear that because of the long-standing relationship between the parties, the testator had intended that the defendant should have the beneficial enjoyment of the money.

After reviewing a number of English and Canadian cases concerning joint deposit accounts, the learned Chief Justice continued:

> Before leaving the cases, I would refer to the Australian case of *Russell v Scott*.[48] I do so because the authorities I have cited involve either husband and wife, or blood relations. In the case before me, the persons involved are employer and personal-servant-companion. I would therefore adopt the language of the joint judgment of Dixon and Evatt JJ in the *Russell* case in the High Court of Australia:[49]
>
> 'The fact that these cases arose between husband and wife affects only the burden of proof. In a case where there is no presumption of advancement, satisfactory affirmative proof of an intention to confer a beneficial interest supplies the place of the presumption. Once it appears, as it does in the present case, that a definite intention existed that the balance at the credit of the bank account should belong to the survivor, these cases become, in our opinion, indistinguishable.'
>
> On the facts before me I find that, by reason of the defendant's long and faithful service, the testator felt himself under an obligation to provide for him; that he did so provide for the defendant in his will; that he conveyed to the defendant by deed of gift the property 'Hampton Court'; that he revealed his intention to benefit the defendant to Mr Hinds and Mr Rouse; that he signed the joint deposit agreement exhibited in court; and that the testator's intention was that the defendant should be free to draw on the account during their joint lives and that the entire balance would go to him at the testator's death.
>
> In my view, the evidence is overwhelming in favour of the defendant. The fact that the withdrawals were for the defendant's own purposes is significant, as is the concurrence of the testator in this pattern of withdrawals. Further, the clear statements in the will and in the deed of gift put the matter of the testator's intention beyond any doubt. The onus is on the defendant to rebut the presumption that he is a trustee of the balance in the joint account by reason of a resulting trust. In my judgment the defendant has discharged that burden.

47 (1970) 15 WIR 522 (High Court, Barbados).
48 (1936) 55 CLR 440.
49 *Ibid* at 453.

A more recent example of rebuttal of a resulting trust of money in a joint account is *Pearson v Cayman National Bank*.[50] Here, T, who was critically ill, decided to add his sister, P, as a signatory to three savings bank accounts held by him. T and P signed a general amendment form listing changes to the accounts and stipulating that the accounts were to be 'either/or' accounts. The bank added P's name to the accounts and issued statements showing P as joint account holder. A few days before he died, T changed his mind and wrote to the bank requesting that the names of third parties be substituted for P with respect to the accounts. The main issue in the case was whether P was entitled beneficially to the money in the accounts as surviving joint tenant, or whether she held on a resulting trust for T's estate. Further, the court had to decide whether T's instruction to the bank to replace P as joint account holder had effected a severance of the joint tenancy of the accounts.

Sanderson J held that the presumption of resulting trust in favour of T that had arisen by virtue of the transfer of funds into the name of a volunteer 'stranger', P, had been rebutted by the evidence that T had intended to confer a joint legal and beneficial title in the accounts on P, in that either T or P could draw on the accounts for their own benefit. This was the effect of an 'either/or' account. Further, the subsequent change of mind on the part of T had not effected a severance of the joint tenancy. Accordingly, no interest in the accounts had passed to the third parties and P had acquired the whole legal and beneficial interest by survivorship.

On the other hand, in *Re Harper, Brathwaite v Harper*,[51] Sir David Simmons CJ, in the Barbados High Court, came to the conclusion that there had been no rebuttal of the resulting trust presumption. The facts were that, shortly before his death, H opened a joint savings account at the bank in the names of himself, his brother (B), and his son (S), who was born out of wedlock.[52] The agreement between the bank and the three signatories provided that, in the event of the death of any signatory, the money in the account 'may be withdrawn by the survivors of the undersigned or any one of them or the sole survivor'. On the day H died, B withdrew practically all the money from the account but subsequently, on legal advice, the money was held in escrow pending the determination of the issue of entitlement. The question to be decided by the court was whether, in particular having regard to the terms of the agreement with the bank establishing the account, the money now in escrow belonged to B by virtue of survivorship, or whether it reverted to H's estate under a resulting trust. Simmons CJ first of all pointed out that, over the years, joint bank accounts had spawned voluminous litigation, and that this was an area of the law which was 'highly fact-sensitive and fact-dependent', in which many of the cases turned on their own facts. However, he proceeded to restate the basic principles which he considered to be applicable in the instant case, as follows:

(i) When the joint deposit account was established, with the entire funds being provided by H, the signatories jointly held the *legal title*[53] to those funds at common law;[54]

(ii) There was no express statement either during the lifetime of H or after his death as to the destination of the *beneficial interest*[55] in the funds, but equity recognised a presumption that,

50 [2000] CILR 246.
51 (2007) 72 WIR 40.
52 Simmons CJ held that, for the purposes of the presumption of advancement, 'child' in the Barbadian context should be interpreted as meaning all children, including those born out of wedlock. See p 90, fn 59 below. However, in the instant case, the presumption of advancement was either inapplicable or, if applicable, was rebutted on the facts.
53 Italics supplied.
54 *Standing v Bowring* (1885) 31 Ch D 282.
55 Italics supplied.

when H opened the joint deposit account in the three names, there was no intention on his part to divest himself of exclusive ownership and control of the funds in the account and constitute B and S as joint tenants of it. Since equity leans against joint tenancies (of a beneficial interest), it would be presumed that the funds were to be held on a resulting trust for H, though the presumption could be rebutted by relevant evidence of facts and circumstances tending to show H's real purpose in creating the account;

(iii) The court's task was to determine the intention of H at the time when the joint account was opened and the three parties signed the agreement. This determination required a consideration of all the evidence and not only the agreement with the bank.[56] In this case, as in *Marshall v Crutwell*[57] and *Ashby v Thornhill*,[58] the evidence showed that the account was opened in joint names, not with the intention of giving any beneficial interest to B and S but rather for convenience, as H was in failing health and he needed assistance in managing his domestic and financial affairs. It was highly significant that, after opening the account, H maintained the right to use it during his lifetime and did not divest himself of control of the account. H permitted B to withdraw relatively small sums from the account, but only with the prior consent of H. In short, all three signatories treated the account as H's personal property.

The conclusion was that the funds were held on a resulting trust for H's estate and were to be distributed in accordance with the terms of H's will.

An example of a partial rebuttal of a presumption of resulting trust in a context other than of joint bank accounts is the Trinidadian case of *Sookradge v Ward*.[59] Here, S (the plaintiff) and W (the deceased) lived together in a 'common law' union as man and wife. In 1960 S agreed to purchase a parcel of land from M and he entrusted W with the purchase money for payment to M. W paid the money to M and the deed of conveyance was made out in W's name. Following this, it was agreed between S and W that W would later transfer the property to S in consideration of natural love and affection. In 1962 S spent his own money in replacing a 'trash house' on the land with a six room house built of tapia and plaster with galvanised iron roofing. S and W thereafter lived in the house until W's death in 1978. Following W's death a dispute arose as to the ownership of the property.

Warner J held:

(a) that from S providing the purchase money for the land and the legal title vesting in W, a presumption of a resulting trust arose;

(b) that the presumption was partially rebutted in that there was a clear intention that W should benefit, though not to the exclusion of S;

56 Cf the approach taken in *Reid v Jones* (1979) 16 JLR 512 at 514, where Bingham J stated that 'the mere fact that the entire proceeds of the joint account earnings might have been furnished by the deceased [wife], could only fix her husband as trustee if the mandate to the bank so indicated, or if the testatrix by her own act sought during her lifetime to exercise control over the sums in that account to the exclusion of her husband.' In this case, both had power to withdraw money from the account. It was held that the husband was entitled beneficially by right of survivorship.

57 (1875) LR 20 Eq 328.

58 (1992) High Court, Barbados, No 832 of 1987 (unreported), where a husband, who was seriously ill, converted a bank account which was in his sole name into a joint account in the names of his estranged wife and himself. Belgrave J was 'satisfied that the husband did not intend to confer any benefit on his wife . . . It was merely a convenient way of permitting the wife to manage his affairs during the remainder of his life. . .[and] the wife knew this.' Accordingly, after the husband's death, the wife held the money on trust for his estate. See also *McLean v Vessey* (1935) 4 DLR 170; *Re Mailman Estate* [1941] SCR 368.

59 (1989) High Court, Trinidad and Tobago, No 4001 of 1984 (unreported).

(c) that since equity leaned in favour of tenancies in common and against joint tenancies of the beneficial interest, W had held the property upon trust for herself and S as beneficial tenants in common. Thus her estate and S were entitled to one half share each; and

(d) that, in the alternative, W began to hold upon trust for herself and S as tenants in common from the time of the construction of the new building, on the basis of the land being the contribution of W and the building being the contribution of S.

Father and child

Where a father voluntarily conveys property to his legitimate child,[60] or purchases property in the name of such child, he is presumed to have 'advanced', that is to say, made a gift of the property to the child. The presumption of advancement is strong in such cases, and is not easily rebutted. For example, in *Re Roberts*,[61] a father took out an insurance policy on his son's life and paid the premiums. The father was expressed to be the trustee of the policy. On his death, the question arose as to whether the premiums were recoverable by his estate. It was held that each premium paid was a separate advancement to the son; the presumption of advancement was not rebutted; and the premiums were not recoverable. And in *B v B*,[62] where a father bought a sweepstake ticket in the name of his 12 year old daughter, and the ticket won $50,000, it was held that the presumption of advancement was not rebutted and the money belonged to the daughter.

Two cases in which the presumption was rebutted are *Re Gooch* and *Warren v Gurney*. In *Re Gooch*,[63] a father bought shares in a company in his son's name in order to qualify the son to be a director. The son handed over to the father the dividends as well as the share certificates. It was held that the presumption of advancement was rebutted. In *Warren v Gurney*,[64] a father purchased a house for his daughter to live in. The conveyance was taken in the daughter's name, but the father kept the title deeds. When the father died 15 years later, the daughter claimed the beneficial ownership of the house. It was held that the presumption of advancement in the daughter's favour had been rebutted by the fact of the retention of the title deeds by the father, coupled with other evidence contemporaneous with the purchase.

A recent Jamaican example of rebuttal of a presumption of advancement is *Scott v Scott-Robinson*.[65] In this case, the claimant purchased property in the joint names of himself and his daughter, the defendant. The property was at all times used by the claimant as his matrimonial home, while the defendant lived in England, visiting Jamaica only occasionally. The claimant retained possession of the duplicate certificate of title. He alleged that he had put his daughter's

60 In *Re Harper, Brathwaite v Harper* (2007) 72 WIR 40, Simmons CJ held that in Barbados the presumption of advancement applies to all children, whether born in or out of marriage. In the context of Barbadian society, where statistics show that a majority of children are born out of wedlock, it would be incompatible with social reality to adopt a narrow interpretation of 'child'. In support of this proposition, the Family Law Act, Cap 214 expressly recognises unions other than marriage and equates the status of such unions with marriage, if certain preconditions are satisfied, so that, broadly, children of such unions are treated in the same way as children of a marriage; and the Status of Children Reform Act, Cap 220 abolished the status of illegitimacy and mandated that, after 1, January 1980, all children are of equal status. 'Child' includes an adopted child: *Edwards v Edwards* (2010) Supreme Court, Jamaica, No HCV 2006 1353 (unreported).

61 [1946] Ch 1.

62 (1976) 65 DLR (3d) 40.

63 (1890) 62 LT 384.

64 [1944] 2 All ER 472.

65 (2010) Supreme Court, Jamaica, No 2009 HCV 01885 (unreported).

name on the title so that she would have the legal title to the property as surviving joint tenant after his death, thus minimising inconvenience and expense; he stated that he never intended that she would be beneficial owner of the property during his lifetime.

In coming to the conclusion that the presumption of advancement had been rebutted, Brooks J referred to the recent case of *Lavelle v Lavelle*,[66] where a father who had purchased an apartment in his daughter's name succeeded in rebutting the presumption on evidence that the reason for the purchase in her name was to avoid inheritance tax. It was a significant fact in *Lavelle* that, although the apartment had been used by him for only three months each year, it had from the outset been remodelled and furnished to suit his needs; further, there was evidence that the rest of his family paid weekly visits to the apartment. Lord Phillips, in giving judgment in the English Court of Appeal, had suggested that the modern tendency is not to apply the rigid rule in *Shephard v Cartwright*[67] with respect to the admissibility of evidence to rebut the presumption of advancement. Rather, in his view, 'equity searches for the subjective intention of the transferor . . . Plainly, self-serving statements of conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as part of the overall picture. Where the transferee is an adult, the words or conduct of the transferor will carry more weight if the transferee is aware of them and makes no protest or challenge to them.'

It was also significant in *Scott*, as in *Warren v Gurney*,[68] that the father had retained possession of the duplicate certificate of title to the property, the 'sinews of the land'. Accordingly, based on the facts and circumstances of the case, Brooks J held 'that Mr Scott has rebutted the presumption of advancement. The intention, in my view, accepted by both sides at the time, was that Mrs Scott-Robinson's interest would only mature on Mr Scott's death.'

There is also a presumption of advancement where the transferor is *in loco parentis* to the transferee, but there is no such presumption in English law as between *mother and child*,[69] apparently because equity does not recognise any obligation on the part of a mother to provide for her children. This is despite the existence of any statutory obligations imposed on mothers to provide for their children.[70] The distinction made between fathers and mothers in this regard is clearly archaic and it has been pointed out that, in practice, it will be comparatively easy to prove that a mother had an intention to make a gift to her child.[71] Some Australian and Canadian judges favour extending the presumption to mother/child relationships.[72]

In the Guyanese case of *Cunje v Cunje*[73] Bollers CJ explained the principles on which a presumption of advancement applies in a case where a father purchases property in his son's name or makes a voluntary transfer of property to his son.

> What Lord Hardwicke was saying [in *Grey v Grey*][74] was that where property is purchased by A in the name of B and B takes the conveyance, in the absence of any explanation as to the facts such

66 [2004] EWCA Civ 223.
67 [1955] AC 431. Though in *Antoni v Antoni* [2007] WTLR 1335, the Privy Council applied the rule without comment.
68 [1944] 2 All ER 472.
69 *Sekhon v Alissa* [1989] 2 FLR 94. See G Kodilinye, [1990] Conv 213.
70 Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 194.
71 *Bennet v Bennet* (1879) 10 Ch D 474 at 478, *per* Jessel MR.
72 See, eg, *Dullow v Dullow* [1985] 3 NSWLR 531; *Cohen v Cohen* (1985) 60 Alberta Rep 234.
73 (1975) Supreme Court, Guyana, No 1153 of 1968 (unreported). See also *Cuny v Johnson* (1988) Supreme Court, The Bahamas, No 721 of 1875 (unreported).
74 (1677) 2 Swans 594.

as the intention to give the property to B, a stranger, equity will presume that A intended B to hold the property in trust for him, but it would be otherwise if B were the son of A, for natural love and affection would supply the necessary consideration and the presumption of an advancement as a gift to the son would arise – to defeat the presumption of what he called a 'constructive trust', but which in the modern authorities is now recognised as a resulting or implied trust. If, therefore, in the latter case the father intended a trust to arise in his favour he should so declare at the time of purchase. The operation of the presumption of advancement is evidential, and since the presumption is rebuttable, it can be rebutted by the true and actual intention of the real purchaser, and subsequent acts and declarations by the father cannot rebut the intention to advance if it was really present at the time of purchase. In *Grey v Grey* the subsequent acts of the father were the receipt of profits from the conveyance, leases made, fines taken, enclosure of parkland on the estate and negotiations for the sale of the land, and yet the son was deemed to hold beneficially. The later authorities hold that this evidence would be inadmissible to establish a trust . . .

In a modern Canadian case *(Northern Canadian Trust Co v Smith)*[75] a father bought a house in the name of his son. The father and his family lived in the house rent free, and both the father and the mother spent money improving it. The Manitoba Court of Appeal held that these facts did not displace the presumption of advancement. In the course of its judgment the court referred to the judgment of Riddell J in *Empey v Fick*[76] where that learned judge said:

'But it is said that the transaction is improvident, and therefore cannot stand. However the case might have stood had the father brought an action to set aside the deed as improvident, as was done in *Watson v Watson*,[77] I think this is not a case in which the representatives of the deceased after his death can do that which, if he had lived, he himself would not have done. The law does not put it upon the child to prove the reasonableness of the gift.'

It is clear, therefore, that the question whether an implied or resulting trust arises or whether the presumption of advancement should be predominant is purely one of intent of the settlor, and in the case of the latter presumption where a father and son are involved, the presumption can only be rebutted by declarations and acts of the settlor prior to or at the time of the purchase in the name of the son. These principles were clearly enunciated in *Shephard v Cartwright*.[78]

In this case, a deceased father, with an associate, promoted several private companies and caused a large part of the shares for which he subscribed to be allotted to his three children, one of them being an infant. The companies were successful and the father and his associate promoted a public company which acquired the shares of all the companies for a large sum of money to be satisfied in cash and shares. The children signed the requisite documents at the request of their father without understanding what they were doing. The father received the cash and at various times sold and received the proceeds of sale of the children's shares in the new company. He then placed to the credit of the children respectively in separate deposit accounts the exact amount of the cash for the old shares and raised sums in each case equivalent to the proceeds of sale of the new shares. Later he obtained the children's signatures to documents in relation to the contents of which they were ignorant, authorising him to withdraw money from these accounts, and without their knowledge he drew on their accounts, which were subsequently exhausted. Part of the sums withdrawn were dealt with for the benefit of the children, but a large part remained unaccounted for. In an action brought by the children of the deceased father against his executors to establish that the shares which the deceased caused to be registered in their names were an advancement to them, the House of Lords held that the presumption of advancement, having regard to the evidence, must prevail. In his judgment, Viscount Simonds said:[79]

75 [1947] 3 DLR 135.
76 (1907) 15 OLR 19 at 29.
77 (1876) 23 Gr 70.
78 [1955] AC 431.
79 *Ibid* at 445.

> 'I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood *in loco parentis*, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: *Finch v Finch*.'[80]

It was established in *Shephard v Cartwright*[81] that:

> . . . the acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration: subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour.

This means that where there is a presumption of advancement, the subsequent acts or declarations of the alleged donor are admissible in evidence only if they are against his interest (that is, where they support the presumption), for 'if the rule were otherwise, it would be extremely easy for persons to manufacture evidence, even though at the time they made the purchase they in fact intended the child [or donee] to have the gift of the property'.[82] Thus, in the Guyanese case of *Samuels v McKoy*,[83] where a father purchased a cottage in the name of his 15 year old daughter and had a tenancy of the land recorded in her name, the fact that the father subsequently paid the land rent and carried out essential repairs could not be used to rebut the presumption of advancement. As Khan J explained:

> In 21 Halsbury's Laws (3rd edn), p 159, it is stated, *inter alia:*
>
> 'A gift *inter vivos* to an infant cannot afterwards be revoked. There is a presumption in favour of the validity of a gift by a parent to a child if it is complete.'
>
> The purchase of the house in question in the name of the plaintiff followed by the recording of the tenancy of the land in her name made the gift complete. The defendant stood in a fiduciary relation to the plaintiff and such a transaction must be construed favourably to the plaintiff who was a child of the defendant: see *Halsbury's Laws of England* (3rd edn), p 201, para 446.
>
> Moreover, where a father purchases realty or personal estate in the name of a child alone, the father is presumed to make a gift to the child. There is a presumption of advancement: a presumption that a gift was intended may exist notwithstanding that the defendant has actually received the income during his lifetime and made leases of the property.
>
> In *Shephard v Cartwright*,[84] where a father invested money in securities in his son's name (unknown to the son) and received the dividends under a power of attorney during his lifetime, it was held that this was an advancement.
>
> In the course of his judgment, Viscount Simonds stated:[85]
>
> 'I do not hesitate to say that the only conclusion which I can form about the deceased's original intention is that he meant the provision he then made for his children to be for their permanent advancement. He may well have changed his mind at a later date, but it was too late. He may have thought that, having made an absolute gift, he could yet revoke it. This is something that no one will ever know. The presumption which the law makes is not to be thus rebutted. If it were my duty to speculate on these matters, my final question would be why the deceased should have put these several parcels of shares in six different companies into the names of his wife and three

80 (1808) 15 Ves 43.
81 [1955] AC 431.
82 *Warren v Gurney* [1944] 2 All ER 472 at 473, *per* Morton LJ.
83 [1968] GLR 30.
84 [1955] AC 431.
85 At 449, 450.

> children unless he meant to make provision for them, and since counsel have not been able to suggest any, much less any plausible, reason why he should have done so, I shall conclude that the intention which the law imputes to him was in fact his intention . . .'
>
> There is no act or declaration before or at the time of purchase or so immediately after it (as to constitute a part of the transaction) to show a contrary intention. Subsequent acts and declarations are only admissible as evidence against the party who did or made them and not in his favour.

The rule in *Shephard v Cartwright* is not confined to cases of presumed gifts (that is, where there is a presumption of advancement) but applies equally to presumed resulting trusts and to cases of express gifts. However, it was held in a Jamaican case, *Reid v Grant*,[86] that the rule has no application where a donor or purchaser, at the time of the transaction, by a contemporaneous declaration expressly reserves a right, whether absolute or qualified, of control over the appropriation of the subject matter of the transaction. In *Reid's* case, the testator, on 15 August 1963, opened a deposit account at his bank in the joint names of himself and his granddaughter, the defendant. The document, which was signed by the testator and the defendant at the time of the opening of the account, authorised the bank *inter alia* to honour withdrawals therefrom, provided such withdrawals were signed by, or by the order of, the testator. It was further stipulated that total revocation of the document could be effected by written notice to the bank by either the testator or the defendant. The entire amount in the account was provided by the testator. On 17 August, the testator wrote to the bank directing that 'in the case of the death of either of us, the full amount must pass over to the survivor'. On 21 September, the testator again wrote to the bank advising that the defendant had gone back to England contrary to his wishes, and directing the bank to 'pay no order by her'.

On the testator's death there was a balance of £6,000 in the account. The main question for determination was whether the £6,000 formed part of the testator's estate or whether it belonged to the defendant.

The Jamaican Court of Appeal held that, by the testator's letter of 17 August, the defendant had obtained the beneficial interest in the fund contingent upon her surviving the testator, but this beneficial interest had been revoked by the letter of 21 September. The defendant therefore held the legal title to the chose in action as the surviving joint tenant, not for her own benefit but upon a resulting trust for the testator's estate.

Watkins JA said:

> Upon the creation . . . of this joint account the deceased as grantor not only expressly reserved for his exclusive exercise in the future the matter of withdrawals and discharges, but the very continuance itself of the joint account as such was reserved for termination, if either party saw fit, by an express notice in writing. The inescapable inference was that the deceased as grantor had reserved for future determination the matter of the beneficial ownership of the fund. Whatever then were the initial intentions of the deceased at the time of the establishment of the joint deposit account, if indeed he had any settled intentions at all, he was careful enough by his contemporaneous express reservations to preserve for the future total freedom of action over and control of the fund . . . Clearly the exclusionary rule in *Warren v Gurney*[87] and *Shephard v Cartwright*, the rationale of which is the discouragement of the manufacture of evidence, cannot, in principle and reason, be applied to such circumstances . . . and we therefore hold that the post-transaction acts and declarations of the deceased were properly admitted in evidence, and that such effect as they are rightly capable of ought to be given to them.

86 (1976) 23 WIR 91.
87 [1944] 2 All ER 472.

Husband and wife

Where a husband voluntarily conveys his property to his wife, or where he purchases property in his wife's name, there is a presumption that he intends to make a gift of the property to her.

In *Changlee v Changlee*,[88] where a husband had registered a house, built at his own expense, in his wife's name, Viera J said:

> It is a fundamental principle of equity that where A advances the money to purchase the property but the conveyance is taken in the name of B, then in the absence of any explanatory facts, such as an intention to give the property to B, a resulting trust arises in favour of A.
>
> But where, as here, the parties are husband and wife, another presumption of equity arises, *viz*, the presumption of advancement. Where a husband purchases or transfers property or makes an investment in the name of his wife, a gift to her is presumed in the absence of evidence of an intention to the contrary, and no question of a resulting trust arises. This equally applies where the conveyance is taken in their joint names, in which case the wife would be entitled to a half share.
>
> Furthermore, the presumption does not operate where a wife purchases or transfers property or makes an investment in her husband's name or in the joint names. In all such cases, the husband is presumed to be a trustee for the wife in the absence of evidence of a contrary intention.
>
> It is important to note that the presumption of advancement is merely an evidential one and may be rebutted by evidence of the real purchaser's actual intention.
>
> What was the real intention of the respondent in this matter? Clearly, in my opinion, he caused the registration of the house after its completion to be put in his wife's name for two reasons:
>
> (i) as a result of his natural love and affection for his wife and children in the event that anything should happen to him; and
>
> (ii) to defraud his creditors.
>
> In *Gascoigne v Gascoigne*[89] it was held that a gift was to be presumed even if the wife's name was used by the husband with her connivance in order to defeat his creditors.
>
> I am therefore satisfied that the respondent intended to give his wife the house as a gift in 1953 when he instructed the Overseer to register the house in her name, and I am further satisfied that this presumption has not in any way been rebutted by him.

The presumption of advancement as between husband and wife has been applied emphatically by the Jamaican courts,[90] notwithstanding that in *Pettitt v Pettitt*[91] Lord Diplock had suggested that the strength of the presumption had greatly diminished in modern times, as it would, in his view, be wrong to impute intentions to modern couples which belonged to an earlier age, when different social conditions prevailed.

Where a husband purchases property and has it conveyed into the joint names of himself and his wife, then there is a presumption of advancement for the benefit of the wife absolutely if she survives him. But if he survives her, the property will revert to him as surviving joint tenant.[92]

Joint bank accounts

The position where a husband and wife maintain a joint bank account may be summarised as follows.

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88 [1967] GLR 507 at 517 (High Court, Guyana).
89 [1918] 1 KB 223.
90 *Harris v Harris* (1982) Court of Appeal, Jamaica, Civil Appeal No 1 of 1981 (unreported); *Ulett v Ulett* (1988) Supreme Court, Jamaica, No E 157 of 1986 (unreported).
91 [1969] 2 All ER 385 at 414.
92 *Re Eykyn's Trusts* (1877) 6 Ch D 115 at 118.

In the absence of a contrary intention:

(a) during their joint lives, each spouse has power to draw on the account not only for the joint benefit of both, but also for his or her separate benefit; accordingly, if either spouse draws on the account to purchase a chattel or an investment in his or her sole name, that spouse will be the sole owner of the chattel or investment both at law and in equity;[93]

(b) on the death of one spouse, the survivor will be entitled to the balance of the account as surviving joint tenant;[94]

(c) where an account is opened in joint names for convenience only (for example, where the husband is ill) the balance in the account may be held upon trust for the husband alone, the presumption of advancement being rebutted;[95] and

(d) on dissolution of a marriage, the equitable rule is that each spouse will be entitled to one-half of the balance in the bank account, and to one-half of any investments purchased in the husband's name with money from the account,[96] but where investments have been purchased in the wife's name, it seems that the ordinary presumption of advancement will apply.[97]

Rebutting the presumption of advancement

The presumption of advancement may be rebutted by evidence that a gift was not intended. Thus, for example, in *Anson v Anson*[98] a husband guaranteed his wife's bank account and was called upon to pay under the guarantee. It was held that the husband could recover the amount from the wife, as the transaction was clearly not by way of gift.

On the other hand, it is well established that where a husband transfers property to his wife for an unlawful purpose, the maxim 'he who comes to equity must come with clean hands' applies, and equity will not allow the husband to rebut the presumption of advancement by pleading his unlawful purpose in making the transfer. For example, in *Re Emery's Investment Trusts*,[99] a husband placed American bonds into his wife's name in order to evade United States income tax. It was held that the presumption of advancement could not be rebutted by evidence that the purpose of the transfer was to evade tax. The wife could therefore keep the bonds, despite the fact that she was implicated in the scheme. And in *Tinker v Tinker*,[100] a husband who had just started a new business and conveyed the matrimonial home into his wife's name to protect it from potential creditors should the business fail, was barred from giving evidence of the true purpose of the conveyance since it was calculated to defeat creditors, which was an unlawful purpose. The wife was accordingly entitled to the property absolutely.

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93 Pettit, *Equity and the Law of Trusts*, 5th edn, p 126; *Campbell v Campbell* (1997) Supreme Court, Jamaica, No E337 of 1990 (unreported).

94 *Ibid.*

95 *Marshall v Crutwell* (1875) 2 LR 20 Eq 328. In *Ashby v Thornhill* (1992) High Court, Barbados, No 832 of 1987 (unreported), where a husband, who was seriously ill, converted a bank account which was in his sole name into a joint account in the names of his estranged wife and himself, Belgrave J was 'satisfied that the husband did not intend to confer any benefit on his wife . . . It was merely a convenient way of permitting the wife to manage his affairs during the remainder of his life . . . [and] the wife knew this'. Accordingly, after the husband's death, the wife held the money on trust for his estate.

96 *Jones v Maynard* [1951] 1 All ER 802.

97 Parker and Mellows, *Modern Law of Trusts*, 5th edn, p 129.

98 [1953] 1 QB 636.

99 [1959] Ch 410. See also *International Credit and Investment Co (Overseas) Ltd v Adham* [1996] CILR 89 (Grand Court, Cayman Islands).

100 [1970] 1 All ER 540.

Where there is a presumption of resulting trust, the person who claims a beneficial interest by virtue of his payment for the purchase of property is unaffected by any illegality surrounding the purchase, since he can establish an equitable title independently of the illegal transaction.[101]

No presumption of advancement between man and mistress

In *Austin v Austin*,[102] where a man purchased a parcel of land in the joint names of himself and the woman with whom he had been living, Worrell J held that:

> . . . on the purchase of the land in the joint names of the defendant and the first plaintiff, the question of advancement does not arise, she being at the time only his mistress; and on the evidence I find nothing to indicate otherwise than that there was a resulting trust of the moiety in fee simple vested in her as legal co-tenant for the defendant.

In *Mahadai v Ragabir*,[103] Vieira J held in a case in which the parties were man and mistress that:

> . . . the parties to this action, not being legally married, have to be treated as strangers, and, therefore, no presumption of advancement arises, and consequently a resulting trust arises in favour of the plaintiff to the extent of the $800 contributed by her towards the repairs and reconstruction of the building in dispute, which amount I consider represents approximately half of the value of the said building. This being so, equity will not allow either party to put the other out, and each is entitled concurrently with the other to the possession, use and enjoyment thereof.

Presumption of advancement between wife and husband

In Barbados, there is now a presumption of advancement in favour of a husband where a wife pays for property which is conveyed into her husband's name or into the joint names of herself and her husband, or where she makes a voluntary conveyance of her property to her husband, by virtue of s 192(2) Property Act, Cap 236.

101 See *Murphy v Quigg* (1996) 54 WIR 162 (Court of Appeal, Eastern Caribbean States) (alien beneficiary unaffected by trustee's failure to obtain a licence under s 14(2) of the Non-Citizens Land Holding Regulation Act, Cap 293, Antigua and Barbuda). See also *Tinsley v Milligan* [1994] 1 AC 340.

102 (1978) 31 WIR 46 at 49 (High Court, Barbados).

103 [1967] GLR 535 at 543 (High Court, Guyana).

CHAPTER 7

CONSTRUCTIVE TRUSTS

Essentially, a constructive trust is a trust relationship arising by operation of law and not by reason of the expressed or implied intention of the parties. There is no clear or comprehensive definition of the constructive trust, and it has been suggested that the courts have deliberately kept its boundaries vague in order not to hamper its future development.[1] In some jurisdictions, notably in the United States and Canada, the constructive trust is regarded as a remedial device to be applied wherever a defendant's conduct is found to be unconscionable, and in order to prevent his unjust enrichment. For a time, especially under the influence of Lord Denning, English law appeared to be approaching the North American position by the development of 'a constructive trust of a new model', to be imposed 'wherever justice and good conscience required it',[2] but in the last several decades the English courts have generally retreated from the 'new model' constructive trust, though it may still have a part to play in the Caribbean in the context of the family home.[3] It may therefore be justifiable to return to the traditional view that, in English law, constructive trusts are imposed only in certain well established contexts, such as:

(a) where a fiduciary makes a profit from his position, and
(b) where a stranger to the trust knowingly receives trust property, or dishonestly assists in a breach of trust by the trustees,

in addition to constructive trusts of the family home,[4] and miscellaneous categories, such as secret trusts,[5] mutual wills[6] and constructive trusts arising on a specifically enforceable contract for the sale of land and/or shares in a private company.[7]

PROFITS BY FIDUCIARIES

As is discussed in Chapter 11, an express trustee is under a strict duty not to profit from his trusteeship and, if he does so, he will be accountable as constructive trustee for all such profits.

The principle that a person in a fiduciary position is accountable as constructive trustee for any profit he makes from his position applies not only as between trustee and beneficiary but also to agents,[8] partners and company directors, whose liability to account is not dependent on proof of fraud or bad faith. The rule was applied in the leading case of *Boardman v Phipps*.[9] Here, the Phipps family trust owned 8,000 of the 30,000 shares in a private company. The plaintiff, John Phipps, was also one of the beneficiaries under the trust. The defendants were Boardman, the solicitor to the trust, and Tom Phipps, a beneficiary. The defendants were dissatisfied with the way in which the company was being managed and they made extensive inquiries about the company's affairs on behalf of the trust, receiving a considerable amount

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1 *Carl Zeiss Stiftung v Herbert Smith and Co* [1969] 2 WLR 427 at 444, *per* Edmund Davies LJ.
2 *Hussey v Palmer* [1972] 2 All ER 744 at 747.
3 See pp 106 *et seq*, below.
4 See p 104, below.
5 See Chapter 5, above.
6 See Chapter 5, above.
7 See pp 25–26, above.
8 *Attorney General of Hong Kong v Reid* [1974] AC 324 (p 5, above).
9 [1967] 2 AC 46.

of confidential information about the company. In particular, they discovered that the value of the company's assets was high but its profits were low, and they realised that it would be advantageous to sell some of the company's non-profit-making assets. With the trustees' consent, the defendants purchased a controlling interest in the company and they implemented a scheme to sell off non-profit-making assets. The scheme was highly profitable, so that the trust gained in respect of its shareholding and the defendants made gains in respect of the shares they had purchased themselves. Boardman considered that he had made full disclosure to the trustees and the beneficiaries about the scheme, and the trustees had been invited to consider whether the trust should purchase the shares, but they were unable and unwilling to do so. There was therefore no doubt that the defendants had acted *bona fide* throughout. Nevertheless, they were held accountable to the trust for the profits they had made, principally on the ground that they had used for their own personal gain the knowledge and information which they had obtained by being able to attend board meetings and undertake negotiations for the purchase of the shares, which they did by representing themselves at all material times as acting for the trust. Since the company was a private one, they could not have obtained the information in any other way. As Lord Cohen explained:[10]

> The mere use of any knowledge or opportunity which comes to the trustee or agent in the course of his trusteeship or agency does not necessarily make him liable to account. In the present case, had the company been a public company, and had the [defendants] bought the shares in the market, they would not, I think, have been accountable. But the company is a private company and not only the information but the opportunity to purchase these shares came to them through the introduction which Mr Fox (one of the trustees) gave them to the board of the company, and in the second phase . . . it was solely on behalf of the trustees that Mr Boardman was purporting to negotiate with the board of the company.

However, having held the defendants accountable, a majority of the House of Lords took the view that the claimant beneficiary was 'a fortunate man in that the rigour of equity enabled him to participate in the profits', and ruled that payment should be allowed on a liberal scale to the defendants in respect of their work and skill in obtaining the shares and the profits realised.

The principle in *Boardman v Phipps* was applied in *Cayman Islands News Bureau Ltd v Cohen*.[11] Here, the plaintiff company had, over a period of nearly 10 years, entered into various contracts with the Cayman Islands government and Cayman Airways for information services, public relations and sales promotion. C had been employed by the plaintiff as its managing director, responsible for all of its day to day operations and budgeting. He also acted as adviser to D, the company's chairman and principal shareholder. Whilst acting in this capacity, C learned that the government was dissatisfied with D's performance, and he secretly encouraged the government to transfer its contract to C Ltd, a company set up and controlled by C.

Harre J, in the Grand Court, held that:

(a) C's fiduciary obligations towards the plaintiff company were the same as those of a trustee, requiring the observance of the general standards of loyalty, good faith and the avoidance of a conflict of self-interest and duty. Accordingly, both C and C Ltd were liable to account

10 *Ibid*, at 100.

11 (1988–89) 1 Carib Comm LR 404 and 439 (Grand Court, Cayman Islands). Cf *Attorney General of St Christopher and Nevis v Mitcham* (2005) 68 WIR 281, where the respondent who, during her tenure as a minister in the government, had received fees from government-controlled banks for which she acted as legal adviser, was held not accountable for the fees as constructive trustee because (a) the respondent was not an agent of the government, and (b) the Prime Minister and his cabinet colleagues were well aware of the payment of the legal fees.

to the plaintiff for the benefit of the contract, and it was immaterial that the government might not in any case have entered into a new contract with the plaintiff company owing to the deteriorating relationship between D and the government; and

(b) C Ltd was entitled to an allowance for expenses reasonably incurred in connection with work done under the contract with the government.

LIABILITY OF STRANGERS TO THE TRUST

A 'stranger' in this context means a person who is not in the position of an express trustee of the trust. Such a person may become liable as a constructive trustee in either of the following situations:

(a) where he received trust money, knowing that it was trust property and of circumstances which made the payment to him a misapplication of the money (that is, cases of 'knowing receipt'); or

(b) where he did not receive any trust money, but he dishonestly assisted the trustees in carrying out a breach of trust (that is to say, cases of 'dishonest assistance').

Knowing receipt

At the outset, a distinction must be made between personal and proprietary remedies in this context. It is clear that a person, not being a *bona fide* purchaser for value, who receives trust property takes it subject to the rights of the beneficiaries, who have a right to trace the property or its proceeds into the recipient's hands and recover it.[12] But the tracing remedy survives against the recipient only so long as he has the property or its proceeds in his hands; if he is no longer in possession, the remedy ceases. If, on the other hand, the recipient is accountable for the trust property, he will remain personally liable for its value,[13] whether he has the property or the proceeds in his possession or not. It is clear that strangers who knowingly receive trust property are accountable and not merely subject to the tracing remedy.

It is a debatable question whether, in order to be held accountable, the recipient must have had actual knowledge that the property was trust property transferred in breach of trust, or whether merely constructive notice suffices. There are numerous conflicting dicta in the case law. The view that constructive notice is sufficient appears to be based on the notion that whereas the 'dishonest assistance' cases are fault based, the 'knowing receipt' cases are based on the concept of unjust enrichment and restitution.[14] In the recent case of *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*,[15] on the other hand, Nourse LJ took the view that constructive notice should not to be sufficient for, in the words of Lindley LJ:[16]

> In dealing with estates in land, title is everything, and it can be leisurely investigated; in commercial transactions, possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we would be doing infinite mischief and paralysing the trade of the country.

12 *Hampshire Cosmetic Laboratories Ltd v Mutschmann* [1999] CILR 21 at 30 (Grand Court, Cayman Islands). See also Chapter 14, below.
13 This may include a requirement to account for profits and to pay compound interest: *Hampshire Cosmetic Laboratories Ltd v Mutschmann*, *ibid.*
14 *Powell v Thompson* [1991] 1 NZLR 597 at 607.
15 [2000] 3 WLR 1423.
16 *Manchester Trust v Furness* [1895] 2 QB 539 at 545.

Nourse LJ expressly approved the opinion of Megarry VC in *Re Montagu's Settlement*[17] that the imposition of a constructive trust creates personal obligations that go beyond mere property rights and that the basic question is therefore whether the conscience of the recipient is sufficiently affected to justify such imposition. Accordingly, Nourse LJ suggested that the single test in the 'knowing receipt' cases ought to be whether 'the recipient's state of knowledge [was] such as to make it unconscionable for him to retain the benefit of the receipt'.[18] Such a test, in his view, would better enable the courts to give commonsense decisions in the commercial context in which the majority of 'knowing receipt' claims were now made.

Ministerial receipt

Where an agent, such as a solicitor or banker, has received trust money in his ministerial capacity, and deals with the money in accordance with his principal's instructions, he will not be liable as a constructive trustee[19] unless:

(a) he has dishonestly assisted his principal in a breach of trust;[20]
(b) he has received the property for his own benefit (for example, where a bank uses the money to reduce an overdraft);[21] or
(c) he has intermeddled in the trust by doing acts characteristic of a trustee and outside the duties of an agent[22] (that is to say, where he has become a trustee *de son tort*).

It is also established that if the agent is unaware that the money is trust property, he will not be liable so long as he acts honestly, within the scope of his agency, and complies with his principal's instructions, even though there may be suspicious circumstances which might have put him on enquiry.[23]

Dishonest assistance

A person who does not actually receive trust property but who dishonestly assists the trustees in committing a breach of trust may be accountable as an accessory. Strictly speaking, such a person cannot be a constructive trustee, as no trust property has been received by him, but the terminology of the constructive trust has nevertheless been used in the case law to describe the accessory's liability.

The leading case on this topic is now *Royal Brunei Airlines Sdn Bhd v Tan*.[24] Here, a company (BLT) was appointed travel agent by the plaintiff. BLT, of which Tan was the principal shareholder and director, committed breaches of trust by using the proceeds of ticket sales for the benefit of its business and, as BLT had become insolvent, the plaintiff sought to make Tan

17 [1987] Ch 264 at 285.
18 [2000] 3 WLR 1423 at 1439. Knowledge on the part of the natural persons who control and manage a company (ie, the directors) is imputed to the company: *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 404, *per* Buckley LJ; *Elliott v Associated Bahamian Distillers* (1997) Supreme Court, The Bahamas, No 782 of 1996 (unreported), *per* Allen J.
19 *Mara v Browne* [1896] 1 Ch 199 (though he may be liable for negligence).
20 See pp 102, 103, below.
21 *Agip (Africa) Ltd v Jackson* [1991] 3 WLR 116.
22 *Williams-Ashman v Price and Williams* [1942] Ch 219 at 228.
23 *Competitive Insurance Co Ltd v Davies Investments Ltd* [1975] 3 All ER 254; *Toukhmanian v Ansbacher (Bahamas) Ltd* (1997) Supreme Court, The Bahamas, No 561 of 1997 (unreported).
24 [1995] 2 AC 378.

liable as an accessory to the breach of trust. Although it was clear that Tan had knowingly assisted in the breach of trust, the Brunei Court of Appeal held that he was not liable as the breach of trust had not been shown to be fraudulent on the part of BLT; according to the Court, both the accessory and the trustee must be shown to have been dishonest. However, the Privy Council held that dishonesty on the part of the trustee is not required; all that is necessary is proof that the accessory was dishonest; accordingly, Tan was personally liable for dishonestly assisting the breach by BLT. As Lord Nicholls explained:[25]

> What matters is the state of mind of the third party sought to be made liable, not the state of mind of the trustee. The trustee will be liable in any event for the breach of trust, even if he acted innocently, unless excused by an exemption clause in the trust instrument or relieved by the court. But his state of mind is essentially irrelevant to the question whether the third party should be made liable to the beneficiaries for the breach of trust. If the liability of the third party is fault based, what matters is the nature of his fault, not that of the trustee. In this regard dishonesty on the part of the third party would seem to be a sufficient basis for his liability, irrespective of the state of mind of the trustee who is in breach of trust. It is difficult to see why, if the third party dishonestly assisted in a breach, there should be a further prerequisite to his liability, namely that the trustee also must have been acting dishonestly. The alternative view would mean that a dishonest third party is liable if the trustee is dishonest, but if the trustee did not act dishonestly that of itself would excuse a dishonest third party from liability. That would make no sense.

The *Royal Brunei Airlines* case is also firm authority for the proposition that 'dishonesty', and not merely 'knowing assistance',[26] on the part of the accessory must be established, in order to fix him with accountability as a constructive trustee. Lord Nicholls rejected mere negligence as a basis for accountability, on the ground that accessories such as bankers, attorneys and brokers would in any event be liable to the trustee for negligent conduct, and there was no good reason for holding them liable also to the beneficiaries. As for the meaning of 'dishonesty', Lord Nicholls considered[27] that 'acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances', which was an objective standard; however, there was also a subjective element, in that the court would assess the accessory's conduct in the light of 'what he actually knew at the time, as distinct from what a reasonable person would have known or appreciated'. He continued:[28]

> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.[29]

25 *Ibid* at 385. Followed in *Islena Airlines v Jefferson* [1998] CILR 148.
26 See *Barclays Bank plc v Kenton Capital Ltd* [1994–95] CILR 489 at 501 (Grand Court, Cayman Islands), *per* Smellie J.
27 At 389.
28 *Ibid*.
29 An example of accessories 'deliberately closing eyes and ears' is *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 385, where Millett J imputed knowledge to accountants who ought, from the clandestine circumstances of the case, to have been aware that they were taking the risk of laundering money on behalf of fraudsters; cf *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

This approach was confirmed by the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd*,[30] where Lord Hoffmann stated that dishonesty would be established where the defendant either knew that the transaction was not one in which he could honestly participate, or where he had suspicions about the transaction and deliberately refrained from making enquiries. The subjective element is the actual state of knowledge of the defendant, while the objective element refers to the standards of propriety to which honest people would subscribe. Thus, as was later emphasised by the Court of Appeal in *Abou-Ramah v Abacha*,[31] in order to find a defendant liable for dishonest assistance, it is not necessary to prove that he was conscious of his own wrongdoing: only that his conduct fell short of normal standards of honest conduct.

CONTRIBUTION TO THE ACQUISITION OR IMPROVEMENT OF PROPERTY

Where, usually in pursuance of some informal family arrangement, a person contributes money towards the acquisition or improvement of property, the court may impose a constructive trust in favour of the contributor in order to satisfy the demands of justice, particularly where the contributor cannot show any entitlement under any other existing principle of equity.[32] This is an application of the 'new model' constructive trust, referred to above, which has been said to be virtually indistinguishable from a resulting trust. Thus in *Forde v Forde*,[33] where the defendant had contributed towards the cost of converting a chattel house into a wall-constructed building in pursuance of an informal arrangement among various members of his family, it was held that a beneficial interest in the property arose in favour of the defendant under a constructive trust to the extent of his contribution. Similarly, in *Mitchell v Baxam*[34] the plaintiff had lived with A, his aunt, from the age of six. After he had completed his education he obtained employment as a school teacher and, out of his salary, he paid for the construction of a house on A's land. Collymore J held, following *Hussey v Palmer*, that the defendant, A's successor in title, held the fee simple of the property upon a constructive trust for the plaintiff, as justice and good conscience required that the plaintiff's equity be satisfied in this way.

It is important, however, that the court should not impose a constructive trust in this context if to do so would be contrary to the common intention of the parties. In *Prashad v Sudan*[35] the plaintiff, a widow, came to an arrangement with the defendants, a younger couple, that the latter should live with her in her house rent free, and that if they looked after her for the rest of her life she would leave them all her property, including the house, by her will. The plaintiff made her will accordingly, but after some time the defendants began to ill-treat her and so she made a deed of gift of the property to other persons and eventually gave the defendants notice to quit. The defendants claimed that a constructive trust of the house had arisen in their favour on account of their expenditure in improving it, and that they were entitled to a beneficial interest. Ramlogan J rejected the defendants' contention. He said:

> There must be a common intention that the property was to be enjoyed by the defendants beneficially, and the defendants must have acted to their detriment . . . Mrs Prashad clearly never

30 [2006] 1 WLR 1476.
31 [2007] 1 All ER Comm 827.
32 *Hussey v Palmer* [1972] 3 All ER 744; *Jessamy v Babb* (1999) High Court, Barbados, No 222 of 1993 (unreported), *per* Blackman J.
33 (1991) High Court, Barbados, No 283 of 1986 (unreported).
34 (1983) High Court, Trinidad and Tobago, No 3557 of 1981 (unreported).
35 (1991) High Court, Trinidad and Tobago, No S 1210 of 1987 (unreported).

> intended that the defendants . . . should acquire any beneficial interest in her property until she was dead. That is why she made a will in 1977 in favour of the defendants and not a deed . . . The property she acquired with her husband is to go to whoever 'mind' her.
>
> She said it more that once and I believe that the defendants understood this as well. I would be surprised if a person of her age, background and education in her circumstances didn't say that to the defendants. She obviously had difficulty in remembering things, but she is physically alert and intelligent. After her husband died, she was left alone with no children. That property was the result of her life's work and her husband's. She is holding on to it to be given to anyone who looks after her, in case she is not able to look after herself.

The family home

Property interests in a matrimonial home are governed by ordinary principles of property law. These principles were established at a time when the wife was less likely to be earning money than would be the case today, and they failed to take into account a wife's contribution to the partnership. A resulting trust arose in favour of a wife or mistress who paid all or part of the purchase price of the property, but no account was taken of the wife's or mistress's non-income-producing contributions, such as housekeeping duties, nor did any interest arise in favour of a wife or mistress who spent her money, not on paying towards the purchase, but on general household expenses.

In the case of married couples, the courts in some jurisdictions have wide statutory powers to adjust the property rights of spouses, as, for example, under the Family Law Act, Cap 214 (Barbados) and the Property (Rights of Spouses Act, 2004 (Jamaica)),[36] which include within their ambit parties to a common law 'union' of at least five years; but in other cases the courts have to apply general equitable principles, and this often proves difficult. The main concerns are 'indirect contributions' by the wife or mistress. The orthodox approach is that such contributions will only give rise to a beneficial interest in favour of the wife or mistress if they are referable to the acquisition of the property, as, for example, where W's payment of household expenses leaves H's salary free to pay the mortgage instalments, or where W's unpaid work in the family business enables H to accumulate money which is used to acquire the property; but the mere performance of domestic duties in the home does not give W any interest.

The application of this principle in the Caribbean is illustrated by *Griffith v Coward* and *Cupid v Thomas*. In *Griffith*,[37] a husband died in 1983, having by his will devised certain property standing in his sole name to his wife for life, and thereafter upon trust for sale for other persons. On the wife's death, the plaintiff, as executor of her will, claimed that her estate was entitled to a beneficial half-share in the property which he alleged she had acquired by virtue of her efforts and contributions during the marriage. The plaintiff contended that the husband, at the time of his death, was a trustee of the beneficial half-share for the wife. Douglas CJ rejected the plaintiff's contention, pointing out that there was no community of property regime in Barbados and, in order to succeed in his claim, the plaintiff would have to establish that the wife had a beneficial interest in the property to which the husband, as trustee, was bound to give effect. The learned Chief Justice found 'no credible evidence of contribution by the wife to the acquisition of the property standing in the husband's name, or of any common intention that she should have a beneficial interest in that property'. Equally, there was 'no evidence . . . that the wife contributed to any business, the proceeds of which went into the purchase of the

36 See also Married Persons (Property) Act, Ch 45:04 (Guyana), s 15 (as amended).
37 (1986) High Court, Barbados, No 468 of 1985 (unreported).

property, nor . . . that she made the sort of "substantial contribution" to the family expenses mentioned in *Falconer v Falconer*[38] as would raise the inference of a trust'.

Similarly, in *Cupid v Thomas*,[39] the plaintiff and defendant had, for about 11 years, enjoyed an intimate relationship from which four children were born. The plaintiff claimed that she was entitled to a half-share in a three-bedroomed house occupied by the couple on the ground that she had contributed substantially to the acquisition of the property. The trial judge found on the evidence that the defendant was promiscuous and was the father of a number of children from other women; that he had never led the plaintiff to believe that their relationship would be a permanent one; and that the plaintiff's contribution to the acquisition of the property was 'negligible'. The trial judge awarded the plaintiff a one-fifth share in the house. The Court of Appeal of the Eastern Caribbean States, following *Burns v Burns*,[40] overturned the lower court's decision, holding that since the plaintiff had not made any substantial contribution to the acquisition of the property, she was not entitled to any beneficial interest.

Bishop JA said:[41]

> Looking at the evidence on the record before this court, I am unable to say that the plaintiff made a really substantial financial contribution towards the family expenses. I have already indicated my finding of fact, and I hasten to add that I am not seeking to belittle the role she played as a mother and even as a mistress, but I am bound by the paucity of the facts.
>
> I am unable to impute a common intention on the part of the parties that the plaintiff was to have a beneficial interest in the property. Indeed, at most there may have been a unilateral intention of the plaintiff, although it seemed to me to be no more that a quasi-moral view of the plaintiff that, since she shared part of her life with the defendant, now that the parting had come and they were to go their separate ways, she should be compensated by being given, what she called, 'part of what she worked for'. She has not, in my view, proved by cogent evidence that there was an implied common intention that she should have an interest in the house.
>
> I think that having found that the plaintiff's contribution was negligible (or in other words not a substantial financial contribution to the acquisition of the property) the trial judge was generous but in error in awarding her a one-fifth share in the property at Diamond Village. In my view she is not entitled to any share in the beneficial interest in that property.

On the other hand, in *Hack v Rahieman*,[42] the Court of Appeal of Guyana did find a common intention that the respondent should have a beneficial share in the quasi-matrimonial home. The facts were that H and R had lived together for more that 28 years in a *de facto* marital relationship, having had a Muslim marriage ceremony in 1944. In 1955 the house which they were to occupy as their home was purchased and conveyed into the sole name of H. H made the initial payment of $700 from his own money and the remainder was paid off by means of a mortgage, the monthly instalments being paid from H's salary. At the time of the present action the house was valued at $10,000. R made no direct contribution to the purchase, but from the profits from her business she made substantial financial contributions to the housekeeping expenses. There was no evidence of any express agreement that R should have a share in the property, nor any declaration of trust in her favour. The trial judge awarded R a one-third share in the property on the ground that the substantial contributions made by her towards the housekeeping expenses were directly referable to the acquisition of the property since they enabled H to pay the mortgage instalments. On appeal, the Court of Appeal of

38 [1970] 3 All ER 449.
39 (1985) 36 WIR 182 (Court of Appeal, Eastern Caribbean States).
40 [1984] 1 All ER 244.
41 (1985) 36 WIR 182 at 196.
42 (1977) 27 WIR 109.

Guyana held that it would be inferred from H's acceptance of R's contributions to the housekeeping expenses that the common intention of the parties was that R should have a share in the beneficial interest which the trial judge had correctly assessed as a one-third share. The court based its decision on the presumption of resulting trust, but the reasoning of the court would seem to be equally applicable to the imposition of a constructive trust. Indeed, this case clearly supports the view of Lord Diplock that, in the family home class of case, it is immaterial whether one describes the trust as 'resulting' or 'constructive'.[43]

An alternative approach based on the 'new model' constructive trust enables the court to impose a trust in favour of a spouse or mistress who has lived with the other party for a period of time, but who may not be able show any direct or indirect contribution to the purchase of the family home. According to Lord Denning, such a trust may be imposed 'wherever justice and good conscience would require it'.[44] Further, in *Harrinarine v Aziz*,[45] Sharma J referred to the 'unique position of the common law marriage' in Trinidad and Tobago and other Caribbean societies and was prepared to hold that 'in our jurisdiction, the living together in a common law relationship over an extended period during which the "wife", out of her earnings, looks after the children (whether they are her husband's by another union, or theirs) and looks after household and other expenses, constitutes *prima facie* evidence of a common intention that she should have a beneficial interest in the property which is solely in the name of the common law husband . . . No reasonable man in our society, looking at the present situation, can come to any other conclusion. It would be repugnant to any decent person's sense of justice'.

This approach was applied in the Barbadian case of *Edey v Nurse*.[46] Here, the plaintiff and the defendant lived together in a *de facto* marital relationship. The plaintiff purchased a chattel house for $12,000, of which the defendant contributed $1,500. The defendant also cleared the site where the home was placed, built the foundation, dug a well for the septic tank, painted the exterior, and planted fruit trees. David J (Ag) ruled that the plaintiff held the property on a constructive trust for herself and the defendant in the proportions of 75% and 25% of the beneficial interest respectively. He said:

> I am satisfied that the defendant gave the plaintiff $1,500 when she purchased the house, and he subsequently made other contributions to the establishment and improvement of the house. It is therefore my opinion that the appropriate remedy would be to impose a constructive trust in shares dictated as to what fairness requires. In support, I refer to *Hussey v Palmer*. In that case Lord Denning had this to say about the trust which arose:[47] 'The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require . . . Thus we have repeatedly held that when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust.'
>
> Reference is also made to *Davis v Vale*.[48] This case was about a matrimonial home and raised interesting points, firstly, as to initial contributions, and secondly, as to subsequent improvements. Lord Denning had this to say:[49]

43 See *Gissing v Gissing* [1970] 2 All ER 780 at 790.
44 *Hussey v Palmer* [1972] 3 All ER 744 at 747.
45 (1987) High Court, Trinidad and Tobago, No 1,992 of 1982 (unreported). See also *Maharaj v Mahadeo* (1995) High Court, Trinidad and Tobago, No 1,202 of 1991 (unreported).
46 (1990) High Court, Barbados, No 1,446 of 1988 (unreported).
47 [1972] 3 All ER 744 at 747.
48 [1971] 1 WLR 1022.
49 *Ibid* at 1025.

> 'On the other hand, there were those who thought that in these days the issue must be determinable on equitable lines recognising that husband and wife are not strangers but engaged as partners in a joint enterprise. According to this school, if the house belonged at the outset to the wife alone, and afterwards the husband made substantial improvements to it at his own expense, then he ought in equity to have a share in the improved house unless he had agreed to forego it.'
>
> He added: 'It affirms, therefore, the decision of this court in *Jansen v Jansen*[50] and the principles adopted by the equitable schools. To this I would add the elucidation given in *Gissing v Gissing*,[51] the speeches in which show that the beneficial interest is given, not by means of contract law, but by imputing a trust by the one for the other. It is a resulting, implied or constructive trust which does not need to be in writing.'

The same principle was applied in the Trinidadian case of *Villariouel v Clarke*.[52] The facts were that in 1941 the defendant and the plaintiff met and started living together as man and wife. They had six children during the ensuing years, the last being born in 1949. In 1954 they decided to rent a plot of land with a view to erecting a dwelling house, the tenancy being taken in the plaintiff's name. Construction of the house started in 1955 and was financed with their joint earnings which were not kept separate but pooled, without regard to the amounts provided by each. Both parties contributed their labour, the plaintiff working 'more than one would normally expect of a woman', helping to clear the land of trees, carrying materials to the site from the road, and helping to mix concrete. The parties moved into the house in 1957 while it was still incomplete. Shortly afterwards, when they ran short of money, the plaintiff transferred the tenancy to the defendant so that he could obtain a 25 year lease to offer as security for a loan. The defendant obtained the loan and the house was completed. The defendant paid off the loan from his salary while the plaintiff continued to use her earnings for the maintenance of the family. The parties separated in 1966, the defendant leaving the quasi-matrimonial home for another woman whom he later married. The plaintiff remained in occupation of the house. In 1972, the defendant purchased the freehold reversion of the land, unknown to the plaintiff, and had it conveyed into the joint names of himself and his wife. The plaintiff claimed that she was entitled to a beneficial interest in the property.

Deyalsingh J held that the plaintiff was entitled to a half-share in the property under a constructive trust. He explained:

> *Gissing v Gissing*[53] concerned a husband and wife and the matrimonial home. The husband was the sole owner at law but the wife paid for furniture and contributed to the household expenses. The issue was whether the wife had acquired an interest in the matrimonial home by virtue of her 'indirect' contributions. It was held that on the facts it was not possible to draw an inference that there was any common intention that the wife should have any beneficial interest in the matrimonial home. The court examined the basis of a wife's claim in such cases and clarified the law which, before *Pettitt v Pettitt*,[54] appeared to be moving towards the introduction of the concept of community of property into the common law. It was said *per curiam* in *Gissing:*
>
> (1) Where
>
> (a) both spouses contributed towards the purchase of the matrimonial home which was conveyed into the name of one spouse only,
>
> (b) there was no discussion, agreement or understanding between the spouses as to sharing the beneficial interest in the matrimonial home, and

50 [1965] 3 All ER 363, CA.
51 [1970] 2 All ER 780, HL.
52 (1980) High Court, Trinidad and Tobago, No 1,048 of 1973 (unreported).
53 [1970] 2 All ER 780, HL.
54 [1969] 2 All ER 385, HL.

(c) the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein,

the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial home is a matter dependent on the law of trusts.

(2) There is no distinction to be drawn in law between the position where a contributing spouse makes direct contributions towards the purchase of the matrimonial home and where the contributing spouse makes indirect contributions, although in the latter instance the relevant share in the beneficial interest is likely to be less easy to evaluate.

In *Gissing*, Lord Diplock succinctly enunciated the principle involved thus:[55]

> 'A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the *cestui que* trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.'

I cannot agree more, and follow with alacrity the principle so enunciated by Lord Diplock and adopted by the Court of Appeal. All I can say is that this development of the law is long overdue, especially more so in this country, as a not insubstantial number of people participate in what is generally called 'common law' marriages, setting up a 'matrimonial home' and raising a family almost akin to a legitimate marriage. It would be unjust in such a society to permit the harshness of the strict law to prevail and equity must come to the rescue, as indeed it has done. Even if equity has refrained from so doing in England, I venture to say it would not have been long before the principle enunciated by Lord Diplock or some such similar principle would have sprung from equity in the social soil obtaining in this country.

It should be noted that the doctrine of resulting, implied or constructive trusts is not limited to a husband and wife but applies even in the case of a man and his mistress. Lord Diplock, in enunciating the principle, put it very broadly and in such a way that there can be no doubt of its wide application to persons outside the ambit of husband and wife, for example, a man and his mistress . . .

Considering all the evidence, I find a clear inference that the parties agreed to erect a home for themselves and their children with each contributing in cash or in kind, an agreement which they both proceeded to put into execution. I find, implicit in this agreement, a term that the premises would be owned in equal shares by each party. It could not be otherwise. To use the words of McKinnon CJ in *Shirlaw v Southern Foundries Ltd*:[56] '. . . if, while the parties were making their bargain (that is to say, deciding to erect their dwelling house), an officious bystander were to suggest that the premises should be owned by them jointly, they would testily suppress him with a common "Oh, of course".' If I am wrong in this, the position in trusts must be examined. The plaintiff provided moneys and services of a substantial measure. This, in all the circumstances, I hold, gives rise to the imputation of a common intention that the premises from the initial stages would be their joint property. Further, having agreed to build a home together for the family, having persuaded the plaintiff to transfer the tenancy of the land to him for the purpose of securing a loan to complete the 'matrimonial home', having subsequently allowed the plaintiff to continue to contribute her labour and maybe money to the completion of the house, it would be inequitable to allow the defendant to deny her a beneficial interest in the premises. Accordingly, the law would impute or impose a constructive trust whereby the defendant holds the premises on trust for the plaintiff and himself. What, then, should be the plaintiff's share? Considering all the evidence, I think this is a case where the appropriate share of the plaintiff in the premises should be one-half.

55 [1970] 2 All ER 780 at 790.
56 [1939] 2 All ER 113 at 124.

Recent developments

Although the principles in *Pettitt v Pettitt*[57] and *Gissing v Gissing*[58] have not been overturned, and indeed are still frequently cited and followed in courts in the Caribbean,[59] subsequent case-law has provided a number of alternative, even revolutionary, approaches to the vexed question of the identification and quantification of beneficial interests in the family home. The principles remain unsettled, though reforming statutes such as the Family Law Act, Cap 214 (Barbados) and the Property (Rights of Spouses) Act, 2004 (Jamaica) have significantly reduced the importance of the general equitable principles in those jurisdictions, with respect to both married couples and unmarried couples cohabiting for at least five years.

The modern position, as far as the general law of trusts is concerned, may be summarised thus:

(1) Cases where the legal title is vested in both parties

Any express declaration as to the beneficial interests in the documents of title will be conclusive. Otherwise, it has recently been confirmed by the House of Lords in *Stack v Dowden*[60] that where the legal title to a family property is in the names of both parties, it is presumed that the beneficial interests will also be jointly owned, and that each will be entitled to a half share in the property. Similarly, where the legal title is in the name of one party only, there will be a presumption of sole beneficial ownership. The burden of proof of establishing otherwise rests on the party who alleges that the beneficial ownership did not follow the legal ownership and, in the case of purchase in joint names, it is not sufficient to rebut the presumption of joint beneficial ownership that the parties contributed unequally to the purchase of the property.[61] Further, the majority of their Lordships were of the view that the strict resulting trust approach based on financial contributions to the purchase of property was no longer appropriate; rather, in order to rebut the presumption of equal shares, the court should seek to discover the shared intentions of the parties, in the light of their whole course of conduct. Relevant factors would include, for example, any discussions at the time of the purchase, the reasons for putting the legal title in joint names, how the purchase was financed and how the parties arranged their finances, and

57 [1969] 2 All ER 385.
58 [1970] 2 All ER 780.
59 'The Court of Appeal of Jamaica has consistently accepted that the law as declared by the majority in *Pettitt v Pettitt* and *Gissing v Gissing* is applicable to Jamaica': *per* Sykes J in *Findlay v Findlay* (2008) Supreme Court, Jamaica, No 723 of 2004 (unreported) [Carilaw JM 2008 SC 55]. See also *Abrahams v Williams* (2008) Supreme Court, Jamaica, No HCV 1779 of 2005 (unreported), *per* Sykes J [Carilaw JM 2008 SC 105].
60 [2007] 2 WLR 831.
61 This approach was followed in *Fowler v Barron* [2008] WTLR 819, where it was held that a woman was entitled to a 50 per cent beneficial interest in the house, held under a legal joint tenancy and occupied with her male partner. He was unable to rebut the presumption of equal shares, despite his having paid the deposit, all the mortgage payments and all direct outgoings. This approach has long been applied in Jamaica: see *Jones v Jones* (1990) 27 JLR 65 at 67, *per* Rowe P, who stated: 'The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then, even if their contributions are unequal, the law leans towards the view that the beneficial interest is held in equal shares.' See also *Sterling v Sterling* (2008) Court of Appeal, Jamaica, Civ App No 69 of 2006 (unreported) [Carilaw JM 2008 CA 11], a similar case of purchase of a matrimonial home in joint names. Here, Smith JA said that it was 'reasonably clear . . . on the evidence that, at the time of its acquisition, the parties formed no common intention as to their proprietary rights in the property. They were happily married and were concerned only with their enjoyment of the property. They gave no thought to the eventuality of their marriage breaking down.'

whether or not the parties had children for whom they had a responsibility to provide a home. In *Stack v Dowden*, concerning an unmarried couple who had lived together with their four children for about 20 years, the circumstances were unusual in that, although the legal title to the family home was in joint names, the parties did not pool their resources, and they had separate bank accounts and investments. It was held that the woman had rebutted the presumption of equal shares, and she was entitled to a 65 per cent share, which was approximately the proportion of her contribution to the purchase.

Lord Neuberger agreed with the decision but not the reasoning of the majority in *Stack*, preferring the resulting trust approach which, on the facts, led to the same result. He pointed out that, according to established principles, the extent of the beneficial interest is to be determined at the time of the acquisition of the property.[62] It could be reassessed if, for example, one party subsequently funded a major improvement, but it cannot generally be influenced by the parties' subsequent course of conduct. In his Lordship's view, the 'whole course of dealing of the parties' concept was too vague, and the emphasis on 'fairness' rather than on actual contributions was misplaced. The majority approach in *Stack* has also been criticised on the ground that it marks a return to the 'family assets' theory which was decisively rejected in *Pettitt v Pettitt*,[63] or to Lord Denning's view (subsequently rejected by the English courts but finding some acceptance in the Caribbean[64]) that the court can impose a trust in cases of disputes over family property, not on the basis of any bargain or expressed intention of the parties, but on the ground that it would be 'just and equitable' to do so.[65]

(2) Cases where the legal title is vested in the sole name of one party

Where the property is conveyed into the sole name of one party, in the absence of any express declaration of the beneficial interests in the title documents, he or she will be presumed to be solely entitled to the beneficial interest also. As Anderson J explained in a recent Jamaican case, *Plummer v Plummer*:[66]

> Just as the starting point where there is joint legal ownership is joint beneficial ownership, so the starting point where there is sole legal ownership is sole beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is for the non-owner to show that he has any interest at all.[67]

Thus, in the most usual case, where the legal title is in the sole name of the man (H), the woman (W) will have no beneficial interest. However, she may be able to establish a share of the beneficial interest by proof of any of the following:

62 Even though the court may be called upon to make this determination many years later. In *CIBC Cayman Ltd v Christiansen* [2008] CILR 103, the parties reached an agreement on the date on which they were married, which was long after the date of acquisition of the property. Henderson J, at 109, found it difficult to discern why an agreement reached subsequently should be treated differently from one entered into at the time of acquisition.

63 [1969] 2 All ER 385.

64 See pp 106–108, above.

65 *Hussey v Palmer* [1972] 3 All ER 744, at 747.

66 (2009) Supreme Court, Jamaica, No 864 of 2006 (unreported) [Carilaw JM 2009 SC 57].

67 In *Jackson v Jackson* (2010) Supreme Court, Jamaica, No FDJ 015 of 1999 (unreported), Brooks J commented that 'with the passage of time, married people can no longer shelter under an umbrella of ignorance of the importance of the formalities of ownership of the matrimonial home. Evidence must be provided to explain the reason for the matrimonial home not having been acquired in the names of both spouses.'

(i) An express contract granting her an interest;
(ii) A declaration of trust in her favour, evidenced in writing;
(iii) An oral declaration of trust which is not evidenced in writing but has been acted upon, thereby giving rise to a constructive trust;
(iv) A direct contribution to the purchase of the property;
(v) In some circumstances, an indirect contribution to the purchase.

Express oral agreement or declaration

An express oral agreement which is not evidenced in writing is unenforceable;[68] similarly, a purely oral declaration of trust concerning land is unenforceable.[69] However, where there is evidence of some oral agreement or arrangement between the parties, the court can impose a constructive trust, which does not require writing. In *Lloyds Bank plc v Rosset*,[70] Lord Bridge stated that (a) where the court finds an agreement, arrangement or understanding between the parties that the beneficial interests will be shared, based on evidence of express discussions, no matter how imperfectly remembered and however imprecise their terms, and (b) the claimant acted to his/her detriment or significantly altered his/her position in reliance on the agreement, a constructive trust arises in favour of the claimant.

A well-known case in which the requirements of express agreement or understanding coupled with detriment were found is *Grant v Edwards*.[71] There, a house was purchased for E and the claimant (a woman who was actually then married to someone else) to live in as a cohabiting couple. The property was purchased in 1969 in the names of E and his brother. E had told the claimant that her name would not go on the title 'for the time being' so as to avoid problems with the divorce proceedings pending between her and her husband. In reality, however, E had no intention of adding the claimant to the legal title. E paid the deposit on the house and most of the mortgage payments. The claimant made substantial indirect contributions to the mortgage repayments by applying her earnings to the joint household expenses, in addition to providing housekeeping and bringing up the children. In 1980 the couple separated, and the claimant claimed a beneficial interest in the property. It was held that the claimant was entitled to a half share in the house. The excuse given by E for not putting the legal title into joint names was evidence of a common understanding or intention that the claimant should have an interest in the property. Further, her contribution to the general household expenses had been in excess of what would be expected as a normal contribution, and without that substantial contribution E would not have been able to keep up the mortgage payments. By making those indirect contributions towards the purchase of the house, the claimant had acted to her detriment, and she could not have been expected to so conduct herself unless she had an interest in the property. As has been observed by the Privy Council, once a common intention has been established, it may not be difficult to find conduct on the part of the woman which is referable to the creation of a beneficial interest in her favour.[72]

68 See Chapter 2, above.
69 See Chapter 2, above.
70 [1990] 2 WLR 867.
71 [1986] 3 WLR 114.
72 A more recent example is *Hammond v Mitchell* [1991] 1 WLR 1127, where a female cohabitee who, pursuant to an oral agreement, acted as the male cohabitee's unpaid business assistant and supported him in his business ventures, in addition to housekeeping duties and looking after the children, was held entitled to a half share in the property.

Direct contributions

As we have seen, the traditional approach to direct contributions to the purchase of property is that such contribution gives rise to a resulting trust in favour of the contributor, the beneficial interest being enjoyed in proportion to the respective contributions of the parties.[73] Payments of mortgage instalments would count as direct contributions, provided the payer had assumed responsibility for the contributions at the time of the purchase of the property.[74] The resulting trust approach to cases of family property was first doubted in *Lloyds Bank v Rosset*,[75] where the House of Lords held that such contributions gave rise to a constructive rather than a resulting trust, and this approach has recently been confirmed by the majority of their Lordships in *Stack v Dowden*, where Lord Walker stated[76] that 'in a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the name of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption'. The House of Lords in *Stack* expressly approved the reasoning of the Court of Appeal in *Oxley v Hiscock*,[77] where it was stated that in a case where there is evidence of a common intention to share but no evidence of intention as to the size of the respective shares, or where a common intention is inferred from direct contributions, there is no necessary inference that the parties' shares should be proportionate to their contributions. The *Oxley* approach requires the court to have regard to 'the whole course of dealing' between the parties, and the aim of the court is to discover the intention of the parties, and not to impose a result which the court itself considers fair.

Indirect contributions

There has always been uncertainty as to whether indirect contributions of a cohabitee can give rise to a beneficial interest. It was accepted that a wife who contributed indirectly to the purchase of the matrimonial home by paying the household expenses and thereby leaving her husband's income free to pay the mortgage instalments was entitled to a beneficial interest. At the other end of the scale, the mere performance of domestic duties in the home did not suffice. An intermediate situation is exemplified by *Gissing v Gissing*,[78] where a wife who had paid over £200 for furnishings and for laying a lawn, in addition to some household expenses, was held not to be entitled to a beneficial interest. In *Lloyds Bank v Rosset*,[79] Lord Bridge said that it was necessary to prove direct contributions and that 'it is at least extremely doubtful whether anything less will do.' Of course, if an express common intention that the claimant should have a beneficial interest were proved, then indirect contributions would suffice (as in *Grant v Edwards*[80]), but otherwise, contributions must be direct. Thus, for example, in *Hammond v Mitchell*,[81] a woman who acted as her partner's unpaid business assistant, supported him in his business ventures, and cared for the home and children, was held to have no claim, in the absence of an expressed common intention.

73 See pp 104 *et seq*, above.
74 *Springette v Defoe* (1993) 65 P&CR 1; *Re Roger's Question* [1948] 1 All ER 328.
75 [1990] 2 WLR 867.
76 [2007] 2 All ER 929 at 941.
77 [2005] Fam 211.
78 [1970] 2 All ER 780.
79 [1990] 2 WLR 867.
80 [1986] Ch 638.
81 [1991] 1 WLR 1127.

In *Stack v Dowden*, serious doubt was cast on the validity of Lord Bridge's view, and the Privy Council in *Abbott v Abbott*,[82] an appeal from the OECS Court of Appeal, has confirmed the new approach. In this case, the parties were an Antiguan man (H) and a Canadian woman (W). On the occasion of their marriage in 1983, H's mother transferred a plot of land in Antigua into H's sole name. H later set up a medical practice in Antigua. W worked for a while in H's surgery and also worked in a travel agency, but she gave up working when their first child was born, and did not work again until 1995. During 1990 and 1991, their matrimonial home was built on the land given by the mother, the construction being financed partly by money contributed by the mother and partly by a bridging loan, later replaced by a mortgage. H, as legal owner, executed the charge over the property, but W also made herself jointly and severally liable for the payment of principal and interest on the loan, which was also secured by insurance policies on each of their lives. All the couple's income went into a joint bank account from which the mortgage instalments and insurance premiums were paid. The couple separated in 1996, when H moved out of the matrimonial home. Mitchell J, in the High Court of Antigua and Barbuda, held that the parties had equal beneficial interests in the matrimonial home for two main reasons: (i) because there was no reason to believe that H's mother intended to make a gift of the land to H alone; on the contrary, it seemed that her intention was to give the land to both parties for the purpose of building their matrimonial home, in the early days of their marriage when their financial resources were limited; (ii) because of their joint and several liability to repay the mortgage, supported by their life insurance policies. Some weight was also given by Mitchell J to the fact that all the couple's income went into a joint bank account. In the OECS Court of Appeal, on the other hand, Gordon JA considered that there was no factual basis for the inference that the land was a gift to both parties. Citing the dictum of Lord Bridge in *Rosset*, he held that W could acquire a beneficial interest only by direct contributions to the mortgage payments, and he disregarded the factors of the joint and several liability to repay the loan and the additional security provided by W's life policy. The Privy Council preferred the reasoning of Mitchell J and restored the decision of the lower court. Baroness Hale, delivering the Privy Council's judgment, said that the OECS Court of Appeal had attached undue significance to the dictum of Lord Bridge in *Rosset*, to the effect that a direct contribution to the purchase was necessary in order to obtain a beneficial interest. She emphasised that the law had 'moved on since then. The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership.'

Statutory regimes

In Barbados and, more recently, in Jamaica, legislation has been enacted to provide formulae for quantifying beneficial interests in a matrimonial home or other assets:

(a) By the Family Law Act, Cap 214 (Barbados), section 57, in proceedings in respect of the property of the parties to a marriage or union (of at least five years), the court may make such order as it thinks fit altering the interests of the parties in the property. In considering what order to make, the court must take into account, *inter alia*, any financial contributions made, directly or indirectly, to the acquisition, conservation or improvement of the property; the age, state of health and financial resources of the parties; and whether either party has the care and control of any minor child of the marriage. It seems that there is no principle that equal division of assets is a convenient starting point in quantifying the beneficial

82 [2008] 1 FLR 1451.

interests under the Act, and in all cases the court must do what is just and equitable in the particular circumstances.[83]

(b) The Property (Rights of Spouses) Act, 2004 (Jamaica), s 13, came into force in April 2006. Section 4 provides that the provisions of the Act replace the rules and presumptions of common law and equity as applied to transactions between spouses. Section 6 grants to a spouse a presumptive interest of 50% of the family home.[84] 'Spouse' is defined to include not only legally married persons but also any single man[85] or single woman who has cohabited with a single woman or single man respectively for at least 5 years. Section 13 entitles a spouse to apply to the court for a division of property within a period of 12 months from the dissolution of marriage, termination of cohabitation or separation, with power in the court to extend the period.[86] In making the division, the court will apply the 50:50 default rule, unless it is of the view that for some reason the division should be otherwise. Section 14 provides that where a spouse applies under section 13 for a division of property, the court may divide 'property other than the family home' as it thinks fit, taking into account factors such as the duration of the marriage and any direct or indirect contribution, financial or otherwise, by a spouse to the acquisition, conservation or improvement of the property. Further, 'contribution' includes not only payment of money towards the acquisition or maintenance of property but also the performance of work or services in respect of the property.

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83 *In the Marriage of Mallett* (1984) 52 ALR 193. Cf *McLean v McLean* (1983) High Court, Barbados, No 131 of 1982 (unreported); *Shorey v Shorey* (1987) High Court, Barbados, No 49 of 1984 (unreported). More recent cases are *Proverbs v Proverbs* (2002) 61 WIR 91; *Carter v Carter* (2003) High Court, Barbados, No 233 of 2002 (unreported) [Carilaw BB 2003 HC 15]; *Noel v Noel* (2004) Court of Appeal, Barbados, Civ App No 27 of 2001 (unreported) [Carilaw BB 2004 CA 26]; *Williams v Williams* (2004) Court of Appeal, Barbados, Civ App No 12 of 1998 (unreported) [Carilaw BB 2004 CA 17]; *Cox v Cox* (2007) Court of Appeal, Barbados, Civ App No 19 of 2005 (unreported) [Carilaw BB 2007 CA 19]; *Wilson v Wilson* (2007) Court of Appeal, Barbados, Civ App No 5 of 2003 (unreported) [Carilaw BB 2007 CA 6]; *Williams-Towner v Towner* (2010) Court of Appeal, Barbados, Civ App No 1 of 2009 (unreported) [Carilaw BB 2010 HC 15].

84 'Family home' is defined in s 2 as 'the dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal residence and used wholly or mainly for the purposes of the household.' In *Shirley-Stewart v Stewart* (2007) No 0327 of 2007 (unreported) [Carilaw JM 2007 sc 112], Sykes J said that the family home meant the 'permanent or usual abode' of the spouses. In *Murray v Murray* (2009) Supreme Court, Jamaica, No 3700 of 2007 (unreported) [Carilaw JM 2009 SC 34], the spouses, after purchasing their house in 1989, 'commuted' between Jamaica and the United Kingdom, it being their intention to return to Jamaica permanently on retirement. Adopting Sykes J's definition of 'family home', Williams J held that, in the absence of evidence as to how much time the spouses spent at the property when they visited Jamaica, it could not be said that the house was their 'permanent or usual abode'. Accordingly, the house in question was to be treated as 'property other than the family home' (s 14 (1)).

85 In *Nelson v Brown* (2009) Supreme Court, Jamaica, No HCV 3493 of 2007 (unreported) [Carilaw JM 2009 SC 78], Sykes J held that 'single' means ' "single in law", and not a person who is lawfully married but living with another person as if they were lawfully married. Thus, a married person cannot be a single person within the meaning of the Act, regardless of how long he or she is cohabiting with someone other than his or her lawfully married spouse. The consequence of this is that any claim to a beneficial interest while one of the parties to the union is still lawfully married to a person other than the claimant or defendant to the claim, 'can only arise under general property law, trusts and equity.'

86 See *Bernard v Bernard* (2008) Supreme Court, Jamaica, No 1865 of 2006 (unreported) [Carilaw JM 2008 SC 33].

CHAPTER 8

NON-CHARITABLE PURPOSE TRUSTS

Non-charitable purpose trusts are those trusts for purposes which do not qualify for charitable status and which must either take effect as private trusts or fail altogether. Examples of non-charitable purposes are: the provision of a prize or cup for an annual sporting event (such as a yacht race) which is unconnected with any educational establishment;[1] the provision of an annual club dinner; the erection and maintenance of a tombstone;[2] and the feeding of a testator's cats or dogs.[3]

Non-charitable purpose trusts may be declared void on all or any of the grounds of:

(a) lack of human beneficiaries;

(b) uncertainty; and

(c) perpetuity.

On the other hand, in several offshore financial centres, legislation has been enacted to validate non-charitable purpose trusts which are (a) sufficiently certain, (b) lawful, and (c) not contrary to public policy.[3a]

THE BENEFICIARY PRINCIPLE

Under the rule in *Morice v Bishop of Durham*,[4] a private trust is void if there are no human beneficiaries to enforce it, for 'there must be somebody in whose favour the court can decree performance'.[5]

Where, therefore, a trust is set up for a private purpose, it may be held void unless it can be interpreted as a gift for persons who can be regarded as beneficiaries. It is a question of construction as to whether a trust is for persons or for 'pure' purposes. For example, a trust fund set up for the purpose of educating certain children can be construed as a trust under which those children are beneficiaries, as in *Re Osoba*,[6] and, if so, will satisfy the beneficiary principle; and a trust for the promotion of fox hunting[7] may be treated as a trust under which the individual hunters are beneficiaries. On the other hand, in *Re Astor's Settlement Trusts*[8] a trust for the purposes of, *inter alia*, 'the maintenance of good relations between nations' and 'the preservation of the independence of the newspapers' had to be construed as a trust for pure purposes, and was void on the beneficiary principle; and in *Leahy v Attorney General for New South Wales*,[9] Viscount Simonds stated that where a trust is created 'for the general purposes' of an association (as in *Leahy*, where a testator provided that a large area of grazing land should be held upon trust for such order of nuns of the Catholic Church as the trustees should select):

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1 *Re Nottage* [1895] 2 Ch 649.
2 *Re Hooper* [1932] 1 Ch 38.
3 *Re Dean* (1889) 41 Ch D 552.
3a See, eg, Purpose Trust Act 2004 (The Bahamas), s 3(1); Trusts (Special Provisions) Amendment Act 1998 (Bermuda), s 12A; Trustee Act 1993 (BV1), s 84A; Trustee Act 1992 (Belize), s 15.
4 (1804) 9 Ves Jun 399.
5 *Ibid* at 404, *per* Grant MR. Under the legislation in the offshore financial centres, this function is performed by an 'enforcer' appointed by the settlor.
6 [1979] 2 All ER 393. See p 80, above.
7 See *Re Thompson* [1934] Ch 342.
8 [1952] 1 All ER 1067.
9 [1959] 2 All ER 300.

> . . . the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object; so also a trust may be created for the benefit of persons as *cestuis que trustent* but not for a purpose or object, unless the purpose or object be charitable . . . It is therefore by disregarding the words 'for the general purposes of the association' . . . and treating the gift as an absolute gift to individuals that it can be sustained.[10]

It seems that a private purpose trust may be held to be for the benefit of individuals notwithstanding that those individuals do not acquire any proprietary interest in the trust fund. For example, in *Re Abbott*,[11] a trust for the maintenance of two deaf and dumb ladies was held valid, even though they were not the owners of any proprietary interest in the fund; similarly, in *Re Gillingham Bus Disaster Fund*,[12] a trust for the benefit of injured cadets and other 'worthy purposes' was held valid notwithstanding that it was accepted that the cadets had no proprietary interest in the assets of the fund.

It has been suggested that these cases are best analysed as examples of trusts for persons to be benefited in a particular way—a reasoning adopted in the later case of *Re Denley's Trust Deed*.[13] In that case, a plot of land was conveyed to trustees to hold 'for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow'.

It was held by Goff J that the trust was valid as being one for the benefit of ascertainable beneficiaries, that is to say, the employees, who were to be benefited in a particular way, *viz* by the provision of the recreation ground. He said:[14]

> I think that there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any *locus standi* to apply to the court to enforce the trust, in which case the beneficiary principle would, it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity. Such cases can be considered if and when they arise. The present is not, in my judgment, of that character, and it will be seen that clause 2(d) of the trust deed expressly states that, subject to any rules and regulations made by the trustees, the employees of the company shall be entitled to the use and enjoyment of the land. Apart from this possible exception, in my judgment the beneficiary principle of *Re Astor's Settlement Trusts*,[15] which was approved in *Re Endacott*,[16] is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object *per se*, but that there is no beneficiary or *cestui que trust* . . . Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.

UNCERTAINTY

The objection of uncertainty with respect to purpose trusts will usually be raised where a settlor has attempted to create a charitable trust (which would not be affected by uncertainty) but, owing to incompetent draftsmanship, has failed to do so. For instance, a trust 'for charitable or worthy causes' fails as a charity because it is not exclusively charitable;[17] it also fails as a private

10 *Ibid* at 307.
11 [1900] 2 Ch 326. See p 78, above.
12 [1958] 2 All ER 749. See p 78, above.
13 [1968] 3 All ER 65.
14 *Ibid* at 69.
15 [1952] 1 All ER 1067.
16 [1959] 3 All ER 562.
17 See below, pp 140 *et seq*.

trust because 'worthy causes' is too uncertain. Sir William Grant MR explained the uncertainty objection on the basis that a trust which is too uncertain cannot be controlled by the court:[18]

> There can be no trust, over the exercise of which this court will not assume control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is indisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner.

An example of a purpose trust which failed on the ground of uncertainty is *Re Endacott*,[19] where a testator bequeathed £20,000 to a parish council 'for the purpose of providing some useful memorial to myself'. It was held that the trust was 'of far too wide and uncertain a nature to qualify within the class of cases cited',[20] that is to say, within the anomalous tomb and monument cases, explained below.

PERPETUITY AND INALIENABILITY

It is a fundamental principle of law that an absolute owner's right to alienate his property must not be restricted. Thus, a condition that imposes a restraint upon alienation is void. Similarly, in the law of trusts, a trust fund must not be rendered inalienable beyond the 'perpetuity period', that is to say, a life or lives-in-being plus 21 years.[21] This rule affects only non-charitable purpose trusts. It does not affect charitable trusts, nor trusts for particular persons.

The effect of the 'rule against inalienability' or the 'rule against perpetual trusts' is that where the *capital* of a trust fund is required to be retained in order that it will yield income to be used for a purpose, such as the maintenance of the testator's tombstone or his animals, the capital must not be required to be retained for longer than the perpetuity period, otherwise the trust will be void. Hayton and Marshall explain the principle thus:[22]

> The rule against inalienability (sometimes known as the rule against perpetual trusts or indestructible trusts) makes purpose trusts void unless one can be sure from the outset that by the end of the perpetuity period the trust fund can be freely spent on non-trust purposes. The perpetuity period is the same as for the common law rule against remoteness, which ensured that by the end of the perpetuity period the beneficiaries would have obtained vested interests enabling them to deal with the trust fund as they wished. The period is 21 years from the expiry of the last survivor of any causally relevant lives-in-being . . .
>
> The rule against inalienability comes into its own in the few anomalous cases where pure purpose trusts infringing the beneficiary principle may be valid, and in those trusts, legitimised by *Re Denley*,[23] which, though expressed as a purpose are directly or indirectly for the benefit of individuals, but who have no *Saunders v Vautier*[24] right to terminate the trust and claim the trust fund by the end of the perpetuity period, for example, a trust of land to be maintained and used as a sports ground for the benefit of present and future employees of a company, or a trust for the benefit of a huge 'unlistable' class . . .

18 *Morice v Bishop of Durham* (1804) 9 Ves Jun 399.
19 [1959] 3 All ER 562.
20 *Ibid* at 568, *per* Lord Evershed MR.
21 In some jurisdictions in the Caribbean, 80 or 100 year perpetuity periods are prescribed by statute; eg, Property Act, Cap 236, s 169 (Barbados) (80 years); Trustee Ordinance 1961, s 68(1) (British Virgin Islands) (100 years).
22 *Cases and Commentary on the Law of Trusts*, 8th edn, 1986, p 175.
23 [1968] 3 All ER 65.
24 (1841) 49 ER 282.

> The rule against inalienability is only invoked where the settlor or testator has manifested an intention that property, usually money, is to be set on one side as capital and then the use thereof or income therefrom is to be for a particular purpose. Such intent may not be clear where a testator leaves, say, £5,000 to my executor and trustee on trust for the purposes of the Eldon Law Club. If this bequest were to be construed as a trust to use the £5,000 as soon as convenient for payment of general expenses, then it will be valid. However, if it were to be construed as a trust to use the income of the bequest for the purposes of the Club, so benefiting present and future members, it will be an endowment and so be void for infringing the rule against inalienability.

ANOMALOUS CASES

As exceptions to the general rule that a purpose trust which lacks human beneficiaries will be void, trusts (a) for the upkeep of tombs, and (b) for the maintenance of particular animals, will be upheld if confined to the perpetuity period. However, although valid, such trusts cannot be enforced against the trustees owing to the lack of beneficiaries to bring an action. The trustees may carry out the trust if they wish, but they cannot be compelled to do so. Such trusts are therefore called 'trusts of imperfect obligation', which take effect more like powers than trusts. Any funds not applied to the trust's purposes will be held on a resulting trust for the testator's estate.

Tombs and monuments

A trust for the erection and upkeep of a tombstone, monument or grave will be valid if confined to the perpetuity period. In *Re Hooper*,[25] for instance, a testator bequeathed money to trustees upon trust to maintain certain family graves and monuments, and a tablet in a church window, for 'so long as they can legally do so'. The trust was upheld for a period of 21 years. Similarly, in *Trimmer v Danby*,[26] a legacy of £1,000 to his executors by the painter Turner 'to erect a monument to my memory in St Paul's Cathedral' was upheld.

Perpetuity is not usually a problem where there is a trust to *erect* a tombstone, because the court will assume that it is to be erected soon after the death. However, a trust to *maintain* or *upkeep* a tomb must be expressly confined within the 21 year period or it will be void. The position is illustrated by *Mussett v Bingle*,[27] where a testator bequeathed (i) £300 for the erection of a monument to his wife's first husband, and (ii) £200, the interest of which was to be used for its upkeep. It was held that the first gift was valid, but the second void for infringing the perpetuity period. If the perpetuity rule is infringed, the court will not supply the necessary words though, as we have seen, if the testator provides that the trust is to continue 'for as long as the law allows', the court will uphold it for 21 years.

A testator would naturally wish his tombstone to be maintained indefinitely, if this were legally possible. One device which may be used to achieve this is for the testator to make a gift of money to Charity X with a gift over to Charity Y if the testator's tomb is not kept in repair by Charity X.[28] The presence of the gift would be an *inducement* to Charity X to keep the tomb in repair, assuming that the gift were of sufficient value to make it worthwhile for Charity X to maintain the tomb. It is important, however, that the testator does not impose an *obligation* or *trust* on Charity X to maintain the tomb, by requiring any part of the income to be used for the

25 [1932] 1 Ch 38.
26 (1856) 25 LJ Ch 424.
27 [1876] WN 170.
28 *Christ's Hospital v Grainger* (1849) 19 LJ Ch 33; *Re Tyler* [1891] 3 Ch 252.

non-charitable purpose; for if he does so, the trust will be void and the whole scheme will fail.[29] Another device for ensuring the perpetual upkeep of a tomb was approved in *Re Chardon*,[30] where a gift of income was made to a cemetery company so long as it maintained a grave. The determinable interest thus granted to the company was held valid. It did not infringe the rule against inalienability because the cemetery company and the person entitled to the possibility of reverter could combine at any time to sell their interests. The result would be that, on failure to maintain the grave, the determinable interest would cease and the possibility of reverter would take effect.

Animals

A trust for the benefit of animals generally is charitable,[31] but a trust for the maintenance or benefit of particular animals can only take effect as a private trust. It is well established that a trust for the benefit of particular animals will be valid as an exception to the 'beneficiary principle',[32] provided it is restricted to the perpetuity period. A leading case is *Re Dean*,[33] where North J upheld a gift of £750 per year for 50 years for the maintenance of the testator's houses and hounds if they should so long live. Strangely, although North J stated that there was nothing objectionable in such a trust 'provided it is not to last for too long a period', he did not address the perpetuity point, despite the 50 year period specified by the testator. It would seem that the trust ought to have been declared void as it was expressed to last for more than 21 years, unless, perhaps, it was assumed by North J that the animals in question could not have lived for more than 21 years, or possibly that an animal life could be used as a measuring life for the purposes of the perpetuity rule.[34]

Trusts for unincorporated associations

An unincorporated association has been defined by Hanbury and Martin as an association 'where two or more persons are bound together for one or more common purposes by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules identifying in whom control of the organisation and its funds are vested'.[35]

An unincorporated association (such as a members' club or society) is not a separate legal person and cannot be the owner of property or the subject of legal rights and duties. Where property is given to such an association it will usually be held by the association's trustees or its committee or officers in accordance with the association's constitution and rules, which also constitute a contract between the members *inter se*.

A trust established for an unincorporated association may be interpreted in any of four different ways, as explained in *Re Recher's Will Trusts:*[36]

(a) As a gift to the individual members of the association at the date of the gift for their own benefit as joint tenants or tenants in common, so that they could at once, if they wished, agree to divide it amongst themselves.

29 *Re Dalziel* [1943] Ch 277.
30 [1928] Ch 464.
31 *Re Wedgwood* [1915] 1 Ch 113.
32 *Pettingall v Pettingall* (1842) 11 LJ Ch 176.
33 (1889) 41 Ch D 552.
34 See Hanbury and Martin, *Modern Equity*, 14th edn, p 373.
35 *Ibid*, p 365.
36 [1971] 3 All ER 401 at 409, citing *Neville Estates Ltd v Madden* [1961] 3 All ER 769 at 778, 779, *per* Cross J.

(b) As a gift to present *and future* members for an indefinite period, in which case it would be void as infringing the rule against inalienability.

(c) As a gift to the trustees of the association upon trust to carry out the *purposes* of the association. On this construction it would be void as infringing the rule in *Morice v Bishop of Durham*.

(d) As a gift to the existing members of the association, not as joint tenants or tenants in common, but subject to the contractual rights and liabilities of the members towards each other, which would prevent an individual member from claiming a share. On this construction, the gift would be upheld.

In *Re Recher* there was a gift by will for the London and Provincial Anti-Vivisection Society, a non-charitable, unincorporated association. The Society had ceased to exist before the death but, if that had not been so, the gift would have been upheld as a beneficial gift to the members, not so as to entitle them to immediate distributive shares, but as an accretion to the funds of the Society to be held in accordance with the Society's rules. It was irrelevant that the association existed for a particular purpose (anti-vivisection) rather than for the benefit of the members themselves, because the members could vote to change the constitution and rules so as to abandon the purpose and divide the funds amongst themselves.

This principle was applied in *Re Lipinski's Will Trusts*,[37] where a testator bequeathed half of his residuary estate to trustees upon trust for the Hull Judaeans (Maccabi) Association 'for the purpose of constructing the new buildings for the Association and/or improvements to the said buildings'. Although this was clearly intended to be a trust for a purpose, Oliver J was able to construe it as a gift to the members of the association, not as joint tenants but subject to their contractual rights and liabilities towards one another as members of the association. He continued:

> There would seem to me to be, as a matter of common sense, a clear distinction between the case where a purpose is described which is clearly intended for the benefit of ascertained or ascertainable beneficiaries, particularly where those beneficiaries have the power to make the capital their own, and the case where no beneficiary at all is intended (for instance, a memorial to a favourite pet) or where the beneficiaries are unascertainable (as for instance in *Re Price*[38] [where there was a gift to the Anthroposophical Society of Great Britain]).

The principle in *Re Lipinski* can be applied only:

(a) where the association has rules constituting a contract between the members; and

(b) where the members have the power to alter the rules so as to divide the assets among themselves.

The first requirement was absent in *Leahy v Attorney General for New South Wales*,[39] in that the members of the religious orders were not bound by any such contract; accordingly it would not have been possible to adopt the *Lipinski* construction, and the gift to the religious orders would have been void as a perpetual endowment, had it not been rescued by statute. The second requirement was lacking in *Re Grant's Will Trusts*,[40] where a gift to a local constituency Labour Party was held void on the ground of inalienability, since the members of the constituency party did not have the power to alter the rules so as to divide the assets among themselves, and the gift could not therefore be construed as one for the members, but only as one for the purposes of the constituency party.

37 [1977] 1 All ER 33.
38 [1943] 2 All ER 505.
39 [1959] 2 All ER 300.
40 [1979] 3 All ER 359.

CHAPTER 9

CHARITABLE TRUSTS

PRIVILEGES OF CHARITABLE TRUSTS

Charitable trusts are known as public trusts because they are considered to be of value and importance to the community at large. They are enforceable by the Attorney General on behalf of the State. A private trust, on the other hand, seeks to benefit defined persons or a narrower section of the public than would be the case with a charitable trust, and, as we have seen in Chapter 8, a private purpose trust will generally be void for lack of a beneficiary to enforce it.

Charitable trusts are basically subject to the same rules as private trusts, but because of their public nature they are accorded certain privileges which are not available to private trusts. These may be categorised under the headings of:

(a) certainty of objects;
(b) the perpetuity rule; and
(c) fiscal privileges.

Certainty of objects

Unlike a private trust, a charitable trust will not fail for uncertainty of objects. Thus, for example, a bequest to trustees 'for such charitable purposes as the trustees shall select' would be valid. Similarly, a gift 'upon trust for charitable objects' would be valid. In such a case, the court has jurisdiction to establish a scheme for application of the funds, indicating the specific charitable objects which are to benefit.

However, it is well settled that, in order to qualify as charitable, a trust must be for *exclusively charitable* purposes. Thus, if the trust funds are capable of being devoted to both charitable and non-charitable purposes, the gift may be held void. This topic is considered in detail below.[1] One example of the application of the rule is *IRC v City of Glasgow Police Athletic Association*,[2] where the issue was whether or not the Association was a charitable body. It was held by the House of Lords that it was not charitable since its main purpose was the provision of sports and recreational facilities for the members of the Association, which was a non-charitable purpose, and the fact that the Association's objects incidentally promoted a charitable purpose, *viz* the improvement of the efficiency of the police force, was insufficient to confer charitable status. Lord Normand explained the position thus:[3]

> The respondents' contention is that the association falls within the last category of Lord Macnaghten's classification of charities, and that it is established for charitable purposes only. In looking for the purposes for which it is established, I begin with the rules. The objects set out in r 2, to encourage and promote all forms of athletic sports and general pastimes, are not charitable purposes. But it will not do to stop there. The next step is to notice that the members' subscriptions are exclusively spent on their own sports and recreations. The question is, what are the purposes for which the association is established, as shown by the rules, its activities

1 See pp 140–144, below.
2 [1953] 1 All ER 747.
3 *Ibid* at 751.

> and its relation to the police force and the public? And what the respondents must show in the circumstances of this case is that, so viewed objectively, the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential. The recreation of the members is an end in itself, and without its attainment the public purposes would never come into view. If the result of establishing the association had been that the members had, instead of being interested, found themselves involved in wearisome and lifeless activities, their efficiency would have suffered, the membership would have fallen off, and there would have been public detriment instead of public benefit. The private advantage of members is a purpose for which the association is established and it therefore cannot be said that this is an association established for a public charitable purpose only.
>
> In principle, therefore, if an association has two purposes, one charitable and the other not, and if the two purposes are such and so related that the non-charitable purpose cannot be regarded as incidental to the other, the association is not a body established for a charitable purpose only.

The perpetuity rule

Charitable trusts are not subject to the rule against perpetual trusts (that is to say, the rule against inalienability). Indeed, many charitable bodies, such as schools and churches, continue indefinitely and rely heavily on perpetual donations for their survival. However, charitable trusts, like private trusts, are subject to the rule against remoteness of vesting, so that a charitable gift which is contingent upon the happening of a future uncertain event will be void if there is a possibility that the gift may vest outside the perpetuity period of a life or lives-in-being and 21 years. Thus, in *Re Lord Stratheden and Campbell*,[4] where an annuity of £100 was bequeathed for 'the Central London Rangers on the appointment of the next lieutenant colonel', the gift was held void as infringing the rule against remoteness of vesting, since this appointment might not have been made within the perpetuity period. Romer J said:[5]

> If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.
>
> The annuity is not to be paid except on the appointment of the next lieutenant colonel; and if a lieutenant colonel is not appointed, the annuity is not to commence or be paid. That being so, it being conditional, can I say that the condition must arise within the time that is prescribed by the rules of law against perpetuities? I am sorry to say I cannot.

There is an exception to the applicability of the rule against remoteness of vesting to charities, *viz* that a gift to charity A with a gift over to charity B on the happening of a future uncertain event will be valid notwithstanding that the future event may occur outside the perpetuity period, provided that the gift to charity A takes effect within the period. But a gift to a non-charity followed by a gift over to a charity (and vice versa) is subject to the rule, so that where the gift over may occur outside the perpetuity period it will be void.

4 [1894] 3 Ch 265.
5 *Ibid* at 266.

Fiscal privileges

Income tax

In most jurisdictions, charitable trusts are exempt from income tax. For example, s 12(h) Income Tax Act (Jamaica)[6] exempts from tax:

> . . . the income of any corporation or association organised and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual.
>
> Provided that it shall be in the discretion of the Commissioner to determine whether or not a corporation or association comes within the meaning of this provision.

CHARITABLE PURPOSES

In Barbados, charitable purposes are listed in section 3 of the Charities Act, Cap 243 (see Appendix 1, below); elsewhere in the Caribbean, charitable purposes are those established under the general law.[7] It may also be noted that section 2 of the Charities Act 2006 (England and Wales) lists charitable purposes largely according to those established under the general law.

The original list of purposes accepted as charitable was contained in the preamble to the Statute of Elizabeth 1601, which referred, *inter alia*, to:

(a) the relief of aged, impotent and poor people;
(b) the maintenance of sick and maimed soldiers and sailors;
(c) the maintenance of schools of learning, free schools and scholars in universities;
(d) the repair of bridges, ports, churches and highways;
(e) the education of orphans;
(f) the support of young tradesmen, handicapped men and persons decayed; and
(g) the relief or redemption of prisoners or captives.

The preamble to the Statute of Elizabeth 1601 is still used as a guide by the courts in determining whether a particular trust is charitable or not. But the list is somewhat archaic and it is the modern classification propounded by Lord Macnaghten in *Commissioners of Income Tax v Pemsel*[8] which usually guides the courts. According to this classification, trusts for the following purposes are charitable:

(a) the relief of poverty;
(b) the advancement of education;
(c) the advancement of religion; and
(d) other purposes beneficial to the community (which come within the words or spirit of the preamble to the Statute of Elizabeth).

6 See also Income Tax Act, Cap 73, s 4 (Barbados).
7 In Belize, s 14 of the Trusts Act 1992, Cap 202, lists charitable purposes broadly corresponding with the *Pemsel* classification.
8 [1891] AC 531.

The relief of poverty

The preamble to the Statute of Elizabeth included among its objects the relief of 'the aged, impotent and poor'. It has since been established that the words must be construed disjunctively,[9] so that the persons to be relieved may be either aged *or* impotent *or* poor.

It seems that to qualify as 'aged', the persons in need of relief must be over the age of 60,[10] and 'impotent' is taken to mean 'disabled'.[11] As for the meaning of 'poverty', it is clear that the persons who are to benefit need not be starving or destitute in order to qualify as 'poor' in the charitable sense. It is sufficient if they are 'in needy circumstances',[12] or have to 'go short',[13] regard being had to their station in life. Thus, trusts 'for ladies of limited means',[14] to provide a nursing home for persons of moderate means,[15] to provide a soup kitchen for parishioners,[16] to assist the victims of a disaster,[17] and to set up a neighbourhood law centre[18] have all been held charitable under this head.

A Jamaican example is *Re McGrath*,[19] where a codicil to the deceased's will provided that his property, known as 'Charlemont', should be permanently charged with an amount sufficient to provide for 'an annual Christmas dole or treat for the poor of Ewarton and Mount Rosser neighbourhood'. Parnell J held that a valid trust for the relief of poverty had been created. He observed:

> . . . it was a common practice when I was a boy that the big landowner would provide for the disposition of a parcel to the old and needy at the approach of Christmas. The main recipients would be the retired labourers on his estate and the poor people who lived near to his large property. A fatted calf would be slaughtered and a piece of beef would form a prominent portion of the contents in the parcel which each person would receive. The provision in the will shows that this custom, which I have known for over 40 years, has not been forgotten by all the wealthy landowners in the country.

Three further principles are:

(a) that a gift which fails to exclude persons who are not in need will not be charitable. Thus, a gift for the purpose of providing clothing for boys in a particular district was not charitable, since affluent children were not excluded;[20] and a gift for the provision of 'dwellings for the working classes and their families in the area of Pembroke Dock'[21] was held not to be charitable, as the expression 'working classes' was not synonymous with poverty. On the other hand, where a testator provided a sum of money to be used for the construction of a working men's hostel in Cyprus, the gift was held to be for the relief of poverty and therefore charitable, in view of the grave housing shortage in the area;[22]

(b) that the expression 'relief' signifies that the persons to be benefited have a need for basic necessities such as food, shelter and clothing which they would find difficult to satisfy from their own resources; and

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9 *Re Cottams*, [1955] All ER,704.
10 See Parker and Mellows, *Modern Law of Trusts*, 6th edn, 1994, pp 312, 313.
11 *Ibid*.
12 *Re Scarisbrick* [1951] Ch 622.
13 *Re Coulthurst* [1951] Ch 661 at 665, 666, *per* Evershed MR.
14 *Re Gardom* [1914] 1 Ch 664.
15 *Re Clarke* [1923] 2 Ch 407.
16 *Biscoe v Jackson* (1887) 35 Ch D 460.
17 *Re North Devon Relief Fund Trust* [1953] 2 All ER 1032.
18 Pettit, *Equity and the Law of Trusts*, 8th edn, 1997, p 230.
19 (1975) 23 WIR 406.
20 *Re Gwyon* [1930] 1 Ch 225.
21 *Re Sanders' Will Trusts* [1954] 1 All ER 667.
22 *Re Niyazi's Will Trusts* [1978] 1 WLR 910.

(c) that it is no objection that the beneficiaries are required to contribute to the cost of the benefits they receive.[23]

The advancement of education

A trust which provides funds for schools, colleges, universities and other educational establishments is clearly charitable under this head, and indeed the preamble to the Statute of Elizabeth speaks of 'the maintenance of schools of learning, free schools and scholars in universities' and 'the education and preferment of orphans'. In modern times the courts have construed 'education' widely to include 'almost any form of worthwhile instruction or cultural advancement, except for purely professional or career courses'.[24] Education is not restricted to academic learning or school activities but encompasses aesthetic education such as the appreciation of art, music and drama.

In the Commonwealth Caribbean, trusts for the advancement of education were upheld in *Re Codrington, USPG v Attorney General*,[25] where it was accepted without argument that a trust for the establishment and maintenance of a theological college was charitable; in *Re Ramoutar*,[26] concerning the 'Ghandi-Tagore College'; and in *Re Collymore*,[27] which concerned the provision of scholarships for pupils in schools. In *Wiles v Barbados National Trust*,[28] where there was a gift for the purpose of providing a museum of antique furniture, Williams J had no doubt that the gift was charitable, implicitly within the head of advancement of education. On the other hand, in *Attorney General of the Bahamas v Royal Trust Co*,[29] a trust for the 'education and welfare' of Bahamian children and young people was held not charitable on the ground that 'welfare' included purposes which were not exclusively charitable, and in *D'Aguiar v Inland Revenue Commissioner*,[30] a gift to an organisation, one of the objects of which was to promote adult education and technical training, was held not charitable on the ground that certain other objects of the organisation were clearly outside the limits of charity.

Other examples of trusts held charitable under this head are a fund for a students' union in a medical college (on the ground that the provision of physical, cultural and social outlets for students assisted learning in the institution);[31] the provision of law reports (on the ground that their purpose was to record accurately the development and application of judge-made law and thereby disseminate knowledge of the law);[32] the support of a zoo;[33] the production of a dictionary;[34] the provision of facilities for students to play football;[35] the promotion of choral singing,[36] the music of Delius,[37] and classical drama and acting;[38] and the study and dissemination of ethical principles.[39] It has also been held that educational purposes include ancillary

23 *Re Resch's Will Trusts* [1969] AC 514.
24 Hanbury and Martin, *Modern Equity*, 15th edn, 1997, p 388.
25 (1970) 16 WIR 87, pp 32, 33 above.
26 (1988) High Court, Trinidad and Tobago, No 2,225 of 1988 (unreported).
27 (1959) 1 WIR 316.
28 (1975) 26 WIR 50.
29 [1986] 3 All ER 423.
30 [1970] 15 WIR 198.
31 *London Hospital Medical College v IRC* [1976] 2 All ER 113.
32 *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1971] 3 All ER 1029.
33 *Re Lopes* [1931] 2 Ch 130.
34 *Re Stanford* [1924] 1 Ch 73.
35 *IRC v McMullen* [1980] 1 All ER 884.
36 *Royal Choral Society v IRC* [1943] 2 All ER 101.
37 *Re Delius* [1957] Ch 299.
38 *Re Shakespeare Memorial Trust* [1923] 2 Ch 398.
39 *Re South Place Ethical Society* [1980] 3 All ER 918.

matters, such as the provision of funds for the payment of instructors and administrative staff.[40]

A trust for aesthetic or artistic purposes will be accepted as charitable under this head only where it has educational value. This principle is illustrated by *Re Pinion*,[41] where a testator offered his studio, pictures (some painted by himself), antique furniture and other objects to the National Trust to be kept intact as a museum. If the National Trust declined the trust (which in fact it did), he authorised the appointment of trustees to carry out the trust. Expert opinion given to the court was unanimous that the collection had no artistic merit; the trust was therefore not charitable, and failed. Harman LJ could 'conceive of no useful purpose in foisting on the public this mass of junk. It has neither public utility nor educational value'.[42]

Another class of trust which is not regarded as charitable is one for political purposes. Accordingly, where a trust seeks to promote the doctrines of a political party under the guise of a trust for education, it will fail, since 'political propaganda masquerading . . . as education is not education within the Statute of Elizabeth',[43] although in one case[44] a trust of income to be applied 'for the furtherance of conservative principles and religious and mental improvement' was held to be charitable; and a trust intended to further the work of an educational project by organising, *inter alia*, conferences having a 'political flavour', but which did not further the interests of any particular political party nor sought a change in the law or in government policies, was held to be charitable under this head.[45] Finally, although, as we have seen, a students' union is a charitable body, being ancillary to the educational purposes of the university or college[46] (notwithstanding that the union has within it political clubs), the application of union funds for political purposes or any purposes that are not educational is not permitted. Thus, for example, the use of union funds to support a campaign for the restoration of free milk for school children was restrained by injunction on the ground that the use was political.[47]

The question as to whether a trust providing funds for research can qualify as charitable under this head was addressed in *McGovern v Attorney General* by Slade J, who summarised the principles thus:[48]

(i) A trust for research will ordinarily qualify as a charitable trust if, but only if:
   (a) the subject matter of the proposed research is a useful object of study; and
   (b) it is contemplated that the knowledge acquired as a result of the research will be disseminated to others; and
   (c) the trust is for the benefit of the public, or a sufficiently important section of the public.

(ii) In the absence of a contrary context, however, the court will be readily inclined to construe a trust for research as importing subsequent dissemination of the results thereof.

(iii) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either:

40 *Case of Christ's College, Cambridge* (1757) 96 ER 49.
41 [1965] Ch 85.
42 *Ibid* at 107.
43 *Re Hopkinson* [1949] 1 All ER 346 at 350, *per* Vaisey J. See also *Southwood v Attorney General* [2000] ITELR 94.
44 *Re Scowcroft* [1898] 2 Ch 638.
45 *Re Koeppler's Will Trusts* [1986] Ch 423.
46 *London Hospital Medical College v IRC* [1976] 2 All ER 113.
47 *Baldry v Feintuck* [1972] 2 All ER 81.
48 [1981] 3 All ER 493 at 518.

(a) that the teacher/pupil relationship should be in contemplation, or

(b) that the persons to benefit from the knowledge to be acquired should be persons who are already in the course of receiving education in the conventional sense.

(iv) In any case where the court has to determine whether a bequest for the purposes of research is or is not of a charitable nature, it must pay due regard to any admissible extrinsic evidence which is available to explain the wording of the will in question or the circumstances in which it was made.

The advancement of religion

Advancement of religion in the charitable sense includes not only the propagation of religious doctrines but also such 'satellite purposes' as the maintenance of churches and other places of worship (including graveyards), the improvement of religious services (including the support of a church choir), and the support of the clergy.

It has been held that any form of 'monotheistic theism' will be recognised as a religion.[49] Religion connotes some spiritual belief in a divine power and is to be distinguished from the dissemination of ethical principles, as 'religion is concerned with man's relations with God', whereas 'ethics are concerned with man's relations with man'.[50] Further, in order to be charitable, the trust must be for the *advancement* of religion, which connotes 'the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which this rests, and the observances that serve to promote and manifest it—not merely a foundation or cause to which it can be related'.[51] It has been held that a trust for a Masonic Lodge is not charitable since freemasonry, though demanding belief in a divine being and the highest standards of conduct from its adherents, does not constitute a religion in the charitable sense;[52] nor was a trust the purpose of which was to assist the settlement of Jews in Palestine charitable under this head.[53] On the other hand, it has more recently been held that a trust for the benefit of a 'faith-healing' group was charitable under this head.[54]

It has been held that in equity there is 'universal toleration', so that a trust for the advancement of any religion or religious sect may be charitable, provided it is not 'subversive of all morality'.[55] Where the purpose of a trust 'is of a religious nature, the court assumes a public benefit unless the contrary is shown'.[56] Accordingly, there appears to be no requirement that the religion or religious sect should subscribe to orthodox religious thought, or that it should be adhered to by more than a small group of followers.

Although the concept of advancement of religion was originally confined to Christian doctrines, it is clear that non-Christian religions equally qualify. Gifts for the promotion of the Jewish religion have been upheld in several cases,[57] and in *Re Singh*[58] the Supreme Court of British Guiana held that a gift of lands in perpetuity to a number of Hindu societies and

49 *Bowman v Secular Society* [1917] AC 406.
50 *Re South Place Ethical Society* [1980] 1 WLR 1565 at 1571, *per* Dillon J.
51 *Keren Kayemeth Le Jisroel v IRC* [1931] 2 KB 465 at 477, *per* Lord Hanworth MR.
52 *United Grand Lodge of Ancient Free and Accepted Masons v Holborn Borough Council* [1957] 3 All ER 281; cf *Bank of Nova Scotia Trust Co of Jamaica Ltd v District Grand Lodge of Jamaica* (1980) Supreme Court, Jamaica, No E 74 of 1975 (unreported) (pp 135–137, below).
53 *Keren Kayemeth Le Jisroel v IRC* [1931] 2 KB 465; affd [1932] AC 650.
54 *Funnell v Stewart* [1996] 1 WLR 288.
55 *Thornton v Howe* (1862) 54 ER 1042; *Re Watson* [1973] 3 All ER 678.
56 *Re Watson ibid* at 688, *per* Plowman J.
57 Eg, *Neville Estates Ltd v Madden* [1961] 3 All ER 769.
58 [1949] LRBG 120.

temples, whose objects were to promote the Hindu religion and to assist and educate the poor, was charitable under the heads of relief of poverty and advancement of religion. Worley CJ said:[59]

> The law as to charities in this Colony is contained in s 8 of the Civil Law of British Guiana Ordinance, Cap 6:01, which provides as follows:
>
> 'The law as to charities shall be the common law of England: Provided that
>
> (a) no bequest or gift, whether testamentary or otherwise, shall be held void by reason only that it is for a superstitious use or purpose; and
>
> (b) by "charities" shall be ordinarily understood charities within the meaning, purview, and interpretation of the preamble to the Act of the 43rd year of Queen Elizabeth, chapter four, as preserved by s 13 of the Mortmain and Charitable Uses Act 1888.'
>
> The relief and education of the poor is a recognised charitable purpose within the meaning of the Act of Elizabeth and is not confined to the poor of any particular religion.
>
> The 'advancement of religion' is also a charitable purpose under the Act and these words have been interpreted as meaning the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and of the observances that serve to promote and manifest it (see *Keren Kayemeth Le Jisroel v IRC)*[60] But, as Lord Parker of Waddington said in *Bowman v Secular Society*,[61] 'trusts for the purposes of religion have always been recognised in equity as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purpose of this rule'. In *Tyssen's Charitable Bequests* (2nd edn), p 95, it is said:
>
> 'By virtue of the relieving Acts and subsequent decisions of the courts, gifts for the propagation of any religious faith are permissible and charitable gifts, but a gift which is subversive of all religion or morality is contrary to public policy and void . . .'
>
> I venture to summarise the common law as follows: a gift is charitable if it be for the promotion of the spiritual teaching of any monotheistic religion, or for the maintenance of the doctrines and observances of any such religion; provided that the expression of these be kept within proper limits of order, reverence and decency, and provided further that the teachings of such religion do not constitute a danger to the State or otherwise run counter to public policy. This second limitation is, as Lord Sumner pointed out, a question of the times and a question of fact.
>
> In the recent case of *Gilmour v Coats*[62] the tolerance or neutrality of the law towards varied forms of religion is again made manifest. Lord du Parcq, at p 858:
>
> 'It must be remembered that the law of England recognises as proper objects of charitable endowment at least all those varied forms in which the Christian religion is professed and practised.'
>
> And Lord Reid said:[63]
>
> 'The law of England has always showed favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion, but where a particular belief is accepted by one religion and rejected by another, the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported, irrespective of whether or not all its beliefs are true.'
>
> But though the tolerance of the law towards religious beliefs is now almost universal, yet it is still the law that not all gifts for religious purposes are charitable. If the purpose of the gift lacks the element of public benefit (which is a matter for the court to determine) it will not be charitable and, if it creates a perpetuity, it will be invalid (*Gilmour v Coats*, above).

59 *Ibid* at 121.
60 [1931] 2 KB 465 at 477, *per* Lord Hanworth MR.
61 [1917] AC 406 at 448.
62 [1949] 1 All ER 848, HL.
63 *Ibid* at 862.

> The evidence before me shows that the propagation of the Hindu religion, as described in the statutory declaration filed, as one of the purposes of the four named temples and the Sanatan Dharma Maha Sabha, satisfies all the conditions which attach to a valid charitable purpose. As I have already said, their other object, the assistance and education of the poor, is a charitable purpose irrespective of the question of religion.
>
> For these reasons I declare the gift to be a good charitable gift.

Other purposes beneficial to the community

This category of charitable trusts (often referred to as 'the fourth head') includes only such purposes as are within the words or spirit of the preamble to the Statute of Elizabeth. It is the residual category of Lord Macnaghten's classification and includes a great variety of trusts. There are no definitional boundaries to the fourth head, but the following purposes are clearly accepted instances.

The promotion of health

A trust for the support of a hospital is charitable under the fourth head. Thus in *Bank of Commerce Trust Co (Barbados) Ltd v Mother of Sorrows Convent*,[64–65] where a testatrix made a gift of residue to the St Joseph Hospital, Williams CJ held that a gift for the purposes of a hospital is *prima facie* a good charitable gift, not merely because of the use of the word 'impotent' in the preamble to the Statute of Elizabeth, but because the provision of medical care for the sick was, in modern times, accepted as a public benefit attracting the privileges given to charitable institutions.

It is no objection to the charitable status of a hospital that it is a private one for paying patients, nor that the benefits will be received by affluent as well as poor persons; but a nursing home privately owned and run as a profit-making venture will not be charitable.[66] 'Satellite purposes' concerned with the improvement of the quality of the services provided, such as the provision of accommodation for relatives of patients,[67] and the provision of increased pay or benefits to the nursing staff,[68] are also charitable.

Disaster relief

In *Chapman v Attorney General*,[69] the Barbados Flood Relief Committee was established to raise funds to assist members of the public who had suffered loss in severe floods. Douglas CJ held that the trust was charitable as being within the intendment of the Statute of Elizabeth. The Chief Justice referred specifically to 'the relief of aged, impotent and poor people' as being one of the charitable purposes mentioned in the Statute. It is thus unclear whether he regarded the Flood Relief Fund as being for the relief of poverty or for 'other purposes beneficial to the community' under the fourth head. The latter alternative seems preferable. Under s 3(d) Charities Act 1979, Cap 243 (Barbados), 'the relief of distress caused by national disasters or sudden catastrophes' is specifically mentioned as a charitable purpose.

64–65 (1989) High Court, Barbados, No 1,685 of 1988 (unreported).
66 *Re Resch's Will Trusts* [1969] 1 AC 514.
67 *Re Dean's Will Trusts* [1950] 1 All ER 882.
68 *Re Bernstein's Will Trusts* (1971) 115 SJ 808.
69 (1976) 11 Barb LR 3.

Accommodation for the elderly and disabled

In *Joseph Rowntree Memorial Trust Housing Association v Attorney General*,[70] the trustees of a housing trust designed a scheme to erect small self-contained dwellings for sale to elderly people on long leases in consideration of a capital payment. The Charity Commissioners of England and Wales refused to approve the scheme as charitable on the ground that benefits were provided by contract and not by bounty, and that it was merely a commercial enterprise. On appeal, Peter Gibson J held that the scheme was charitable because the purpose of the scheme was to benefit elderly persons in need, and the fact that they were to pay for the accommodation did not prevent the scheme from being charitable.[71] Nor did the persons to be benefited need to be 'poor', as the words 'aged, impotent and poor people' in the preamble to the Statute of Elizabeth had to be read disjunctively. He said:[72]

> [The] authorities convincingly confirm the correctness of the proposition that the relief of the aged does not have to be relief for the aged poor. In other words, the phrase 'aged, impotent and poor people' in the preamble must be read disjunctively. The decisions in *Re Glyn*,[73] *Re Bradbury*,[74] *Re Robinson*,[75] *Re Cottam*[76] and *Re Lewis*[77] give support to the view that it is a sufficient charitable purpose to benefit the aged, or the impotent, without more. But these are all decisions at first instance and, with great respect to the judges who decided them, they appear to me to pay no regard to the word 'relief'. I have no hesitation in preferring the approach adopted in *Re Neal*[78] and *Re Resch's Will Trusts*[79] that there must be a need which is to be relieved by the charitable gift, such need being attributable to the aged or impotent condition of the person to be benefited. My attention was drawn to Picarda, *The Law and Practice Relating to Charities* (1977), p 79, where a similar approach is adopted by the author.
>
> In any event in the present case, as I have indicated, the plaintiffs do not submit that the proposed schemes are charitable simply because they are for the benefit of the aged. The plaintiffs have identified a particular need for special housing to be provided for the elderly in the ways proposed and it seems to me that on any view of the matter that is a charitable purpose.
>
> The first objection [by the Commissioners] is, as I have stated, that the scheme makes provision for the aged on a contractual basis as a bargain rather than by way of bounty. There are numerous cases where beneficiaries only receive benefits from a charity by way of bargain. *Re Cottam*[80] and *Re Resch's Will Trusts*[81] provide examples. Another class of cases relates to fee-paying schools: see for example *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning*.[82] Another example relates to a gift for the provision of homes of rest for lady teachers at a rent: *Re Estlin*.[83] It is of course crucial in all these cases that the services provided by the gift are not provided for the private profit of the individuals providing the services.
>
> If a housing association were a co-operative under which the persons requiring the dwellings provided by the housing association had by the association's constitution contractual rights to the

70 [1983] 1 All ER 288.
71 Similarly, a private school may be charitable tinder the head of advancement of education, notwithstanding that the pupils pay for, their instruction: *Abbey Malvern Wells Ltd v Minister of Local Government and Planning* [1951] 2 All ER 154.
72 [1983] 1 All ER 288 at 297.
73 (1950) 66 TLR (Pt 2) 510.
74 [1950] 2 All ER 1150.
75 [1951] Ch 198.
76 [1955] 3 All ER 704.
77 [1954] 3 All ER 257.
78 (1966) 110 SJ 549.
79 [1969] 1 AC 514.
80 [1955] 3 All ER 704.
81 [1969] 1 AC 514.
82 [1951] 2 All ER 154.
83 (1903) 72 LJ Ch 687.

> dwellings, that would no doubt not be charitable, but that is quite different from bodies set up like the trust and the association. The applicants for dwellings under the schemes which I am considering would have no right to any dwelling when they apply. The fact that the benefit given to them is in the form of a contract is immaterial to the charitable purpose in making the benefit available. I see nothing in this objection of the Charity Commissioners.
>
> A [further] objection was that the schemes were for the benefit of private individuals and not for a charitable class. I cannot accept that. The schemes are for the benefit of a charitable class, that is to say the aged, having certain needs requiring relief therefrom. The fact that, once the association and the trust have selected individuals to benefit from the housing, those individuals are identified private individuals does not seem to me to make the purpose in providing the housing a non-charitable one any more than a trust for the relief of poverty ceases to be a charitable purpose when individual poor recipients of bounty are selected.
>
> [Another] objection was that the schemes were a commercial enterprise capable of producing a profit for the beneficiary. I have already discussed the cases which show that the charging of an economic consideration for a charitable service that is provided does not make the purpose in providing the service non-charitable, provided of course that no profits accrue to the provider of the service. It is true that a tenant under the schemes may recover more than he or she has put in, but that is at most incidental to the charitable purpose. It is not a primary objective. The profit – if it be right to call the increased value of the equity a profit as distinct from a mere increase avoiding the effects of inflation as was intended – is not a profit at the expense of the charity, and indeed it might be thought improper, if there be a profit, that it should accrue to the charity which has provided no capital and not to the tenant who has provided most if not all the capital. Again, I cannot see that this objection defeats the charitable character of the schemes.

Animal welfare

It was established in *Re Wedgwood*[84] that a trust for the welfare of animals in general is charitable, on the ground that it would 'tend to promote and encourage kindness towards [animals] and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by this means to promote feelings of humanity and morality generally, repress brutality and thus elevate the human race'.[85] A trust for animal welfare may also be charitable under the head of advancement of education, for example, in the case of the maintenance of a zoo.[86]

Examples of animal welfare trusts which have been held charitable are a gift for a Society for the Prevention of Cruelty to Animals,[87] for a dogs' home,[88] for an animal hospital,[89] and for the promotion of humane slaughtering.[90] On the other hand, a trust for the establishment of an animal sanctuary, where animals, birds and other creatures would be safe from molestation by humans, was held not charitable, since a sanctuary which deprived humans of all involvement and participation could not be of benefit to the public, and further, it would have provided an opportunity for the stronger species to molest and harry the weaker ones, which would not be for the benefit of the animals themselves.[91] And in *National Anti-Vivisection Society v IRC*[92] it was held that a trust to campaign for the abolition of vivisection was not charitable because:

84 [1915] 1 Ch 113.
85 *Ibid* at 122, *per* Swinfen Eady LJ.
86 See p 125, above.
87 *Armstrong v Reeve* (1890) 25 LR Ir 325.
88 *Re Douglas* (1887) 35 Ch D 472.
89 *London University v Yarrow* (1857) 44 ER 649.
90 *Tatham v Drummond* (1864) 34 LJ Ch 1.
91 *Re Grove-Grady* [1929] 1 Ch 557.
92 [1947] 2 All ER 217.

(a) insofar as the abolition of vivisection could not be achieved without a change in the law, it was a political purpose; and
(b) the advantages to animals which would accrue from the abolition of vivisection were outweighed by the benefits to mankind from its retention.

Other purposes

Other examples of trusts held charitable under the fourth head include:

(a) the maintenance of public services, such as a fire brigade,[93] or police force;[94]
(b) the improvement of agriculture;[95]
(c) the provision of recreational facilities for the general public;[96]
(d) the protection of the environment and the conservation of the national heritage;[97]
(e) the benefit of a locality, such as a town or village, even where no charitable purposes are specified;[98] and
(f) national defence, such as the support and maintenance of an army regiment.[99]

THE PUBLIC BENEFIT REQUIREMENT

Even where a trust falls clearly within one or other of the four heads, it will not achieve charitable status unless it satisfies the requirement of benefit to the public or a section of the public. If its object is to benefit certain private individuals, however numerous, it will not be charitable. In particular, it is settled that a trust for the education of the relatives of a particular person[100] or the employees of a particular company[101] is not charitable, because a class of persons chosen on account of their relationship with a particular person or body does not constitute a section of the public in the charitable sense.[102] By way of exception to the general rule, a trust for the relief of poverty is charitable even though confined to the relatives of the donor[103] or to the employees of a particular company.[104]

In *Re Collymore*[105] the testator established a scholarship fund for the benefit of 'white boys' whose parents were natives of Barbados. Other funds under the will were for scholarships to be

93 *Re Wokingham Fire Brigade Trust* [1951] 1 Ch 373.
94 *IRC v Glasgow Police Athletic Association* [1953] 1 All ER 747.
95 *Hadaway v Hadaway* [1955] 1 WLR 16.
96 *Re Hadden* [1932] Ch 133.
97 See Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 333. 'Charitable objects' under s 3 of the Charities Act, Cap 243 (Barbados) include 'the promotion and improvement of the national heritage, whether physical, environmental, artistic, cultural or otherwise'. It was thus held in Re *Bannochie* (1994) High Court, Barbados, No 893 of 1991 (unreported) that words in the testatrix's will to the effect that 'it is my earnest desire that [the Andromeda Gardens] should survive to give pleasure to those who walk and work in them' created a charitable trust for the benefit of the public, to be carried out by the Barbados National Trust.
98 *Re Norton's Will Trusts* [1948] 2 All ER 842.
99 *Re Good* [1905] 2 Ch 60.
100 *Re Compton* [1945] Ch 123.
101 *Oppenheim v Tobacco Securities Trust* [1951] AC 297.
102 See also Charities Act 1979, s 4 (Barbados), Appendix 1, below.
103 *Re Scarisbrick* [1951] Ch 622.
104 *Gibson v South American Stores Ltd* [1950] Ch 177; *Dingle v Turner* [1972] AC 601.
105 (1959) 1 WIR 316.

open to all races. One of the main issues in the case was whether the testator's 'intention to ensure that the white section of the community obtained a benefit not available to the coloured section satisfied the test of public benefit'. Stoby CJ held that the public benefit requirement was satisfied.

It seems inconceivable that a trust which promoted racial discrimination would be held to be for the public benefit today (even assuming that 'white boys' constituted a section of the public in the charitable sense), and even in the context of the 1950s when the case was decided, the decision is an extraordinary one. Furthermore, as Evershed J pointed out in another 'colour bar' case, *Re Dominion Students' Hall Trust*,[106] a discriminatory condition 'would be liable to antagonise those students, both white and coloured, whose support and good will it is the purpose of the charity to sustain'. Nor would such a trust satisfy the test of 'public benefit' laid down by s 4 of the Charities Act 1979, Cap 243 (Barbados) which defines 'public benefit' as a benefit 'which is available to members of the public at large or to a section of the public ascertained by reference to some specified geographical area'. It is also significant that by s 34 of the Race Relations Act 1976 (UK) it is unlawful to discriminate in favour of a class defined by reference to colour.

In *Re Compton* there was a gift upon trust for the education of the children of three named relatives of the testator. It was held that the trust was not charitable because the relatives of the testator did not constitute a section of the public for the purposes of the rule. Lord Greene MR explained the position thus:[107]

> No definition of what is meant by a section of the public had, so far as I am aware, been laid down and I certainly do not propose to be the first to make the attempt to define it. In the case of many charitable gifts it is possible to identify the individuals who are to benefit or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus if there is a gift to relieve the poor inhabitants of a parish, the class to benefit is readily ascertainable. But they do not enjoy the benefit when they receive it by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are AB, CD and EF, but because they are poor inhabitants of the parish. If in asserting their claim it were necessary for them to establish the fact that they were the individuals AB, CD and EF, I cannot help thinking that on principle the gift ought not to be held to be a charitable gift since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to establish their status, have to assert and prove, not that they themselves are AB, CD and EF, but that they stand in some specified relationship to the individuals AB, CD and EF, such as that of children or employees. In such a case, too, a purely personal element enters into and is an essential part of the qualification which is defined by reference to something, that is to say, a personal relationship to individuals or an individual which is in its essence non-public…. The fact that in cases where a personal element forms an essential part of the qualification the numbers involved may be large does not appear to me to make any difference to the principle to be applied. Once that element is present, numbers can make no difference. The gift is in such a case a personal gift.

106 [1947] Ch 183.
107 [1945] Ch 123 at 129.

Lord Greene then went on to consider several cases in which it had been held that trusts for 'poor relations' were charitable, by way of exception to the general rule, and continued:[108]

> In these circumstances the question arises whether we ought to extend the analogy of these decisions so as to cover a trust of the kind now in controversy. Taking the view which I do, as already expressed, I do not think that we are bound or ought to do so. There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded: whereas in the case of an educational trust where there is no poverty qualification the funds may at any time be applied for the purpose of educating a member of the family for whose education ample means are already available, thus providing a purely personal benefit and one freed, incidentally, from the burden of income tax. Failing such a ground of distinction, I can only regard the poor relations cases as anomalous and I prefer to let them remain as such rather than to extend the anomaly to a different class of case.

In *Oppenheim v Tobacco Securities Trust Co Ltd*,[109] the trustees were directed under a settlement to apply moneys in providing for the education of the children of employees and ex-employees of the British American Tobacco Co or any of its subsidiary companies. There were more than 110,000 employees. It was held by the House of Lords that, although the class was numerous, the nexus between the members of the class was employment by a particular employer, and it therefore followed that the trust lacked the necessary element of public benefit, and was not charitable. Lord Simonds said:[110]

> If I may begin at the bottom of the scale, a trust established by a father for the education of his son is not a charity. The public element, as I will call it, is not supplied by the fact that from that son's education all may benefit. At the other end of the scale, the establishment of a college or university is beyond doubt a charity. 'Schools of learning and free schools' and 'scholars of universities' are the very words of the preamble to the Statute of Elizabeth. So also the endowment of a college, university or school by the creation of scholarships or bursaries is a charity and none the less because competition may be limited to a particular class of persons.
>
> The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *Re Compton*,[111] of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single *propositus* or to several *propositi*, they are neither the community nor a section of the community for charitable purposes.

It has been held, on the other hand, that if a trust can be construed as granting a mere preference to a limited class such as relations or employees, it will be held charitable. In *Re Koettgen's Will Trusts*,[112] a fund was established for the advancement of the commercial education of

108 *Ibid* at 139.
109 [1951] AC 297.
110 *Ibid* at 306.
111 [1945] Ch 123.
112 [1954] Ch 252.

British-born persons, with a direction that preference be given to the employees of a company in respect of a maximum of 75% of the income. Upjohn J held that the trust satisfied the public benefit requirement and was charitable, on the ground that:[113]

> If, when selecting from that primary class the trustees are directed to give a preference to the employees of the company and members of their families, that cannot affect the validity of the primary trust, it being quite uncertain whether such persons will exhaust in any year 75% of the trust fund. On the true construction of this will, that is not (as to 75%) primarily a trust for persons connected with John Batt & Co and the class of persons to benefit is not 'confined' to them, and in my judgment the trust contained in cll 7 and 8 of the will of the testatrix is a valid charitable trust.

The decision in *Re Koettgen* was later criticised by the Privy Council in *Caffoor v Commissioner of Income Tax, Colombo*[114] by Lord Radcliffe, who took the view that the Koettgen trust was essentially an 'employee trust' which had edged 'very near to being inconsistent with *Oppenheim's* case'. In *Caffoor*, the settlor executed a trust deed transferring property to trustees and directing that, after the settlor's death, the income should be applied by the trustees at their discretion for, *inter alia*, 'the education, instruction or training in England or elsewhere of deserving youths of the Islamic faith'. The recipients of the benefits 'shall be selected from the following classes and in the following order: (i) male descendants of the grantor or any of his brothers and sisters, failing whom youths of the Islamic faith born of Muslim parents . . . resident in Ceylon'.

It was held that the settlor had created a family trust and not a charitable one, since the public benefit requirement was not satisfied.

The *Koettgen* decision was again criticised in *IRC v Educational Grants Association Ltd*,[115] where Pennycuick J found 'considerable difficulty' with the decision. In his view, the *Koettgen* trust could be regarded as one 'for the application of income at the discretion of the trustees between charitable and non-charitable objects'. In the *Educational Grants Association* case, the association was established for the advancement of education by *inter alia* making grants to individuals. Funding for the association was provided by means of annual grants from the Metal Box Co, and about 85% of the association's income was applied for the education of the children of Metal Box Co employees. It was held that the association was not a charitable body because the application of such a high proportion of its income for the benefit of employees' children was inconsistent with an application for charitable purposes.

An example of the application of the public benefit test in the Caribbean is *Bank of Nova Scotia Trust Co of Jamaica Ltd v District Grand Lodge of Jamaica*.[116] In this case, the testator's will contained the following provision:

> As to the remainder of my residuary trust fund I direct my trustees to pay therefrom to the Treasurer for the time being of the District Grand Lodge of Scotland in Jamaica the sum of six thousand pounds for the purpose of founding an educational scholarship available to the children of members of Scottish Lodges in Jamaica, and I direct that the said District Grand Lodge shall elect the child to whom the scholarship is to be awarded from time to time and I further direct that the said Lodge shall in its own discretion expend the income derived from the capital in providing such a scholarship.

The main question to be considered was whether this trust satisfied the test of public benefit.

113 *Ibid* at 259.
114 [1961] 2 All ER 436.
115 [1967] Ch 993.
116 (1980) Supreme Court, Jamaica, No E 74 of 1975 (unreported).

Wright J held that the trust was not charitable since the possible beneficiaries were 'a class within a class' and constituted only a minuscule selection from a class of persons which was itself numerically negligible. He said:

> The question whether a valid charitable trust has been created by the bequest to the District Grand Lodge of Jamaica (hereinafter referred to as 'The Lodge') has to be determined in relation to the classification of trusts for charitable purposes as set out in *Pemsel's* case,[117] and more particularly with reference to the second division, *viz*, trusts for the advancement of education. It may be observed that the bequest is manifestly for the advancement of education. But that is not enough. There are three requirements which must all be met.
>
> 1 The trust must be of a charitable nature within the accepted meaning of the term charitable.
>
> 2 It must promote a public benefit.
>
> 3 It must be wholly and exclusively charitable.
>
> Advancement of education: as stated above, this requirement is obviously met. Public benefit: this is, in practice, the severest aspect of the test. A charitable trust may confer a public benefit even though its nature is such that only a limited number of people are likely to avail themselves or are capable of availing themselves of its benefits. There is a distinction . . .
>
> '. . . between a form of relief extended to the whole community yet by its very nature advantageous only to a few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it': *per* Viscount Simonds in *IRC v Baddeley*.[118]
>
> The former type does not lack the necessary element of public benefit whereas the latter type does. Against this background it will be necessary to assess the bequest to the Lodge.
>
> Evidence of the size of the community from which the possible beneficiaries are to be chosen is supplied by the affidavit of Neville Gibbs, the District Grand Secretary of the Lodge, and so far as is relevant it states:
>
> Para 4: 'That the membership of the Scottish Lodges in Jamaica is open to all male adults of the public who believe in a Supreme Being, pursue truth and virtue, promote obedience to law and the peace and good order of the society and who are not remiss in allegiance due to the sovereign of their native land.'
>
> Para 5: 'That there are 15 craft Lodges throughout Jamaica situated in seven parishes.'
>
> Para 6: 'That there are approximately 1,100 members of Lodges under the Scottish constitution throughout Jamaica.'
>
> At first blush it may appear that the membership is broadbased, but closer scrutiny reveals a rather stringent and not too definite test for acceptance. In actual fact, as deposed, the actual membership as against the possible membership is 1,100 out of a population of some two million souls. Further . . . there are no means of ascertaining how many of this membership are fathers or indeed capable of producing children from whom the trustees will from time to time choose one child who will benefit. It is submitted also that in as much as it may benefit the rich as well as the poor, it cannot be rescued as being a trust for the relief of poverty.
>
> It is worthy of note that while *Pemsel's* case supplies the framework within which a trust must fall to qualify as charitable, much judicial time and effort has been consumed by the exercise of determining whether any particular set of facts meets the criterion. Experience has shown the negative approach useful, that is to say, identifying those intended trusts which cannot make the grade. Among the disenabling conditions there stand prominently personal relationship to a single *propositus* or several *propositi*.[119] This principle was approved in *Oppenheim v Tobacco Securities Trust Co*

117 [1891] AC 531.
118 [1955] AC 572 at 592.
119 *Re Compton* [1945] Ch 123.

Ltd.[120] In this case a trust for the benefit of 110,000 persons failed to meet the test because of the fatal taint of a personal relationship. An extract from the judgment of Lord Simonds[121] emphasises the point at issue:

'The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit. These words "section of the community" have no special sanctity but they conveniently indicate first, that the possible (I emphasise the word "possible") beneficiaries must not be numerically negligible, and secondly that the quality which distinguishes them from other members of the community so that they form by themselves a section of it must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *Re Compton*, of a number of families, cannot be regarded as charitable. A group of persons may be members, but if the nexus between them is their personal relationship to a single *propositus* or to *several propositi* they are neither the community nor a section of the community for charitable purposes . . .'

Viewed against this background it seems a foregone conclusion that this gift cannot pass the public benefit test, on the ground that the possible beneficiaries are numerically negligible. However, Mr Muirhead strenuously resists such a conclusion, contending that the possible beneficiaries are drawn from a broadbased section of the community and are not tainted by being related to a single *propositus*. In addition, he seeks aid from *Ward v Ward*[122] which held that a trust to provide an annual outing for children of members of an ex-servicemen's club was charitable as serving an educational purpose. That decision must necessarily stand on the facts of that particular case. I am guided by the decision of the House of Lords in the *Oppenheim* case and cannot yield to Mr Muirhead's argument. The real iniquity afflicting this trust from which it can receive no absolution is that the possible beneficiaries, being a class within a class, are in fact a minuscule selection from a group which is itself numerically negligible. It fails as a charitable trust.

Public benefit in religious organisations

Subject to the absence of any personal nexus as defined in the *Compton* and *Oppenheim* line of cases, the issue as to whether the class of beneficiaries constitutes a section of the public is a question of degree. There may be particular difficulty in determining whether there is a sufficient public benefit in a trust for the advancement of religion.[123] This issue was addressed by the House of Lords in *Gilmour v Coates*,[124] where the trust fund was to be applied for the purposes of a Carmelite convent populated by a community of about 20 strictly cloistered nuns who did not engage in any activities outside the convent but devoted themselves to prayer and contemplation. It was held that the gift did not satisfy the public benefit test since:

(a) the benefit to the public of intercessory prayer could not be proved in law, and
(b) the element of edification was too vague and intangible.

Lord Simonds explained the position thus:[125]

120 [1951] AC 297.
121 *Ibid* at 306.
122 (1937) 81 SJ 397.
123 In *Re Hetherington* [1990] Ch 1, it was held that a gift to a Roman Catholic church for the purpose of saying masses for the repose of souls was charitable, so long as the masses were said in public. In *Funnell v Stewart* [1996] 1 WLR 288, it was emphasised (at p 297) that the religious nature of a faith healing movement rendered its work 'a charitable purpose within which a sufficient element of public benefit is assumed so as to enable the charity to be recognised by law as being such, unless there is contrary evidence' (*per* Hazel Williamson QC).
124 [1949] 1 All ER 848.
125 *Ibid* at 851.

The nuns take vows of perpetual poverty, chastity and obedience and live under rules which impose and regulate the strict enclosure and observance of silence, which are said to be the conditions of the true and fruitful following of the contemplative life. So, too, their rules prescribe the occupations which are to fill their lives. They must assist devoutly and every day at the celebration of the mass and the recital of the Divine Office and other offices and prayers of the Church; must spend all the time that is not occupied in community duties in prayer or spiritual reading or work in their cells. Further, the rules prescribe practices to further the spirit of humility and particular mortifications, as, for example, a monastic fast lasting from 14 September to Easter, and the prohibition throughout their lives of those aids to comfort which by ordinary women are regarded as necessities rather than luxuries of life.

This, then, is the life which it is the purpose of this community to promote in the women who join it. Is it a charitable purpose and is a trust for its furtherance a charitable trust? The community does not engage in—indeed, it is by its rules debarred from—any exterior work, such as teaching, nursing, or tending the poor, which distinguishes the active branches of the same order. A Catholic woman, it is said, joins such a contemplative order as this to promote in herself more fully and perfectly the love of God, expressed in as perfect a submission to His will as she can achieve with the help of His Grace, to promote that love in her neighbour and to make reparation to God for the sins of mankind. It is the teaching of the Church that the religious life thus led is, as it is called, 'the state of perfection'. It is this benefit to all the world, arising from the value of their intercessory prayers, that the prioress puts in the forefront of her case in urging the charitable purpose of the trust. Nor is it only on the intercessory value of prayer that the prioress relies for the element of public benefit in the lives of the nuns. I turn then to the question whether, apart from this final consideration, the prioress has established that there is in the trusts which govern this community the element of public benefit which is the necessary condition of legal charity. If now for the first time the necessity for determining that question arose, it might be a more difficult one to answer than it now appears to me to be. But, my Lords, when I consider the law of charity, its origin and the manner of its development, when I find that, though communities such as this have existed over a considerable period and their charitable character has been rarely advocated and never sustained, I do not think that it is possible to open the door and admit them to the house of charity unless there is some novel and compelling reason for doing so.

My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof. But then, it is said, this is a matter not of proof but of belief, for the value of intercessory prayer is a tenet of the Catholic faith, and therefore, in such prayer there is benefit to the community. But it is just at this 'therefore' that I must pause. It is, no doubt, true that the advancement of religion is, generally speaking, one of the heads of charity, but it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing where they cannot prove: the court can act only on proof. A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not, from that belief alone, derive validity any more than does the belief of any other donor for any other purpose.

I turn to the second of the alleged elements of public benefit, edification by example, and I think that this argument can be dealt with very shortly. It is, in my opinion, sufficient to say that this is something too vague and intangible to satisfy the prescribed test. The test of public benefit has, I think, been developed in the last two centuries. Today it is beyond doubt that that element must be present. No court would be rash enough to attempt to define precisely or exhaustively what its content must be. But it would assume a burden which it could not discharge if now for the first time it admitted into the category of public benefit something so indirect, remote, imponderable and, I would add, controversial as the benefit which may be derived by others from the example of pious lives.

In *Gilmour v Coates* the House of Lords arguably took an unduly restrictive view of the necessary qualifications for a religious institution to acquire charitable status, though it is possible to justify the decision on the ground that the nuns did no work in the general community. In *Neville Estates Ltd v Madden*,[126] on the other hand, where there was a gift of money for the purposes of the Catford Synagogue, Cross J had no difficulty in finding that the trust was charitable, because the members of Catford Synagogue 'spend their lives in the world . . . whereas the members of a Carmelite priory live secluded from the world'. He said:[127]

> The chief purposes which a synagogue exists to achieve are the holding of religious services and the giving of religious instruction to the younger members of the congregation. But just as today church activity overflows from the church itself to the parochial hall, with its whist drives, dances and bazaars, so many synagogues today organise social activities among the members. A new clause added to the scheme of the United Synagogue in October 1926 authorised, or purported to authorise, that body to establish, *inter alia*, halls for religious and social purposes, and the Catford Synagogue, as I have said, has erected a communal hall near the synagogue building in which social functions are held. The plaintiffs, fastening on these facts and on the wording of cl 2 of the trust deed, argue that the trust in this case is open to the objections which proved fatal to the trust for the foundation of a community centre which came before the court in *Inland Revenue Commissioners v Baddeley*.[128] But in my judgment there is a great difference between that case and this. Here the social activities are merely ancillary to the strictly religious activities. In the *Baddeley* case, on the other hand, no one sought to argue – indeed it was manifestly impossible to argue – that the trust was for the advancement of religion. No doubt it had a religious flavour in that the beneficiaries were confined to Methodists or persons likely to become Methodists, and the premises and the activities in which the beneficiaries were to engage were to be under the control of the leaders of a Methodist mission. Nevertheless, the activities in themselves were directed predominantly to the social and not to the religious well-being of the beneficiaries.
>
> In my judgment the purposes of the trust with which I am concerned are religious purposes – the social aspect is merely ancillary.
>
> I turn now to the argument that this is a private, not a public trust. In an article which he contributed in 1946 to volume 62 of the *Law Quarterly Review*, Professor Newark argued that the courts ought not to concern themselves with the question whether or not a trust for a religious purpose confers a public benefit. Even assuming that such question can be answered at all, judges, he said, are generally ill-equipped to answer them and their endeavours to do so are apt to cause distress to the faithful and amusement to the cynical. I confess that I have considerable sympathy for Professor Newark's views; but the decision of the House of Lords in *Gilmour v Coates*[129] has made it clear that a trust for a religious purpose must be shown to have some element of public benefit in order to qualify as a charitable trust. The trust with which I am concerned resembles that in *Gilmour v Coates* in this, that the persons immediately benefited by it are not a section of the public but the members of a private body. All persons of the Jewish faith living in or about Catford might well constitute a section of the public, but the members for the time being of the Catford Synagogue are no more a section of the public than the members for the time being of a Carmelite Priory. The two cases, however, differ from one another in that the members of the Catford Synagogue spend their lives in the world, whereas the members of a Carmelite Priory live secluded from the world. If once one refuses to pay any regard – as the courts refused to pay any regard – to the influence which these nuns living in seclusion might have on the outside world, then it must follow that no public benefit is involved in a trust to support a Carmelite Priory. But the court is, I think, entitled to assume that some benefit accrues to the public from the attendance

126 [1961] 3 All ER 769.
127 *Ibid* at 780.
128 [1955] AC 572.
129 [1949] 1 All ER 848.

> at places of worship of persons who live in this world and mix with their fellow citizens. As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.

TRUST MUST BE EXCLUSIVELY CHARITABLE

A trust will fail as a charity if its purposes are not exclusively charitable. This means that, by the express terms of the trust instrument, it must not be possible, without committing a breach of trust, for the trustees to use the fund for non-charitable purposes, unless those purposes are purely ancillary to the main charitable purpose.

An example of a non-charitable purpose which was held to be merely ancillary to the main charitable purpose and which therefore did not affect the charitable status of the trust is *Re Coxen*,[130] where a sum of money was given by the testator to the trustees for the purpose of financing an annual dinner at their meeting on the business of managing a trust in favour of orthopaedic hospitals. Similarly, in *London Hospital Medical College v IR Comr*[131] it was held that a students' union's charitable status, as furthering the educational purposes of the college, was unaffected by the fact that the union also provided a personal benefit for individual student members who made use of its facilities. And in *Incorporated Council of Law Reporting for England and Wales v Attorney General*,[132] it was held that the fact that legal practitioners made use of law reports in order to earn their professional fees did not prevent the Council's objects from being regarded as charitable.

On the other hand, in *Hadaway v Hadaway*,[133] a Privy Council appeal from the Windward Islands Court of Appeal, where the testator had bequeathed the residue of his personal estate on trust for the purpose of establishing a bank 'to assist the planters and agriculturalists of St Vincent by way of loans at a sufficiently low rate of interest' as was compatible with the proper operation of the bank, it was held that the trust was not charitable as, although the promotion of agriculture was charitable within the fourth head, the purposes in this case were not *exclusively* charitable; it was 'impossible to regard the will of the testator as creating a trust for the general improvement of agriculture only, or for such a purpose and purely ancillary purposes only'. Viscount Simonds said:[134]

> In the present case their Lordships entertain no doubt that the ambit of the trust is wide enough to include loans which could not fairly be described as being for the promotion of agriculture or as being ancillary to that purpose, and that it is only by inserting restrictive words that loans could be so confined. For it is clear that it would be competent for the directors of the bank, which is to be established under the will, to make loans to planters in any financial emergency, whether due to crop failure or other farming disaster or to some personal distress. But such loans which might or might not be used for agricultural purposes cannot be properly described as made for the general promotion of agriculture, however much individual planters may benefit. The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative and remote to justify the attribution to it of a charitable purpose. It would be equally

130 [1948] 2 All ER 492.
131 [1976] 2 All ER 113.
132 [1971] 3 All ER 1029.
133 [1955] 1 WLR 16.
134 *Ibid*, at p 19.

> easy and equally wrong to regard as charitable a trust for the granting of loans on generous terms to any member of any other class which performs a useful function in the social or economic life of the country.

The rule that a trust must be exclusively charitable has been applied in a number of cases where trusts have been created for 'charitable or benevolent' or 'charitable or worthy purposes', where the courts have held that the adjectives must be construed disjunctively,[135] to the effect that the trustees might apply the trust fund for either a charitable or a non-charitable purpose. Such a construction will, of course, render the whole trust non-charitable. In such cases it is a question of construction as to whether or not the purposes of the trust are exclusively charitable.

In the recent case of *Attorney General of the Cayman Islands v Wahr-Hanson*,[136] the settlor had established a trust whereby the trustees were to distribute income from the fund to such 'religious, charitable or educational institutions' (the 'first group' of purposes) or to such 'organisations or institutions operating for the public good' (the 'second group' of purposes) as they thought fit. A recital to the trust deed also recorded that the settlor wished 'to establish a trust for the benefit of worthy individuals, organisations and corporations'. The Privy Council held that the trust was not exclusively charitable, and therefore failed. Lord Browne-Wilkinson regarded the use of the word *'or'* as crucial, in that it enabled the trustees to use the income from the trust fund *either* for the charitable (first group) of purposes *or* for the non-charitable (second group). Applications of funds for public, philanthropic or benevolent purposes would be for the public good, but they would not necessarily be legally charitable. Further, the trusts in this case were not to be equated with the anomalous category of 'locality trusts', where gifts made, for example, 'for the good of a particular parish, or 'for my country, England' were held to be valid charitable trusts, notwithstanding that the wording of the gifts was wide enough to enable the funds to be used for non-charitable purposes. Lord Browne-Wilkinson explained:[137]

> In all these cases the gifts were held to be valid charitable trusts, even though the breadth of the words used, literally construed, would certainly have authorised the application of the funds for non-charitable purposes in the specified locality. The courts have held that such purposes are to be impliedly limited to charitable purposes in the specified community. So, it is argued in the present case, although the second group of purposes ('organisations or institutions operating for the public good') is not limited to a particular locality, the same principle ought to be applied and the purposes should be limited to those organisations operated for the public good by charitable means.
>
> In their Lordships' view, this argument is fallacious. There is a limited class of cases where gifts in general terms are made for the benefit of a named locality or its inhabitants. For reasons which are obscure, such cases have been benevolently construed. They are now so long established that in cases falling within the very circumscribed description of gifts for the benefit of a specified locality they remain good law. But they have been widely criticised and indeed have been said to be wrongly decided (see, for example, Albery, 'Trusts for the Benefit of the Inhabitants of a Locality' (1940) 56 LQR 49). To apply the same principle to all cases where there are general statements of benevolent or philanthropic objects so as to restrict the meaning of the general words to such objects as are in law charitable would be inconsistent with the overwhelming body of authority which decided that general words are not to be artificially construed so as to be impliedly limited to charitable purposes only.

135 Eg, *Chichester Diocesan Fund v Simpson* [1944] 2 All ER 60.
136 [2000] 3 ITELR 72.
137 At p 78.

In the leading case of *Attorney General of the Bahamas v Royal Trust Co*[138] the testator had directed that the residue of his estate should be invested and be used by his trustees 'for any purposes for and/or connected with the education and welfare of Bahamian children and young people.' Here it was strenuously argued that the purposes 'education and welfare' should be read in a conjunctive rather than a disjunctive sense, as meaning that the only purposes for which the funds were authorised to be used were purposes which were not merely for the welfare of Bahamian children and young people but were also educational. Put in another way, the word 'education' limited the word 'welfare', and there was only one overall purpose of the trust, which was educational welfare. The Privy Council refused to adopt this conjunctive construction, holding that 'welfare' had an extremely wide meaning, capable of embracing almost anything which might enhance the quality of life of the children and had not, in the particular will, been confined to educational purposes. Lord Oliver said:[139]

> It is true that in the instant case there are two and only two objects specified, so that, to that extent, it is the easier to adopt the conjunctive construction for which Mr Newman contends. But there are a number of formidable difficulties about this, and not least that it is not easy to imagine a purpose connected with the education of a child which is not also a purpose for the child's welfare. Thus if 'welfare' is to be given any separate meaning at all it must be something different from and wider than mere education, for otherwise the word becomes otiose. Mr Newman has sought to meet this by the submission that, in the context of the paragraph as a whole, 'welfare' is used in the sense of 'welfare ancillary to education'. But 'welfare' is a word of the widest import and when used in connection with a class of 'children and young people' generally is capable of embracing almost anything which would lead to the enhancement of the quality of life of any member of the class. Mr Newman's difficulty then is to find any context, either in the paragraph itself or in other parts of the will, for subordinating this wide concept to the object of education. Despite Mr Newman's helpful argument, their Lordships have been unable to discern any context from which the inference of subordination can be drawn, and that difficulty would remain even if the trustees had been directed simply to apply the income for 'education and welfare'. The difficulty is, however, compounded by the additional and not unimportant words 'for any purposes for and/or connected with', for, if Mr Newman were otherwise able to link the word 'welfare' with the preceding word 'education' in a conjunctive sense, it would then be impossible to find a purpose which was connected with 'welfare' (used in this ancillary sense) which was not also 'connected with' education, so that the reference to 'welfare' would again become otiose. The point is not one which is susceptible of a great deal of elaboration and their Lordships need to say no more than that they agree with Blake CJ and the Court of Appeal [of The Bahamas] that the phrase 'education and welfare' in this will inevitably falls to be construed disjunctively. It follows that, for the reasons which were fully explored in the judgments in the courts below, and as it is now conceded on the footing of a disjunctive construction, the trusts in paragraph (t) do not constitute valid charitable trusts and that, accordingly, the residue of the trust estate falls into the residuary gift in cl 16 of the will.

Finally, in *D'Aguiar v Inland Revenue Commissioner*,[140] a Privy Council appeal from Guyana, a taxpayer covenanted to pay a sum of money to an organisation called the Citizens' Advice and Aid Service, whose objects were:

(a) to provide advice, aid and services on or relating to medical, dental, optical, health, legal, matrimonial, domestic or other social matters;

(b) to establish and operate a fund for the assistance of those in need on such terms and conditions as the Central Committee may determine;

138 [1986] 3 All ER 423.
139 At p 426.
140 (1970) 15 WIR 198.

(c) to encourage thrift and provide savings facilities;
(d) to make available to the individual in confidence accurate information and skilled advice on personal problems of daily life;
(e) to establish, organise, sponsor or otherwise promote adult education and technical training of every kind, including the explanation of legislation and government notices and publications;
(f) to help the citizen to use wisely the services provided for him by the State;
(g) in general, to advise the citizen in the many complexities which may beset him; and
(h) generally to do anything to assist the citizen, whether financially or otherwise, who makes enquiry of the Service and in any way as may be determined by the Central Committee.

The question to be decided was whether the sum was exempt from taxation on the ground that it had been transferred to a charitable body. The Privy Council held that the organisation was not charitable since its objects were so wide as to permit the money to be applied for purposes which were not legally charitable.

Lord Wilberforce agreed with the view of the Court of Appeal of Guyana that the trust in this case would be charitable only if it could be brought within the fourth head of the *Pemsel* classification: 'other purposes beneficial to the community'. The process which the Court should follow in deciding this question was:[141]

> It must first consider the trend of those decisions which have established certain objects as charitable under this heading and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these. Secondly, it must examine certain accepted anomalies to see whether they fairly cover the objects under consideration. Thirdly – and this is really a cross-check upon the others – it must ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail.

However, in considering whether the instant case was favoured by existing decisions, Lord Wilberforce emphasised that they were mainly decisions of the English courts concerned with English trusts, and therefore with questions of benefit to the English community. He continued:[142]

> The present case concerns the country of Guyana and a community different in composition and development. Their Lordships are impressed by the passages in the judgment of the learned Chancellor, Sir Kenneth Stoby, in which he appealed to these differences in terms of racial conflict and poverty, and underlined the special need of the people of Guyana for just such help and advice as the Service sets out to provide. Their Lordships agree that these considerations are properly the object of judicial notice or concern, and they bear them fully in mind. They have no doubt that the motives of the organisers of the Service, and of the appellant in giving money to it, arise out of a genuine concern for the nation's problems. They equally have no doubt that, by suitable definition, a valid charitable trust could be set up which would comprehend much of the substance of the Service's objects. But for the purposes of the present appeal, their Lordships must take the Constitution as it is. So taken, their Lordships find that the general trend of authority does not favour its charitable character . . .
>
> Their Lordships must examine the stated objects of the Constitution. They have set them out above. It is not necessary to analyse in any great detail to perceive that even giving to doubtful expressions the most favourable significance, they would permit of applications of the convenanted income for purposes widely outside any conception of the legally charitable. Their Lordships are

141 At p 201.
142 *Ibid.*

> fully satisfied with the findings of Luckhoo CJ to this effect: indeed they consider that his treatment of certain of the stated purposes might be regarded as somewhat favourable to the appellant. But on his finding (concurred in by the majority in the Court of Appeal) that those purposes which are stated in cl 2, paras (a), (d) and (g) are outside the purview of charity, the appeal must fail.

THE *CY-PRÈS* DOCTRINE

Where property is given for a charitable purpose which cannot be carried out in the way intended by the settlor, the court has power to order a scheme whereby the property can be applied for other charitable purposes as near as possible *('cy-près')* to that designated by the settlor. The *cy-près* doctrine may come into play not only where it is impossible to carry out the settlor's purpose (for example, where a testator devises a plot of land to trustees for the purpose of building a hospital thereon, but the land is compulsorily acquired by the government), but also where it is impracticable to do so (as, for example, where there was a trust for, *inter alia*, the redemption of British slaves in Barbary and Turkey),[143] and where the consequences of observing the original terms of the trust might tend to defeat the charity's main object (as, for example, in *Re Dominion Students' Hall Trust*,[144] where, on a *cy-près* application, a 'colour bar' imposed by the settlor on a students' hall of residence was removed). Property has also been directed to be applied *cy-près* when capital provided more income than was required to carry out the specified charitable purpose; and where a surplus existed after the purpose for which an appeal was launched had been satisfied. Thus in *Chapman v Attorney General*,[145] where a surplus of funds remained in the hands of the Barbados Flood Relief Committee, Douglas CJ had to decide whether the surplus could be applied *cy-près*. He said:[146]

> Here there is a substantial surplus after all claims have been satisfied. There is no question but that those who subscribed parted with their contributions out and out, and did not expect the return of any part of their contributions when the immediate object of the charity was achieved. The proposed scheme for applying the surplus funds *cy-près* involves their being employed for the purpose of relieving any suffering or hardship which may from time to time befall any person in Barbados as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not. This seems to accord with the principles laid down in *Re Welsh Hospital (Netley)* Fund[147] and other cases.
>
> In the result . . . there will be a declaration that the surplus funds may be applied *cy-près*.

Under the general law, a *cy-près* application is possible only in cases of impossibility and impracticability, but s 13 Charities Act 1960 (UK) extended the range of circumstances in which property may be applied *cy-près*. In Barbados, s 24 Charities Act, Cap 243 (which is a simplified version of s 13 of the UK statute) provides for a *cy-près* application 'where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and

(a) it is impossible, impracticable or inexpedient to carry out that purpose; or

(b) the amount available is inadequate to carry out that purpose; or

143 *Ironmongers' Co v Attorney General* (1844) 8 ER 983.
144 [1947] Ch 183.
145 (1976) 11 Barb LR 3.
146 *Ibid* at 5.
147 [1921] 1 Ch 655.

(c) that purpose has been effected already; or

(d) that purpose has ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or

(e) that purpose has ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift or trust.

One notable feature of the Barbados statute is that it authorises application of trust property for '*some other* charitable purpose', no mention being made of 'similar' charitable purposes. It remains to be seen whether the courts in Barbados will interpret the provision according to its plain and natural meaning or whether they will interpret it as being subject to the general equitable principle that the purposes for which the property may be applied must be similar to those envisaged by the settlor.

Initial failure and subsequent failure

A distinction is drawn between cases of:

(a) *initial failure* (that is to say, where the charitable trust cannot be carried out at the date when it comes into effect); and

(b) *subsequent failure* (that is to say, where the trust can be carried out at the date when it comes into effect but it subsequently becomes impossible or impracticable to perform).

In cases of initial failure, property cannot be applied *cy-près* unless the donor exhibited what is known as a 'general charitable intention'; whereas in cases of subsequent failure, a general charitable intention is not required.[148] It may be noted, however, that s 24 Charities Act, Cap 243 (Barbados) expressly dispenses with the requirement of general charitable intention in all *cy-près* applications.

Subsequent failure

A recent example of subsequent failure is *Bank of Commerce Trust Co (Barbados) Ltd v Mother of Sorrows Convent*.[149] Here the testatrix by her will made a gift of residue to the St Joseph Hospital. The testatrix died in September 1985. At that date the hospital was in existence, but in January of the following year it was closed down. Williams CJ held, *inter alia*, that the gift was to be construed as a gift for the charitable purposes served by the hospital and not as a gift to the religious order which owned and managed the hospital and that, since the hospital had continued to exist beyond the testatrix's death, following *Re Slevin*,[150] the gift did not lapse but should be applied to meet the hospital's outstanding debts and liabilities (if any), and any excess should be paid to the Crown to be administered for some analogous charitable purpose, if necessary by means of a scheme.

In the Trinidadian case of *Re Ramoutar*,[151] the question was whether, upon dissolution of a charitable institution, the trust funds were to be applied for similar charitable purposes or whether they were held upon a resulting trust for the founders of the institution. In this case, R, A and I established a trust fund to found and carry on an institution to be known as 'The

148 *Re Slevin* [1891] 2 Ch 236.
149 (1989) High Court, Barbados, No 1685 of 1988 (unreported).
150 [1891] 2 Ch 236.
151 (1988) High Court, Trinidad and Tobago, No 225 of 1988 (unreported).

Ghandi-Tagore College', and were named as trustees. The objects of the college were, *inter alia*, to promote the study of the 'works of Ghandi, Tagore and other great teachers of the world'; 'to promote a comparative study of the various religions' practised in Trinidad and Tobago; and to prepare students for GCE examinations in arts, science and languages. Responsibility for the acquisition of property for the college and for all liabilities was to rest on the trustees. It was also provided that, on dissolution, any credit balance in the trust fund, after settlement of all liabilities, should be distributed to charitable institutions. When the college closed down in 1975, R and I, the surviving trustees, claimed to be beneficially entitled to certain land which had been purchased by the trustees in 1967 'unto the use of the trustees of the Ghandi-Tagore College in fee simple as joint tenants', on the ground that, on the closure of the college, a resulting trust arose in favour of those who had contributed money to the founding and running of the college, namely R, A and I. Permanand J held that:

(a) a valid charitable trust had been created;
(b) there was no evidence showing an intention for a resulting trust to arise on dissolution; and
(c) the property belonging to the college must be applied *cy-près*.

Initial failure

Where it is impossible or impracticable to carry out a trust at the date when it comes into effect, that is to say, where there is a case of initial impossibility, the property can be applied *cy-près* only where a general charitable intent is shown. Such an intention is an intent to benefit charity generally, as opposed to an intent to benefit a particular charity or to further a particular charitable purpose. In *Re Wilson*,[152] Parker J said that the authorities are to be divided into two classes:

> First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect.
>
> Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift – a gift for a particular purpose – and it being impossible to carry out that particular purpose, the whole gift is held to fail. Put in another way, the distinction is between, on the one hand, the case where the scheme prescribed by a testator can be regarded as the mode by which a general charitable purpose is to be carried into effect and where the mode is not of the substance of the gift; and, on the other hand, the case where no part of the scheme prescribed by the testator can be disregarded as inessential without frustrating the testator's evident intent.[153]

Examples of cases in which a general charitable intent was found are *Biscoe v Jackson* and *Re Lysaght*. In *Biscoe v Jackson*[154] a testator left property 'for the establishment of a soup kitchen for the Parish of Shoreditch, and a cottage hospital adjoining thereto'. It was impossible *ab initio* to carry out the trust as no suitable land could be found. It was held that the will showed that the testator had an underlying intention to benefit the poor inhabitants of the parish generally, and

152 [1913] 1 Ch 314 at 320, 321. See JC Hall [1957] CLJ 87.
153 Pettit, *Equity and the Law of Trusts*, 8th edn, 1997, p 300.
154 (1887) 35 Ch D 460.

the property was applied *cy-près*. In *Re Lysaght*,[155] the testatrix left property to the Royal College of Surgeons upon trust to establish awards for medical students other than those of the Roman Catholic or Jewish faiths. The College declined to accept the gift with the discriminatory clause; it was therefore a case of initial impossibility. It was held that there was a general charitable intention in that the testatrix's intent was to found medical studentships generally, and the property could be applied *cy-près* under a scheme whereby the College held the property upon the trusts of the will, omitting the discriminatory clause.

Caribbean examples of cases in which a general charitable intention was found are *Wiles v Barbados National Trust* and *Re Paap*. In *Wiles v Barbados National Trust*[156] the testator devised his freehold residence to the trustees of the Barbados National Trust for the 'purpose of providing a museum for bygones and old furniture until such time as the . . . trustees shall have bought an old plantation house for this purpose (as they intend)'. Thereafter the trustees were to hold the property upon trust to sell and to hold the net proceeds of sale upon trust for the maintenance, upkeep and general benefit of the museum. The property was subject to a covenant restricting its use to residential purposes and could not therefore be used as a museum. The Council of the National Trust therefore decided to accept the property under the condition that it could be sold and the proceeds devoted to the purchase of a plantation house. The main question to be determined was whether the testator had evinced a general charitable intent so that the gift could be applied *cy-près*, it being a charitable gift which could not be carried out in the manner prescribed.

Williams J held that the will disclosed a general charitable intent. He said:

> The clear intention of the testator is to assist or participate in the establishment of a museum for bygones and old furniture. It is settled that such a purpose is charitable: *British Museum v White*.[157] This being so, the foremost question to be determined is whether the testator has evinced a general charitable intent. For this question is relevant in any case in which a charitable gift has been made in terms which cannot be carried out in the manner prescribed and it is sought to vary the donor's terms.
>
> At this stage it is important to note that the Council still have the intention of buying a plantation house as a permanent museum . . . and the testator's property can still be sold for the purpose of maintaining the museum. It is only in the provision of a temporary accommodation of the bygones and old furniture that the testator's idea has proved impracticable. And if tomorrow the Council were to get the plantation house they are hoping for, temporary accommodation for the objects would not be needed.
>
> Is there a general charitable intention indicated in the will? In *Re Templemoyle Agricultural School*, Chatterton VC said:[158]
>
> 'In deciding whether a general charitable intention has been indicated, it is necessary to consider what is the proper meaning of that expression. It does not mean merely an intention to give to charity generally, without reference to any specified object; but it means an intention the substance of which is charitable, whether generally and without any specified object, in which case the Crown will prescribe the mode of effectuating it, or for an object more or less accurately specified, but with a mode of benefiting that object superadded which cannot be lawfully or at all carried into execution, in which case the court will carry out the substantial intention.'

155 [1965] 2 All ER 888.
156 (1975) 26 WIR 50, High Court, Barbados. The Barbados National Trust was held to be a charitable body in *Re Bannochie* (1994) High Court, Barbados, No 893 of 1991 (unreported), *per* Chase J. See also Charities Act, Cap 243, s 3(i) and (n).
157 (1826) 57 ER 473.
158 (1869) IR 4 Eq 295 at 301.

> The words of Dixon and Evatt JJ in *Attorney General for New South Wales v Perpetual Trustee Co Ltd* are even more apt:[159]
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> 'The question is often stated to be whether the trust instrument discloses a general intention of charity or a particular intention only. But, in its application to cases where some particular direction or directions have proved impracticable, the doctrine requires no more than a purpose wider than the execution of a specific plan involving the particular direction that has failed. In other words "general intention of charity" means only an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that the impracticable direction be carried into execution as an indispensable part of the trust declared.'
>
> In the case before me the testator's intention was to participate in setting up a museum for bygones and old furniture. He intended to do this by giving his property for use as a temporary museum and, on the acquisition by the Council of a permanent home for them, by having his property sold and the proceeds used for maintaining the permanent museum. His plan failed in a subsidiary respect. His property cannot be used as a temporary museum owing to restrictions affecting its use. The remainder and the more substantive and lasting portion of the plan remains capable of fulfillment. It is in my judgment well within the *cy-près* doctrine to provide in these circumstances an alternative within the scope of the testator's overall intention.

In *Re Paap*[160] the testatrix devised and bequeathed the residue of her estate to the Royal Masonic Hospital, the Cancer Society Fund and the Multiple Sclerosis Fund, all of London, England, in equal shares absolutely; and she further directed that the receipts of their respective treasurers should be a sufficient discharge for her executors and trustees. Section 3 Charities Act 1979 provided that the expression 'charitable purposes' included 'the relief and prevention of sickness and disability, both physical and mental, including:

(a) the provision and staffing of hospitals, nursing and convalescent homes and clinics; and
(b) the promotion of medical research'.

No difficulty arose in relation to the gifts to the Royal Masonic Hospital or the Multiple Sclerosis Fund, but there was no single identifiable Cancer Society Fund of London. There were, however, six organisations in London which were concerned with the relief of suffering from cancer or with cancer research. Two principal questions fell to be decided by the court:

(a) whether the bequest to the non-existent Cancer Society could be applied *cy-près*; and
(b) how to apply the property where there were several organisations which qualified under the *cy-près* doctrine.

Douglas J held that the gift could be applied *cy-près*. There would be an order by consent of the Attorney General that the executors and trustees pay the proceeds of the one-third share of the residue to the six organisations in equal shares. He explained:

> The first issue which arises in these proceedings is whether a general charitable intention can be inferred from the terms of the testator's will.
>
> In *Re Davis*[161] Buckley J said: '. . . where you find a gift to a charitable institution which never existed, the court, which always leans in favour of charity, is more ready to infer a general charitable intention than to infer the contrary.'

159 (1940) 63 CLR 209 at 225.
160 (1986) High Court, Barbados, No 1185 of 1985 (unreported).
161 [1902] 1 Ch 876 at 881.

[Buckley J continued]:[162] 'It seems to me that the principle which is to be extracted from *Re Clergy Society*[163] and *Re Maguire*[164] is that the court will in this class of case—where there is a gift to a charity which has never existed at all—lean in favour of a general charitable purpose, and will accept even a small indication of the testator's intention as sufficient to show that a purpose, and not a person is intended.'

Now, in the will in the present case, I find in the first place that this gift is interpolated between other charitable gifts . . . I think there is more ground here than there was in either *Re Clergy Society* or *Re Maguire* for the court drawing the inference of a general charitable intention . . .

In *Re Knox*,[165] the fact that the testatrix directed that each share was to be received by the treasurer of an institution was held by Luxmoore J to be a factor to be taken into consideration.

Section 3 of the Charities Act 1979 provides:

'For the purpose of this Act, the expression "charitable purposes" includes the following purposes, namely

(b) the relief and prevention of sickness and disability, both physical and mental, including—

(i) the provisions and staffing of hospitals, nursing and convalescent homes and clinics,

(ii) the promotion of medical research

Applying the tests laid down in *Re Davis* and *Re Knox*, and having regard to the definition of 'charitable purposes' in s 3 of the Charities Act, I hold that the testatrix in these proceedings has shown a general charitable intention. In these circumstances the gift to the Cancer Society Fund of London is not void but may be applied *cy-près*.

The second issue is how to apply the fund where there are several organisations which qualify under the *cy-près* doctrine. Guidance on this point is afforded by *Re Songest*,[166] where Lord Evershed MR stated:

'I have said more than once that, in the circumstances, there are but two possible beneficiaries, and I have said (and I now assume) that the claims of both of them are nicely and indeed equally balanced. It would therefore, as I think, follow that any *cy-près* application would inevitably be by way of equal division.'

I consider this approach appropriate in the instant case and the equitable solution would seem to be that the gift be divided equally between the six organisations listed above.

It seems, however, that it was unnecessary for the learned Chief Justice to have considered whether the testator in this case had shown a general charitable intention, since s 24(1) Charities Act 1979 provides that where property is given for a charitable purpose and 'it is impossible, impracticable or inexpedient' to carry out that purpose, the property 'shall be disposed of for some other charitable purpose, whether or not there is any general charitable intention'. The requirement of a general charitable intention, however, remains in other Caribbean jurisdictions where general equitable principles apply.

No general charitable intent

Examples of cases where no general charitable intent was found are *Re Wilson* and *Re Stanford*. In *Re Wilson*[167] property was bequeathed by the testator for the purpose of providing income for a schoolmaster of a school which the testator envisaged being built by public subscriptions on

162 *Ibid* at 884.
163 (1856) 69 ER 928.
164 (1870) LR 9 Eq 632.
165 [1936] 3 All ER 623.
166 [1956] 2 All ER 765 at 768.
167 [1913] 1 Ch 314.

a certain hill. It was impossible to carry out the trust. It was held that no charitable intent wider than that for the specified purpose could be inferred, and the property fell into residue.

In *Re Stanford*[168] a testator bequeathed a sum of money to a university for the purpose of publishing a dictionary written by him. The book was published, and a surplus remained. It was held that there was no general charitable intent disclosed in the will and the surplus could not be applied *cy-près* but fell into residue. It will be noted that *Re Stanford* was a case of surplus remaining after carrying out a charitable purpose; it could not therefore be classified as a case of initial impossibility, but rather should have been treated as one of subsequent failure, in which case it should not have been necessary to show a general charitable intention. It is thus unclear as to whether a general charitable intention is necessary in the 'surplus' cases.[169]

A Caribbean example where no general charitable intent was shown is *Re Maynard*.[170] Here the testatrix made gifts by her will to four institutions, the Methodist Missionary English Society, the China Missionary Society, the Panama Methodist Society and the African Missionary Society, none of which were shown to have been in existence at the date of the death. A petition was brought under ss 82 and 83 Guardians, Executors, Administrators and Trustees Act 1891 for the advice of the court.

Hanschell J held that, as it was the testatrix's intention to benefit particular institutions rather than particular purposes, no general charitable intent could be inferred and the property could not be applied *cy-près*. He said:

> I now turn . . . to decide whether the gifts to the four institutions are to be administered *cy-près* or whether they are to fall into residue. I think I am right in saying . . . that the answer to this difficult question depends upon whether or not the testatrix can be said to have evinced a general charitable intention when she purported to make these gifts.
>
> It is well established that a gift to a charitable institution which has never existed is some indication of a general charitable intention. But this is not an absolute or conclusive or unconditional rule, and the cases make it equally clear that the will must be looked at and construed as a whole in order to determine what is the intention of the testator in each case. I approve and adopt the statement of Luxmoore J in Re *Knox*:[171]
>
> 'The question whether there is a charitable intention or not, in cases where there is a gift to some body or institution which has never existed, is, I think, always a matter of construction of the particular will which has to be considered . . .'
>
> . . . Although the evidence was not adequate for me to make a finding of fact that the four institutions did in fact exist at the date of the will, yet there can be little doubt that it is very relevant to the question of what was in the mind of the testatrix at that time. She said quite positively that she knew of the institutions, although she did not have their addresses. As far as she was concerned, she was not vague about their names or in doubt as to their existence: I conclude therefore that, however mistaken she may have been about their existence, it was her intention to benefit particular institutions rather than particular purposes.
>
> In *Re Harwood*, Farwell J found that there was an intention, in the case of an institution (the Peace Society of Dublin) which never existed, to benefit any society whose object was the promotion of peace and which was connected with Dublin. The learned judge stated, in dealing with the evidence in that case:[172]

168 [1924] 1 Ch 73.
169 *Cf Re King* [1923] 1 Ch 243; *Re Ulverston and District New Hospital Building Trusts* [1956] Ch 622.
170 (1973) 8 Barb LR 84 (Supreme Court, Barbados).
171 [1936] 3 All ER 623 at 625.
172 [1935] All ER Rep 918 at 919.

> 'I doubt whether the lady herself knew exactly what society she did mean to benefit' and again 1 do not think she had a very clear idea in her mind'.
>
> I have already found quite differently about the state of mind of the testatrix in this case.
>
> For the above reasons, I find that there is no such general charitable intention as would justify the application of the *cy-près* doctrine in this case. Accordingly, the purported gifts to the four institutions concerned will fall into residue.

Gifts to charitable institutions

A particular form of impossibility occurs where there is a gift to a specified charitable institution which ceases to exist before the gift takes effect. *Prima facie*, where a testator makes a bequest to an institution but the institution ceases to exist before the testator's death, the gift lapses in the same way as a gift to an individual. In *Re Rymer*,[173] for example, the testator gave a legacy 'to the Rector for the time being of St Thomas's Seminary for the education of priests in the Diocese of Westminster for the purposes of such Seminary'. Shortly before the testator's death, the seminary had been closed, the building sold, and the students transferred to another seminary 100 miles away. It was held that the legacy lapsed and fell into residue. However, it has been pointed out that 'the courts have gone very far in the decided cases to resist the conclusion that a legacy to a charitable institution lapses, and a number of very refined arguments have been found acceptable with a view to avoiding that conclusion'.[174] Possible bases for avoiding a lapse are:

(a) That although the named charity has ceased to exist, its work is being carried on by other charities. For example, where two or more charities are amalgamated under the name of one of them, or under a new name, the purposes of the original charities may be incorporated into the trusts of the new amalgamated charity. Thus, any property given to the original charities will automatically pass to the amalgamated institution.[175]

(b) That the gift can be construed as a gift for charitable *purposes* which are continuing. 'Charitable purposes are not easily destroyed'[176] and, if they continue, a gift will not lapse even though the original organisation or machinery for carrying out such purposes may have ceased to exist at the time the gift came into effect.

(c) In *Re Vernon's Will Trusts*,[177] Buckley J drew a distinction between gifts to unincorporated charities and gifts to corporate charities. In his view, every gift to an *unincorporated* charity must take effect as a gift for the purpose which the charity exists to promote. Such a gift will not fail for want of a trustee, and if the charity is dissolved during the testator's lifetime, the court will give effect to it by way of a scheme, unless there is something to show that the continued existence of the charitable organisation was essential to the gift. On the other hand, a gift to a *corporate* charity takes effect as a gift to the corporate body beneficially, and it will lapse if the body ceases to exist before the testator's death, unless there is positive evidence that the corporate body took the property upon trust for charitable *purposes*. This distinction was applied in *Re Finger's Will Trusts*[178] where one share of residue was given by the testatrix to the National Radium Commission (an unincorporated charity) and the

173 [1895] 1 Ch 19.
174 *Re Roberts* [1963] 1 All ER 674 at 678.
175 *Re Faraker* [1912] 2 Ch 488.
176 [1972] Ch 300n.
177 [1971] 3 All ER 1050.
178 [1972] Ch 286.

other share to the National Council for Maternity and Child Welfare (a corporate charity). Both organisations had been dissolved before the testator's death. It was held that the gift to the Radium Commission did not fail as it was construed as a purpose trust for the work of the Commission which was not dependent on the continued existence of the named organisation. Its purposes could still be carried out and the share of residue was applicable under a scheme. But the gift to the Child Welfare Council failed, since it was an absolute gift to a corporate body which had ceased to exist before the testatrix's death and the will did not show an intention that the gift should be held upon trust for the charity's purposes.

CHAPTER 10

APPOINTMENT, RETIREMENT AND REMOVAL OF TRUSTEES

The appointment, retirement and removal of trustees in the Commonwealth Caribbean is governed by statutory provisions modelled on the Trustee Act 1893 or Trustee Act 1925 (UK) and by equitable principles.

APPOINTMENT OF TRUSTEES

There are two occasions on which an appointment of trustees will be made:

(a) on the creation of a new trust, whether *inter vivos* or by will; and
(b) during the continuance of an existing trust, either in substitution for a trustee who, for example, wishes to retire or who has died, or in addition to the existing trustees.

CREATION OF A NEW TRUST

Where a settlor creates an *inter vivos* trust he may, as we have seen,[1] either declare himself a trustee of the property or he may appoint other persons as trustees and transfer the trust property to them. In the latter case, he must ensure that the proper method of transfer of the legal title is used, for if the document purporting to transfer the property is ineffective, no trust will be created and the property will remain vested in the settlor. Similarly, as Pettit explains,[2]

> . . . it seems clear that there can be no valid trust if the document relied upon as constituting the trust is a purported conveyance or transfer to trustees who are not named or otherwise identified, or who are already dead, or have otherwise ceased to exist or are not capable grantees. Such a document would be a nullity and completely ineffective to constitute a trust.

On the other hand, once there is a valid transfer of the legal title to named, existing persons as trustees, the trust will be completely constituted and remain valid, notwithstanding that the trustees *later* die or disclaim,[3] for 'equity will not allow a trust to fail for want of a trustee'. In the event of such death or disclaimer, new trustees will be appointed by those entitled to exercise the power to appoint,[4] or by the court.[5]

Where a testator creates a trust by his will, the legal estate in the trust property vests automatically in his executors at his death; and where an administrator obtains letters of administration, his title 'relates back' to the death. Thus, 'the fact that the trustees appointed all predecease the testator or otherwise cease to exist, or even that no trustees were originally appointed by the testator at all, or that they all disclaim the trust, or that the trustee appointed is legally incapable of taking, will not cause the trust to fail, even though the will may contain no provisions for the appointment of trustees'.[6] In such circumstances, the executors or

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1 See Chapter 4, above.
2 *Equity and the Law of Trusts*, 8th edn, 1997, p 317.
3 *Ibid*.
4 See below, pp 154–156.
5 See below, pp 158–159.
6 Pettit, *Equity and The Law of Trusts, ibid*.

administrators will be deemed to be constructive trustees until express trustees are appointed by the court.[7] The position is even more secure where, as is most usual, the same persons are appointed executors and trustees of the will. In such a case, when they have completed their duties as executors, the appointees automatically become trustees and the property remains vested in them in their new capacity; though where the trust property consists of land, they must execute a written assent in favour of themselves as trustees.[8]

Appointment of new trustees

Whether a trust is created *inter vivos* or by will, the trust property vests in all the trustees as joint tenants, so that when one or more trustees die, the property devolves on the survivors. Thus, s 18(1) Trustee Act 1925 (UK)[9] provides:

> Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

The rules relating to the appointment of new trustees are the same whether the trust is created *inter vivos* or by will. Where the trust instrument grants an express power to appoint new trustees, such provision must be strictly followed.[10] In the absence of an express power, there is a statutory power contained in s 36(1) Trustee Act 1925 (UK); s 38(1) Trustee Act, Cap 250 (Barbados); s 10(1) Trustee Act (Jamaica); s 36(1) Trustee Ordinance, Ch 8, No 3 and s 48(1) Trustee Act, No 21 of 1981 (Trinidad and Tobago); s 42(1) Trustee Act 1998 (The Bahamas).[11] It is unusual to insert an express power, and the statutory power will be relied upon in most cases.

The statutory power enables an appointment of a new trustee to be made out of court by the persons entitled to appoint, who are:

(a) the person or persons nominated in the trust instrument to exercise the statutory power; or if there is no such person or persons
(b) the 'surviving or continuing' (that is to say, the existing) trustees; or, if there is no such person or persons
(c) the personal representatives of the last or only surviving trustee.

Persons nominated

The settlor of an *inter vivos* trust may nominate himself as having the power to appoint new trustees, or he may nominate other persons. In the absence of such nomination, the settlor has no power to appoint trustees other than the original ones. In a testamentary trust, of course, only other persons may be nominated.

Where a person is nominated he will normally be given the power to appoint new trustees in all circumstances, but if he is only given power to do so in limited circumstances, such provision will be strictly construed. Thus, for example, where N was given power to appoint a new trustee where an existing trustee became 'incapable' of acting, it was held that he had no power

7 *Ibid.*
8 *Re King's Will Trusts* [1964] Ch 542.
9 Similar provisions are contained in Cap 250, s 22(1) (Barbados); TA 1975, s 9(1) (Bermuda); Trusts Law, 1967 (2009 Rev), s 24(1) (Cayman Islands); Cap 303, s 19(1) (BVI); TA, s 22(1) (Jamaica).
10 Parker and Mellows, *Modern Law of Trusts*, 6th edn, 1994, p 367.
11 See also TA 1975, s 26 (Bermuda); Trusts Law, 1967 (2009 Rev), s 4 (Cayman Islands); Cap 303, s 36 (BVI).

to appoint a replacement for a bankrupt trustee, because such a trustee, although 'unfit', was not 'incapable'.[12]

Where a beneficiary is nominated, his power of appointment is treated as being detached from his beneficial interest, so that if he disposes of that interest, he will remain entitled to appoint new trustees.[13]

An appointor may appoint himself in place of a trustee who is dead, retiring, unfit, incapable etc, but he may not appoint himself as an additional trustee.[14]

Surviving or continuing trustees

This second category has the power to appoint new trustees where there is no one nominated to appoint, or where there is 'no such person able and willing to act'. It has been held that the latter requirement was satisfied where, for example, the donee of the power of appointment could not be found,[15] and where the donees were a husband and wife who were required to act jointly, and they could not agree on an appointment.[16]

It is specifically provided by the sections that the provisions 'relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions' of the sections. 'The purpose of this provision is to enable a trustee who is disclaiming or retiring to appoint his successor. It is accordingly possible for all the surviving trustees together, or a sole trustee, to retire and at the same time appoint new trustees or a new trustee to act in their or his place, which could not be done if this power was given to the continuing trustees or trustee in the *prima facie* sense.'[17] Another consequence of the sections is that an appointment of a new trustee made without the concurrence of a refusing or retiring trustee would be void, if such refusing or retiring trustee could show that he was competent and willing to act and yet was not consulted.[18] It is therefore advisable that a refusing a retiring trustee be required to join in the deed of appointment of the new trustee.

In *Re Stoneham's Settlement Trusts*,[19] a trustee had been replaced on the ground that he had remained outside the United Kingdom for more than 12 months. On his return, he sought to upset the appointment on the ground that he had not been consulted in the selection of the replacement trustee. It was held that he had no right to participate in the appointment, since the phrase 'refusing or retiring trustee' did not include one who has been removed compulsorily on account of his absence from the jurisdiction for more than 12 months.

Finally, it was held in *Re Brockbank*[20] that where there was a dispute between the continuing trustees and the beneficiaries as to who should be appointed a new trustee, the beneficiaries had no right to interfere in the exercise of the discretion which the legislature had given to the continuing trustees, even where, as in this case, the beneficiaries are all *sui juris* and absolutely entitled to the trust property and therefore entitled to terminate the trust under the rule in *Saunders v Vautier*.[21]

12 *Re Wheeler and De Rochow* [1896] 1 Ch 315.
13 *Hardaker v Moorhouse* (1884) 26 Ch D 417.
14 Parker and Mellows, *ibid*, p 252.
15 *Cradock v Witham* [1895] WN 75.
16 *Re Sheppard's Settlement Trusts* [1888] WN 234.
17 Pettit, *Equity and The Law of Trusts*, 8th edn, 1997, p 323, 324.
18 See *Re Coates to Parsons* (1886) 34 Ch D 370.
19 [1952] 2 All ER 694.
20 [1948] Ch 206.
21 (1841) 49 ER 282.

Personal representatives of the last surviving trustee

Where all the trustees of a will predecease the testator, the last of them to die is not a surviving or continuing trustee and so his personal representatives are not entitled to appoint a new trustee.[22] It is clear, therefore, that the power is exercisable only by the personal representatives of a trustee (including a sole trustee) who was alive at the time when the trust came into effect.

Occasions for appointment of new trustees

The sections provide for the appointment of new trustees in two kinds of case:

(a) *in place* of an-outgoing trustee; and
(b) *in addition to* trustees who are remaining in office.

The appointment must be in writing, though a deed is normally used so that advantage can be taken of the statutory provisions whereby trust property vests automatically in the new trustee where the appointment is made by deed.[23]

Replacement trustees

By TA 1925, s 36(1) (UK); TA, Cap 250, s 38(1) (Barbados); TA 1998, s 42(1) (The Bahamas); TA, s 10(1) (Jamaica); T Ord, Ch 8, No 3, s 36(1) and TA 1981, s 48(1) (Trinidad and Tobago); TA, Cap 303, s 36(1) (BVI); Trusts Law 1967 (2009 Rev), s 4(1) (Cayman Islands); and TA 1975, s 26(1) (Bermuda), new trustees may be appointed as replacements in the following circumstances:

(a) *Where a trustee is dead.* Under the sections, this includes a person nominated as trustee under a will but predeceasing the testator.
(b) *Where a trustee remains out of the jurisdiction for a period of more than 12 months*. The absence must be continuous, and the period will be broken and the provision will not apply where the trustee returns to the jurisdiction for even a very short time, for example, one week.[24] The motive for the absence is irrelevant, so that if, for example, the trustee has been imprisoned abroad, he may be replaced.[25]
(c) *Where a trustee desires to be discharged*, whether from all or any of the trusts or powers conferred on him. Thus, a replacement trustee may be appointed where a trustee wishes to retire from the trust altogether, or where he wishes to retire from part only.[26]
(d) *Where a trustee refuses to act.* This would include the case of a trustee disclaiming his office.[27] It is advisable that a disclaimer be exercised by deed.
(e) *Where a trustee is unfit to act.* Unfitness denotes defects of character in the trustee rather than medical infirmity. This would include, for example, conviction for a crime involving dishonesty;[28] it would also include bankruptcy of the trustee,[29] unless perhaps the bankruptcy

22 *Nicholson v Field* [1893] 2 Ch 511.
23 See below, p 160.
24 *Re Walker* [1901] 1 Ch 259.
25 Parker and Mellows, *Modern Law of Trusts*, 6th edn, 1994, p 372.
26 *Ibid*. See *Pile v Pile* (1983) High Court, Barbados, No 426 of 1978 (unreported).
27 *Re Birchall* (1889) 40 Ch D 436.
28 *Re Hopkins* (1881) 19 Ch D 61 at 63: cf *Re Wheeler and De Rochow* [1896] 1 Ch 315.
29 *Re Barker's Trusts* (1875) 1 Ch D 43.

were shown to have been caused by financial misfortune without any moral blameworthiness on the part of the trustee.[30]

(f) *Where a trustee is incapable of acting.* Incapacity denotes physical or mental inability to attend properly to the administration of the trust, such as mental deficiency or senility.[31] It does not include bankruptcy.[32]

(g) Under TA 1925, s 36(1) (UK), TA 1998, s 42(1) (The Bahamas), T Ord, Ch 8, No 3, s 36(1) and TA 1981, s 48(1) (Trinidad and Tobago), a trustee who is a minor may be replaced; but the Trustee Acts of Barbados, Jamaica and Bermuda contain no such provision.[33]

Additional trustees

Under TA 1925, s 36(6) (UK); TA 1998, s 42(6) (The Bahamas); T Ord, Ch 8, No 3, s 36(5) (Trinidad and Tobago); TA, Cap 250, s 38(6) (Barbados); TA, Cap 303, s 36(5) (BVI); Trusts Law 1967 (2009 Rev), s 4(5) (Cayman Islands); and TA 1975, s 26(6) (Bermuda), *additional* trustees may be appointed (that is to say, without the occurrence of any of the circumstances specified in s 36(1)) provided that the total number does not increase beyond four. Additional trustees may not be appointed under the sections if any existing trustee is a trust corporation.

Maximum and minimum numbers

In general, any number of persons may be trustees of a particular trust; though, from a practical point of view, it is inadvisable on the one hand to appoint a sole trustee because of the danger of fraud and maladministration, or, on the other, too many trustees, which might make the management of the trust unwieldy. There are, however, certain statutory provisions which require a minimum or a maximum number, as follows:

(a) In some jurisdictions, unless a trust corporation is appointed, at least two trustees are required to give a valid receipt for the proceeds of sale of land belonging to the trust.[34]

(b) Where a trustee wishes to retire, but it is not proposed to appoint a replacement, he can only do so if at least two trustees (or a trust corporation) remain to administer the trust.[35]

(c) In some jurisdictions, the maximum number of trustees of a settlement or trust for sale of land is four. If more than four are appointed, the first four named who are able and willing to act will be the trustees. This limit does not apply to land held upon trust for charitable purposes.[36]

(d) Where an additional trustee is being appointed under the statutory power and all the existing trustees are remaining, the number of trustees must not be increased beyond four.[37]

30 *Re Bridgeman* (1860) 1 Drew and Sm 164.
31 *Re Lemann's Trusts* (1883) 22 Ch D 633; *Re Blake* [1887] WN 173.
32 *Turner v Maule* (1850) 15 Jun 761.
33 Trustee Act 1893, s 10(1) also omits infancy as a ground.
34 See p 189, *post*.
35 TA 1925, s 39 (UK); TA, Cap 250, s 41 (Barbados); T Ord Ch 8, No 3, s 40 (Trinidad and Tobago); TA, Cap 303, s 40 (BVI); Trusts Law 1967 (2009 Rev), s 8 (Cayman Islands); TA 1975, s 29 (Bermuda); TA, s 11 (Jamaica).
36 Eg, TA 1925, s 34(2) (UK); T Ord, Ch 8, No 3, s 35(2) (Trinidad and Tobago); Trusts Law 1967 (2009 Rev), s 3(3) (Cayman Islands).
37 TA 1925, s 36(6) (UK); TA, Cap 250, s 38(6) (Barbados); T Ord, Ch 8, No 3, s 36(5) (Trinidad and Tobago); TA, Cap 303, s 36(5) (BVI,); Trusts Law 1967 (2009 Rev), s 4(5) (Cayman Islands); TA 1975, s 26(6) (Bermuda).

Appointment by the court

The court has a statutory power to appoint new trustees in substitution for or in addition to existing trustees 'wherever it is expedient, difficult or impracticable [to do so] without the assistance of the court'. This statutory power was originally contained in s 25 Trustee Act 1893 (UK) and was re-enacted in s 41 TA 1925 and in several Caribbean jurisdictions.[38]

The court will not exercise its power if it is possible for the new trustee to be appointed out of court under an express or statutory power;[39] nor will the court interfere with an appointment made by a person having an express or statutory power to appoint new trustees, even where an application is made to it by all the beneficiaries.[40] In other words, the court will exercise its power only as a last resort. Examples of circumstances where the court has exercised the power are: where all the named trustees predeceased the testator;[41] where no trustees were named by the testator;[42] where there was a doubt as to whether the statutory or an express power of appointment out of court was exercisable;[43] where the persons who should have exercised a power of appointment were resident abroad;[44] and where a minor had been nominated to appoint new trustees.[45]

An example of the exercise of the court's power to appoint a new trustee in the Caribbean is the Guyanese case of *Re Jardine*.[46] In this case there was an application to the court for the appointment of a new trustee under s 25 Trustee Act 1893, which was a statute of general application in British Guiana. There were no trustees expressly appointed by the testator, but the three executors of the will had become constructive trustees of the estate (which was subject to a life interest followed by interests in remainder). Major CJ granted the application sought. He said:

> Nothing remains in the administration of Mrs Chatterton's estate to be done by the executors *ex virtute officii*. Funeral and testamentary expenses, debts and specific legacies have been paid. But there are other acts to be performed by the executors in the capacity of constructive trustees, just as in the capacity of 'administrators' under Roman-Dutch law, although not appointed by that name in the will. There is the protection of the remainder against the tenancy for life; there are dealings with that remainder during the life tenancy; there is the alternate division of the estate and the application of the advancement clause in the will. And the executors of the will are still trustees for those purposes. One of the trustees, Bollin Chatterton, is the tenant for life. Apart from the undesirability of that duality of position, he has become unfit to act as trustee. Another of the trustees, Douglas Jardine, is incapable of acting ….
>
> There remains Mr Harvey Chatterton, one of the sons of the testatrix and a residuary devisee and legatee.
>
> Under the provisions of s 25 of the Trustee Act 1893, I find on the facts of this case that it is expedient to appoint a new trustee of the will, and that the appointment cannot be made without the assistance of the court. The petitioner is a person entitled to make the application and, in the absence of any provision in our Rules of Court for originating summons, to do so by petition.

38 Eg, TA, Cap 250, s 43 (Barbados); TA, s 25 (Jamaica), T Ord, Ch 8, No 3, s 42 and TA 1981, s 53 (Trinidad and Tobago); TA, Cap 303, s 42(1) (BVI); Trusts Law 1967 (2009 Rev), s 10 (Cayman Islands); TA 1975, s 34 (Bermuda); TA 1998, s 48 (The Bahamas).
39 Re *Gibbon* (1882) 45 LT 756.
40 *Re Higginbottom* [1892] 3 Ch 132.
41 *Re Smirthwaite's Trusts* (1871) LR 11 Eq 251.
42 *Re Gillett's Will Trusts* (1876) 25 WR 23.
43 *Re Bignold's Settlement Trusts* (1872) 7 Ch App 223.
44 *Re Humphry's Estate* (1855) 1 Jur NS 921.
45 Re *Parsons* [1940] 4 All ER 65.
46 [1919] LRBG 116.

Exercising the discretion

It was established in *Re Tempest*[47] that, in exercising its discretion in appointing a new trustee, the court will consider:

(a) the wishes of the settlor, in so far as they have been made known;
(b) the interests of all the beneficiaries; and
(c) the efficient administration of the trust.

Where the existing trustees have made it known that they will refuse to act with the person whom the court proposes to appoint, Turner LJ had this to say:[48]

> I think it would be going too far to say that the court ought, on that ground alone, to refuse to appoint the proposed trustee: for this would . . . be to give the continuing or surviving trustee a veto upon the appointment of the new trustee. In such a case I think it must be the duty of the court to inquire and ascertain whether the objection of the surviving or continuing trustee is well founded or not, and to act or refuse to act upon it accordingly.

In such circumstances, therefore, a balance must be struck between, on the one hand, upholding the court's dignity and, on the other, avoiding a situation where there is serious friction between the trustees, which would be detrimental to the administration of the trust.

Traditionally, certain categories of persons have been regarded as unsuitable appointees as trustees: for example, a beneficiary under the trust,[49] on the ground that a trustee/beneficiary might act more in his own interests than those of the other beneficiaries; or a near relative of any of the beneficiaries;[50] or the solicitor to the trust[51] or to a beneficiary.[52] However, in more recent times it has been realised that there may be an advantage in appointing a beneficiary as trustee because he may be expected to approach his duties with greater enthusiasm and commitment than a person who was not beneficially entitled; similarly, it has also been realised that there may be an advantage in appointing a family solicitor as trustee, in order that the trust may benefit from his professionalism and detailed knowledge of the family circumstances.[53] Above all, in making an appointment, 'qualities to be looked for include integrity, a willingness to spend time and trouble on the trust affairs, the ability to get on with co-trustees and beneficiaries, and knowledge of financial matters, business acumen and common sense'.[54]

Vesting trust property in the trustees

Since the mere appointment of a person as trustee does not of itself vest the trust property in him, it is necessary on every appointment to provide for the vesting of the property in the trustee or trustees:

(a) In the case of the original trustees, the settlor must transfer the property to them using the appropriate methods of transfer. Where the trust is testamentary, the will itself operates to vest the property in the named trustees.

47 (1866) 1 Ch App 485.
48 *Ibid* at 490.
49 *Forster v Abraham* (1874) LR 17 Eq 351.
50 *Re Goode* (1913) 108 LT 94.
51 *Re Orde* (1883) 24 Ch D 271.
52 *Re Cotter* [1915] 1 Ch 307.
53 See Parker and Mellows, *Modern Law of Trusts*, 6th edn, 1994, p, 376.
54 Pettit, *Equity and the Law of Trusts*, 6th edn, 1989, p 295.

(b) In the case of new trustees, TA 1925, s 40 and its equivalents in Caribbean jurisdictions[55] operate to vest the trust property automatically in a new trustee, provided that the appointment of the trustee is made by deed. Certain kinds of property are, however, excluded from the operation of the sections, *viz* stocks and shares; mortgages of land, when a formal transfer of the mortgage is required; leasehold land, where the lease contains a covenant against assigning the lease without the lessor's consent, and such consent has not been obtained before the deed of appointment has been executed; and land registered at the appropriate land registry, where the deed of appointment is required to be registered so that the proprietorship register is brought up to date.

RETIREMENT OF TRUSTEES

A trustee may retire from the trust in one of four ways:

(a) by taking advantage of an express clause in the trust instrument providing for retirement;
(b) by taking advantage of the statutory powers:
    (i) under s 36(1) and its equivalents, where he 'desires to be discharged' and a new trustee is appointed in his place; or
    (ii) under TA 1925, s 39 and its equivalents, where no replacement is appointed (see below);
(c) by obtaining the consent of all the beneficiaries, being *sui juris* and absolutely entitled to the trust property; or
(d) by obtaining the authority of the court (see below).

Retirement without replacement

A trustee may retire without replacement under TA 1925, s 39 and its equivalents[56] where:

(a) at least two individual trustees or a trust corporation remain to administer the trust;
(b) the remaining trustees and any other person empowered to appoint new trustees consent by deed to the retirement; and
(c) the trustee executes a deed of retirement.

A purported retirement which does not comply with the statutory provisions is invalid and, in such a case, the trustee remains in office.[57]

Retirement under an order of the court

The court may discharge a trustee under TA 1925, s 41 (UK); TA 1998, s 48 (The Bahamas); TA, Cap 250, s 43 (Barbados); TA, s 25 (Jamaica); Ord, Ch 8, No 3, s 42 and TA 1981, s 53 (Trinidad and Tobago); TA 1975, s 31 (Bermuda); Trusts Law 1967 (2009 Rev), s 10 (Cayman Islands); TA, Cap 303, s 42 (BVI), but only where it is willing to replace the trustee within the

55 Trusts Law 1967 (2009 Rev), s 9 (Cayman Islands); Cap 303, s 41 (BVI); Cap 250, s 42 (Barbados); TA 1975, s 30 (Bermuda); T Ord, Ch 8, No 3, s 41 and TA 1981, s 52 (Trinidad and Tobago); TA 1998, s 47 (The Bahamas).
56 Eg, Cap 250, s 41 (Barbados); TA, s 11 (Jamaica).
57 *Jasmine Trustees Ltd v Wells and Hind (A Firm)* [2007] 3 WLR 810.

power given by the sections. The court also has an inherent power to discharge a trustee without a replacement in an action to administer the trust.[58] This latter power may be used where it is not possible for the trustee to retire under s 39 or its equivalent because the requisite consents cannot be obtained.

REMOVAL OF TRUSTEES

We have seen that a trustee may be removed from his trusteeship out of court where he remains outside the jurisdiction for a continuous period of 12 months or more, where he refuses to act, or where he is unfit or incapable of acting.[59] He may also be removed and replaced by the court under s 41 TA 1925 or its equivalents. In addition, the court has an inherent power to remove a trustee without replacement under the principle in *Letterstedt v Broers*,[60] which is that a trustee may be removed if his continuance in office would be prejudicial to the due performance of the trust, and so to the interests of the beneficiaries. Fraud, bankruptcy or gross incompetence would clearly be grounds for removal, but it is not necessary for those seeking the trustee's removal to show misconduct on the part of the trustee. It may be sufficient if there is friction between the trustee and his co-trustees or the beneficiaries, or simply a lack of confidence in the trustee.[61]

A clear example of the exercise of this jurisdiction in the Caribbean is *De Mercado v Cititrust (Bahamas) Ltd*,[62] where, under the provisions of the trust deed, the corporate trustee had power to terminate the trust and pay the capital over to the income beneficiaries in equal shares. The income beneficiaries requested such termination by letter to the trustee, setting out detailed reasons for the request. The trustee rejected the request in a perfunctory manner and after undue delay. The beneficiaries sought the removal of the trustee by the court on the ground that the relationship between the trustee and the beneficiaries was unsatisfactory, and that such removal was in the interest of the beneficiaries. Georges CJ said:

> The principles to be applied in, considering the removal of a trustee, were discussed in *Letterstedt v Broers*.[63] Their Lordships stated:
>
> 'In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle . . . that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety.' Earlier their Lordships had discussed the dearth of authority in this area and had agreed that in practice, once issues of character had been settled, once it was clear that the continuance of the trustee would be detrimental to the interests of the trust, even if for no other reason than that human infirmity would prevent those beneficially interested from working in harmony with the trustee, the trustee is usually advised by his own counsel to resign unless the trust instrument indicated a contrary intention on the part of the settlor.
>
> In this case there were veiled allegations of breach and trust and rather direct charges of incompetence. Understandably these had to be resisted, and I find that they have been disproved.

58 *Re Chetwynd's Settlement* [1902] 1 Ch 692.
59 See above, pp 156, 157.
60 (1884) 9 App Cas 371.
61 A conflict of duty and interest on the part of a trustee may be sufficient ground for his removal: *Eastmond v O'Hara* (1983) High Court, Barbados, No 44 of 1982 (unreported).
62 (1986) Supreme Court, The Bahamas, No 1252 of 1986 (unreported).
63 (1884) 9 App Cas 371.

> I do find, however, that the charge of unresponsiveness has been made out and I am satisfied that the relationship between the income beneficiaries and the trustee is such that the interests of the beneficiaries are likely to be affected. The income beneficiaries are both from the record competent and experienced at managing large assets, and the trust is likely to benefit from close collaboration between themselves and a trustee in whom they have full confidence.
>
> The trust instrument makes clear that the interests of the income beneficiaries are to be the primary concern of the trustee. Paragraph C of the fifth article reads:
>
> 'The powers vested in the trustee under the foregoing provisions of this Article shall be exercised with primary regard for the interests of the income beneficiary of the particular trust, or, to the extent the trustee shall deem appropriate, the interests of the members of her family, and the interests of any other person shall be disregarded.'
>
> In the circumstances, although I find that the allegations of incompetence and possible breach of trust have not been substantiated, I am satisfied that, in the interest of the welfare of the beneficiaries, there should be a change.

On the other hand, in another Bahamian case, *Viso v Chase Manhattan Corporation Ltd*,[64] Osadebay Ag J adopted a more restrictive approach to the court's jurisdiction to remove a trustee, suggesting that some misconduct on the trustee's part must be shown. He said:

> . . . to remove a trustee merely on the basis that the [beneficiaries] are not happy with the way the trustee has behaved towards them, without proof of any misconduct or mismanagement of the trust assets . . . would not be a proper exercise of the court's jurisdiction.

In the *Viso* case, four of the beneficiaries sought the removal of the corporate trustee on the ground *inter alia* that the trustee had made no effort to sell the trust's 49% interest in a partnership, as directed by the settlor, who was given power so to direct in the trust deed. After finding that the trustee had not fallen short of the standard of care required by *Speight v Gaunt*[65] and *Re Whiteley*,[66] Osadebay Ag J interpreted *Letterstedt v Broers*[67] as establishing that:

> . . . it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or want of reasonable fidelity.

He went on to hold that, in deciding whether to remove the trustee, the court was entitled to take into account the facts that the trust had only six more years to run before coming to an end on the last child's attaining his majority, and that the asset with which the present action was concerned had since been liquidated, and the sum realised from the liquidation had been distributed among the beneficiaries. In his view, the question to be asked was:

> Is it necessary, having regard to the welfare of the beneficiaries and for the protection of this trust, to remove the trustee?

Osadebay Ag J answered this question in the negative and accordingly refused the application for removal of the trustee.

64 (1994) Supreme Court, The Bahamas, No 1,261 of 1992 (unreported).
65 (1883) 9 App Cas 1, p 219, below.
66 [1910] 1 Ch 600.
67 (1884) 9 App Cas 371.

CHAPTER 11

DUTIES OF TRUSTEES

ONEROUS NATURE OF TRUSTEESHIP

Having accepted the trusteeship, a trustee must observe the duties placed upon him. The duties are onerous. As Lord Hardwicke once said:[1] 'A trust is an office necessary in the concerns between man and man and, if faithfully discharged, is attended with no small degree of trouble and anxiety . . . It is an act of great kindness in anyone to accept it.' As Parker and Mellows put it:[2] 'The interest of the beneficiaries will only be adequately protected if the trustees are scrupulously honest; prepared to give adequate time to the administration of the trust; have enough common sense and business acumen to do well with the trust property; and are able to treat fairly beneficiaries with possibly conflicting interests, such as tenant for life and remainderman.'

The general functions of a trustee are properly to preserve the trust fund; to pay the income and the capital to those entitled; and to give to the beneficiaries, on demand, information as to the way in which the trust is being managed.

As for the standard of care owed by trustees, it was established in *Speight v Gaunt*[3] that 'as a general rule a trustee sufficiently discharges his duty *if he takes in managing trust affairs all those precautions which an ordinary, prudent man of business would take in managing affairs of his own*'; though in the case of a paid, professional trustee, a higher standard is required. As Harman J said:[4] 'I do not forget that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and . . . a bank which advertises itself largely in the public press as taking charge of administrations is under a special duty.' This view was echoed more recently in *Bartlett v Barclays Bank Trust Co Ltd (No 1)*,[5] where Brightman J said:

> I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals. With a specialist staff of trained officers and managers, with ready access to financial information and professional advice, dealing with and solving trust problems day after day the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship. Just as, under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have.

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1 *Knight v Earl of Plymouth* (1747) 21 ER 214.
2 *Modern Law of Trusts*, 6th edn, 1994, p 360.
3 (1883) 9 App Cas 1 at 19, *per* Lord Blackburn.
4 *Re Waterman's Will Trusts* [1952] 2 All ER 1054 at 1055.
5 [1980] 1 All ER 139 at 152.

DUTIES ON THE ACCEPTANCE OF THE TRUST

On assuming office, a trustee must:

(a) confirm that his appointment was properly made;
(b) ascertain what property is comprised in the trust estate and acquaint himself with the terms of the trust;
(c) ensure that all the trust property is vested in the joint names of himself and his co-trustees, and that all negotiable securities are placed under joint control;
(d) ensure that if any part of the trust property is outstanding, he presses for payment or transfer of such property to the trustees; and
(e) in the case of a new trustee, investigate any suspicious circumstances suggesting a possible breach by a former trustee, and to attempt to obtain satisfaction for the trust.

DUTY TO ACT UNANIMOUSLY

In administering a trust, trustees are under a duty to act unanimously. Equity does not approve of a 'sleeping trustee', and all trustees are required to be active in exercising discretions and in carrying out the business of the trust. Further, 'there is no law . . . which enables the majority of trustees to bind the minority. The only power to bind is the act of them all'.[6] Therefore, subject to any contrary direction in the trust instrument, only the unanimous decisions of all the trustees and only those transactions which are jointly executed will be valid.[7] Thus, for instance, if a single trustee enters into a contract to sell trust property without the concurrence or subsequent ratification of his co-trustees, the sale will not be enforceable against the trust estate.

There may be occasions where a minority of the trustees disagree with an action proposed by the majority. In some cases, the minority may be justified in deferring to the majority, especially where the latter can claim to have superior knowledge or expertise in the matter in question,[8] or in order to prevent deadlock in the administration of the trust,[9] so that they will not be guilty of a breach of trust if they do not stand firm and resist the majority decision. In other cases, however, it may be advisable for the minority, in order to protect themselves, not to defer to the majority but to approach the court for directions.

There are a number of exceptions to the rule that all the trustees must act jointly, *viz:*

(a) The trust instrument may authorise individual action.
(b) A single trustee has power to give a receipt for dividends from shares. This is necessary because the articles of association of most companies provide that dividends are payable to the first-named registered holder of the particular shares.
(c) The trustees are entitled to delegate most ministerial acts to one of their number.
(d) A majority of the trustees of a private trust are entitled to pay money into court, even if the minority objects.

6 *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121 at 125, *per* Jessel MR.
7 Pettit, *Equity and the Law of Trusts*, 5th edn, 1983, p 317.
8 *Re Schneider* (1906) 22 TLR 223.
9 Parker and Mellows, *Modern Law of Trusts*, 5th edn, 1983, p 270.

(e) In a trust for sale of land there is a duty to sell the land coupled, in some jurisdictions,[10] with a statutory power to postpone the sale. It has been held that if some of the trustees wish to sell but others wish to postpone sale, the wishes of those desiring to sell must prevail, whether they are in a majority or a minority.[11]

DUTY TO ACCOUNT AND TO GIVE INFORMATION

Trustees are under a duty:

(a) to keep financial accounts; and
(b) to provide information, within certain limits, as to the management and administration of the trust.

Accounts

Trustees must maintain accurate accounts of the trust property and 'it is the first duty of [a trustee] . . . to be constantly ready with his accounts'.[12] He must allow the beneficiaries to inspect and take copies of the accounts and, where trust money is invested, supply a beneficiary on request with details of the investments.[13] Where trustees fail to keep proper accounts, a beneficiary may apply to the court for an order requiring them to do so, and the trustees will be ordered to pay the costs of the application.[14]

Information

Since trustees may be called upon by the beneficiaries at any time to give information as to how the trust is being administered, it is advisable for them to keep a 'trust diary', which has been described as 'a type of minute book in which decisions taken in the administration of a trust are recorded'.[15] The beneficiaries are entitled to inspect the trust diary. They are also entitled to inspect not only deeds and documents relating to trust investments but also other documents concerned with the administration of the trust. This right of inspection arises from the principle that the beneficiaries are the equitable owners of any documents that pertain to the management of the trust. In Lord Wrenbury's words:[16]

> A beneficiary has a right of access to the documents which he desires to inspect upon what has been called, in the judgments in this case, a proprietary right. The beneficiary is entitled to see all trust documents because they are documents, and because he is a beneficiary. They are, in this sense, his own.

In the leading case of *Re Londonderry's Settlement*[17] this right of inspection came into conflict with the principle that trustees are not bound to disclose to the beneficiaries the reasons for their

10 See below, p 189.
11 *Re Mayo* [1943] 2 All ER 440.
12 *Pearse v Green* (1819) 37 ER 327 at 329, *per* Plumer MR; *Davis v Administrator-General* (1965) 9 JLR 200 (p 213, below).
13 *Re Tillott* [1892] 1 Ch 86.
14 Parker and Mellows, *Modern Law of Trusts*, 5th edn, 1983, p 274.
15 *Ibid*.
16 *O'Rourke v Darbishire* [1920] AC 581 at 626.
17 [1964] 3 All ER 855, CA. See A Samuels (1965) 28 MLR 220.

decisions. In this case the trustees of the settlement had a power, exercisable with the consent of certain appointors, to appoint shares of capital amongst a class of beneficiaries. G, a member of the class, was dissatisfied with the share appointed to her, and she claimed to be entitled to inspect various trust documents, which might indicate the reasons behind the distribution decided upon by the trustees. These documents included the agendas and minutes of trustees' meetings and correspondence between individual trustees and appointors and between trustees, or appointors, and beneficiaries.[18]

The Court of Appeal held that the beneficiary was not entitled to inspect the documents. The principle that trustees were not bound to disclose the reasons for their decisions relating to the exercise of their discretionary powers overrode the beneficiary's right of inspection. The reasoning of their Lordships, however, in coming to this conclusion is far from clear. Three factors appear to have weighed heavily with the court:

(a) If the beneficiaries were given access to the documents recording the reasons for the trustees' decisions, this might result in family strife.

(b) It was doubtful whether the documents which the beneficiary claimed to be entitled to inspect were in fact 'trust documents', a term which, according to Salmon LJ, 'has never been comprehensively defined; nor could it be—certainly not by me'.[19] If in fact they were not trust documents, then the beneficiary had no right of inspection.

(c) If the trustees' reasons were not protected from disclosure, they would not be able properly to carry out their functions.

In the Cayman case of *Re Ojjeh Trust*,[20] one of the issues was whether a beneficiary was entitled to disclosure of information about the affairs of underlying trust companies. Smellie Ag J had this to say:[21]

> Cayman law is the same as the English law on this matter . . . The principles are summarised as follows: from *O'Rourke v Darbishire*,[22]
>
> (a) a beneficiary will normally be permitted to inspect and take copies of essential trust documents; and from *Butt v Kelson*,[23]
>
> (b) that normal right does not extend to detailed information about the affairs of companies owned by the trust, and for information of that kind the beneficiary must make out a special case,
>
> (c) in so doing, the beneficiary must specify the documents he or she wishes to see,
>
> (d) there must be no valid objection by the trustees or directors or (in special circumstances) the beneficiaries whom the trustees consider should properly be consulted upon the matter, and
>
> (e) the beneficiary seeking disclosure must give proper assurances that he or she will not disclose the documents to anybody but his or her own legal or other advisers, and not make copies save as may be properly advised by legal advisers.

18 Similarly, beneficiaries are not entitled to disclosure of a settlor's confidential 'letter of wishes' containing the settlor's non-binding instructions as to how the trustees should exercise their discretions: *Hartigan Nominees Pty Ltd v Ridge* (1992) 29 NSWLR 405; *Breakspear v Ackland* [2008] 3 WLR 698.

19 But Salmon LJ suggested that they have three characteristics in common: (i) they are documents in the possession of the trustees as trustees; (ii) they contain information about the trust which the beneficiaries are entitled to know; and (iii) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them. *Ibid* at 863.

20 [1992–93] CILR 348.

21 *Ibid* at 362.

22 [1920] AC 581.

23 [1952] Ch 197.

And in another Cayman case, *Lemos v Coutts and Co*,[24] Kerr JA emphasised that:

> . . . although a beneficiary has a proprietary right to trust documents, it is by no means an absolute right; there may be documents or a category of documents which it would be proper to exclude . . . An order for accounts will be granted, save in circumstances where the document or category of documents is not relevant or evidentially essential to the beneficiary's case, or where the probative value is minimal and considerably outweighed by prejudice to the other beneficiaries or to the proper administration of the trust. If I am right in this approach, then only in exceptional circumstances would a blanket refusal of an application for accounts be justified in cases where a beneficiary makes serious allegations impeaching the validity of the trustees' actions.

In the *Lemos* case, there was an allegation that the beneficiaries, who were Greek nationals, had brought their summons for accounting in the Cayman courts as a 'fishing exercise' in order to obtain evidence and information for use in an action being brought in Greece. Kerr JA was not required to decide whether the allegation was well founded or not, but he considered the trustees' apprehension to be reasonable. Accordingly, the court made the disclosure order on the beneficiary's undertaking that the disclosed information would be used only in the breach of trust action in the Cayman court.

In the Bahamian case of *Juarez v Sands*,[25] the trustees of a will held the residuary estate upon trust to convert, to call in debts, and to invest the proceeds in authorised investments. They were also given power to postpone calling in and conversion. The investments were to be held by the trustees upon trust to pay half of the income therefrom to the testator's widow for life, and to apply the other half at their discretion for the maintenance or benefit of the only child of the marriage. The testator died possessed of the share capital in a company, which subsequently declared dividends that were received by the trustees and treated by them as income of the residuary estate. The company owed the trust a large debt, which the trustees did not call in.

The trustees sought the determination of the court as to, *inter alia*, whether the dividends should have been treated as capital of the residuary estate. The court had also to determine whether the trustees had properly exercised their discretion to postpone calling in and conversion. The question arose as to whether the trustees were bound to disclose the minutes of their meetings in order to discover whether their actions in the above matters were justified.

The Court of Appeal of the Bahamas held that the circumstances of this case were essentially different from those in *Re Londonderry's Settlement*,[26] because in *Londonderry*, according to Sinclair P:[27]

> . . . the trustees' discretion related to the selection of beneficiaries and it would be clearly unreasonable to compel them to disclose their confidential reasons for the exercise of their discretion. They did not ask the court to confirm or investigate their actions in performing their trust, as in the present case . . . Here the beneficiaries have already been marked out by the testator, and the trustees ask the court to tell them whether they have acted correctly in the past. The same objections to disclosure do not apply . . . If the propriety of the trustees' actions is to be investigated, the reasons for their actions must be disclosed – in particular the reasons for the large payment by way of dividend. Furthermore . . . the minutes are relevant to whether the trustees really exercised a discretion not to call in the debt. To sum up, the trustees having asked for the court's directions must . . . disclose the documents relevant to the question to be decided.

24 [1992–93] CILR 460 at 518.
25 (1965–70) 2 LRB 353.
26 [1964] 3 All ER 855, CA.
27 (1965–70) 2 LRB 353 at 359.

It was also added by Bourke J that there was no authority for the view put forward by the trustees that there can be enforced disclosure of documents, such as minutes of trustees' meetings, only where the proceedings involved an allegation of fraud, breach of trust or lack of *bona fides* on the part of the trustees. In Bourke J's words,

> . . . there may be other circumstances arising in proceedings where there is no direct attack upon the *bona fides* of the trustees where documents should be disclosed on the ground that they are at least *prima facie* relevant to the issues where the actions of the trustees are called into question.[28]

The authority of the *Londonderry* case appears to have been undermined by the reasoning of the Privy Council in *Schmidt v Rosewood Trust Ltd*,[29] where the main issue was whether members of a discretionary class of beneficiaries or objects of a power of appointment were entitled to disclosure of trust documents. It was held that a discretionary beneficiary or the object of a power may be entitled to such disclosure, on the basis that the court has an inherent jurisdiction to supervise the administration of trusts and therefore has power to order disclosure if it thinks fit. In so reasoning, the court denied that a beneficiary's right of disclosure was based on his having a proprietary interest in the trust documents (the basis of *O'Rourke v Darbishire* and *Londonderry*), and accordingly the right of disclosure was not restricted to persons having fixed and transmissible interests but could be extended to discretionary beneficiaries. Although it is possible to treat the reasoning in *Schmidt* as being confined to cases concerning disclosure to discretionary beneficiaries or objects of a power of appointment, the language of Lord Walker can be interpreted as being of general application, so that even a beneficiary with a fixed interest in a trust fund would no longer have an automatic right of disclosure based on his proprietary interest in the trust documents, but would have to rely on the court's willingness to exercise its supervisory power in his favour.[30]

Restrictions under a 'blind trust'

An express restriction of a particular beneficiary's right to inspect trust documents, including the trust accounts, occurs under a 'blind trust'. A blind trust may be created 'where a wealthy person, upon entering the political arena, decides to hand over the management of his wealth to trustees upon trust for beneficiaries, of whom he may be one, the trustees being prohibited from revealing their investment policy to the politician beneficiary. This device . . . safeguards the politician from possible accusations that he may use his political influence as a means of enhancing his private fortune.'[31]

The concept of the blind trust is unknown to English law, but it is recognised in Australia and Canada, and has been given statutory force in Trinidad and Tobago by the Integrity in Public Life Act, 2000, ch 22:01, s 22 of which provides:

> (3) Notwithstanding any other law relating to the duties of trustees, a trust company managing the assets of a person in public life by way of a blind trust shall reply fully to any inquiries of the [Integrity] Commission relating to the nature and management of the assets in the blind trust.

28 *Ibid* at 366.
29 [2003] 2 AC 709, PC.
30 It has been held in New Zealand that *Schmidt* does not have this effect, and that the beneficiary's right to information under the previous law remains: see *Foreman v. Kingstone* [2005] WTLR 823.
31 Ford and Lee, *Principles of the Law of Trusts*, 1983, para 937.

(4) A blind trust is created when a person in public life enters into an agreement with a qualified trust company whereby–

(a) all or any part of his assets are conveyed to the trust company for its management, administration and control, in its absolute discretion without recourse or report to the persons beneficially entitled to those assets;

(b) income derived from the management of the assets is to be distributed to him as agreed;

(c) should the assets be converted into other assets, that fact is not to be communicated to him, until he ceases to be a person in public life; and

(d) after he ceases to be a person in public life, proper and full accounting is to be made to him, as the circumstances of the management of the trust require.

Control of trustees' discretions

A related question is the extent to which the court can control the exercise of trustees' powers and discretions. The position may be summarised by the following propositions:

(a) Since a discretion or power is intended to be exercised by the trustees, and only the trustees, the court's jurisdiction to interfere is limited.

(b) Trustees cannot be compelled to explain their reasons for exercising or not exercising a discretion or power. In *Re Beloved Wilkes' Charity*[32] trustees were directed by the trust instrument to select a boy to be educated for holy orders in the Anglican Church. Preference was to be given to boys resident in certain parishes, if a suitable candidate could be found therefrom. The trustees selected a boy whose brother was a clergyman who had apparently canvassed one of the trustees on behalf of the boy. The boy was not resident in a designated parish. The trustees gave no reasons for their choice, but they maintained that they had acted impartially. It was held that the court would not interfere with the trustees' decision, nor require them to give reasons for their choice.

(c) It was emphasised in *Re Londonderry's Settlement*[33] that a distinction must be drawn between documents relating to the day-to-day management of the trust (which must be disclosed to the beneficiaries) and documents relating to the exercise of trustees' discretions (which need not be disclosed).

(d) If trustees do give reasons for the exercise of a discretion or power, then the court may scrutinise them.[34]

(e) According to *Gisborne v Gisborne*,[35] where the trust instrument expressly gives trustees an 'uncontrollable' discretion, the court will not interfere in the absence of bad faith, even though it may be of the view that the trustees have not acted reasonably.

(f) Where a discretion is not expressed to be uncontrollable, the position is unclear. In some cases it has been held that the court has jurisdiction to control the exercise of such discretions by trustees, and that it may interfere where the trustees have 'not exercised a sound discretion'.[36]

32 (1851) 3 Mac & G 440.
33 See above, pp 165–167.
34 *Klug v Klug* [1918] 2 Ch 67.
35 (1877) 2 App Cas 300.
36 *Re Roper's Trusts* (1879) 11 Ch D 272; *Klug v Klug*, above; *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1210.

(g) According to *Re Hastings-Bass*,[37] the court will invalidate the exercise of a discretion by trustees where it is clear that they would not have acted as they did if they had not failed to take into account considerations which they ought to have taken into account, or if they had taken into account considerations they ought not to have taken into account; for example, where they have overlooked some rule of law or misunderstood the limits of their powers.

(h) The court may set aside the trustees' decision where fraud is proved[38] or where it is shown to be 'capricious',[39] or where they have blindly followed the settlor's wishes.[40]

The question of the court's power to intervene in the exercise of trustees' discretionary powers in relation to a pension scheme was in issue in the Barbadian case of *Ramsahoye v Caribbean Meteorological Organisation*.[41] Here, the trustees of a pension scheme for members of staff of the Caribbean Meteorological Institute were given an 'absolute and uncontrolled' discretion, in concurrence with the Institute, to alter the rules of the scheme as contained in the trust deed. One such rule (r 20) entitled an employee who retired on grounds of ill health to receive 50% of his pensionable salary at the date of retirement, provided he had completed at least five years of pensionable service. The trustees and the board of management of the Institute considered, in the light of expert opinion, that this entitlement was too generous, and that it was detrimental to the financial stability of the pension scheme as a whole. It was accordingly resolved to alter the rule so as to require at least 10 years' pensionable service, and to reduce the entitlement to 20% of pensionable salary at the date of retirement. The amendment was executed on 16 November 1983, but was made effective retrospectively as from 22 July 1983. Meanwhile, the plaintiff employee on 5 October 1983 had applied to retire on grounds of ill health, and claimed entitlements under the original r 20. He argued that the trustees had exercised their discretionary power improperly and unreasonably in that, knowing of his application to retire, they had resolved to alter rule 20 retrospectively without consulting him or other members of the scheme. The trustees contended that, as they had been given an 'uncontrolled' discretion, the rule in *Gisborne v Gisborne*[42] precluded the court from interfering with the exercise of such discretion.

Williams J held that the court did have power to intervene in this case. He declined to apply the rule in *Gisborne v Gisborne*, preferring the view expressed by Fry J in *Re Roper's Trusts*[43] to the effect that the court has a wide power to intervene where trustees have 'not exercised a sound discretion', and that of Professor Cullity, who suggested[44] that the principle in *Gisborne* applies only to the extent that the trust instrument 'indicates an intention to exclude the application of any standards which equity would otherwise regard as governing the exercise of the discretion'. Williams J said:

> . . . trustees were not only given responsibilty for the management of the pension scheme, but they were to manage it on behalf of members of the staff . . . The decision of the trustees to give

37 [1970] 2 All ER 193.
38 *Tempest v Lord Camoys* (1882) 21 Ch D 571.
39 *Re Manisty's Settlement* [1973] 2 All ER 1203; [1974] Ch 17.
40 *Turner v Turner* [1983] 2 All ER 745.
41 (1986) High Court, Barbados, No 38 of 1985 (unreported). See also *MTC of the Bahamas Ltd v JW* (1998) Supreme Court, The Bahamas, No 958 of 1997 (unreported).
42 (1877) 2 App Cas 300.
43 (1879) 11 Ch D 272.
44 [1975] U Tor LJ 99, p 113.

retrospective effect to the amendment of rule 20 was not a sound or proper exercise of functions under the scheme.

Emphasising the contractual nature of pension schemes, Williams J stressed that it was incumbent on the trustees to have a dialogue with the members of the scheme before altering the rules in a manner which would be unfavourable to those members. This they had not done. He accordingly held that the original r 20 was in operation when the plaintiff sought retirement, and that he was entitled to the benefits thereunder.

Application of the rule in Re Hastings-Bass

Recent case-law shows that the scope of the rule in *Re Hastings-Bass* is being extended by the courts, but the precise limits of the rule remain uncertain. In the *Hastings-Bass* case itself, Buckley LJ expressed the principle that where a trustee is given a discretion in the administration of a trust, 'the court should not interfere with his action, notwithstanding that it does not have the full effect which he intended, unless (i) *what he has achieved is unauthorized by the power conferred upon him*, or (ii) *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*.'[45] With respect to (ii), in *Mettoy Pension Trustees Ltd v Evans*[46] Warner J expressed the view that where trustees fail to take into account considerations which they ought to have taken into account, 'it cannot matter whether that failure is due to their having overlooked (or to their legal advisers having overlooked) some relevant rule of law or limit on their discretion, or is due to some other cause'. The broad scope for the rule proposed by Warner J has been accepted in subsequent cases, and marks an emphatic departure from the *Gisborne* principle of non-interference with the actions of trustees in the exercise of their powers and discretions. The circumstances in which a court may interfere were outlined by Lloyd LJ in *Sieff v Fox*[47] and summarised by Smellie CJ in the Cayman case of *A v Rothschild Trust Cayman Ltd*:[48]

(i) where there is a procedural defect, such as the failure to obtain a prior consent;

(ii) where a power is exercised in an unauthorised way, eg, by an unauthorised delegation, or by the inclusion of beneficiaries who were not objects of the power;

(iii) where some rule of law, such as the rule against perpetuities, is infringed;

(iv) where trustees exercise a power for some improper purpose (known as 'fraud on a power'), or where they do not act in good faith;

(v) where trustees were unaware that they had a discretion to exercise;

(vi) where trustees have failed to have regard to some relevant consideration which they ought to have taken into account, or have taken into account some consideration which is irrelevant.

45 [1975] Ch 25 at 41. It has been held that the rule in *Re Hastings-Bass* may also apply to the decisions of company directors, on the basis that directors act as fiduciaries (*Hunter v Senate Support Services Ltd* [2005] 1 BCLC 175; *Wang v CIBC Bank and Trust Co (Cayman) Ltd* [2010] 1 CILR 541); similarly, a receiver acting on behalf and in the name of a settlor has been held to be within the rule, on the basis of his fiduciary position (*Pitt v Holt* [2010] 2 All ER 774).

46 [1990] 1 WLR 1587 at 1624.

47 [2005] 3 All ER 693 at 704.

48 [2004–05] CILR 485 at 489.

Circumstance (vi) is clearly within the *Hastings-Bass* principle. In *A v Rothschild Trust*[49] Smellie CJ opined that the rationale for the principle is that since trustees exercise the fiduciary powers vested in them for the benefit of the beneficiaries, they can properly exercise those powers only after informing themselves of all matters relevant to their decisions, and giving due consideration to all the relevant circumstances. In particular, where trustees act under a mistaken or flawed understanding as to the nature of the benefit to be derived or conferred on the beneficiaries as a consequence of their decision, 'they cannot be said to have exercised their discretion properly for the benefit of the beneficiaries and so acting within the powers vested in them. Having so acted improperly, their actions may be set aside by the court as being void, or, according to other expressions of the developing case-law, voidable.'[50]

In the *Rothschild Trust* case, the settlor and primary beneficiary under certain settlements contemplated that he would be spending extended periods of time in the United States and would therefore become a US resident for tax purposes. The concern arose that by operation of US law the assets of the trusts would be deemed to be his assets, and their income thus become liable to tax as his income. According to legal advice, the settlements could not be restructured, but had to be restated in order to avoid those tax consequences. The defendant trustee accepted and acted upon that advice by creating new trusts, but the advice turned out to be incorrect and the new trusts themselves gave rise to the very tax consequences they were intended to avoid. In fact, the intended result could have been achieved by making minor amendments to the original settlements. The plaintiffs (the primary beneficiary and six others), sought to have the original settlements restored in order to make the necessary amendments and to avoid the potentially severe tax consequences of the defendant trustee's reliance on the erroneous legal advice. The trustee supported the application, affirming that it had acted in error and thus in a manner which could not be described as being for the benefit of the beneficiaries, even though that was what had been intended; had it received the correct advice, and had it been aware of the true consequences of the advice, it would not have concluded that the new trusts were for the benefit of the beneficiaries and would not have created them.

Smellie CJ said that the issue in the case was 'the extent to which the court is able to set aside or vitiate what appears to be the valid exercise of a trustee's discretion, on the basis that the trustee's exercise of discretion was ill-advised or was misinformed because of having taken irrelevant matters into consideration, or because of a serious failure to take material factors into consideration.'[51] The learned Chief Justice considered that there was no doubt that, had the trustee been properly advised as to the true tax consequences of the action it took in creating the new trusts, it would not have taken that step. The circumstances of the case fell well within the boundaries of the *Hastings-Bass* principle. Accordingly, the restatements were declared void *ab initio* and the original settlements were restored.

Similar issues were considered in the recent case of *Wang v CIBC Bank and Trust Co (Cayman) Ltd*,[52] an application to set aside the declaration of a dividend and the receipt of the dividend into a trust. Here, W (first plaintiff) was a beneficiary under a trust set up in the Cayman Islands in order to minimise W's tax liability upon immigration to Canada, where he was entitled to a five year 'tax holiday', the effect of which was that any dividend paid to the trust within that period would not attract Canadian tax. The trust had been established between S (second plaintiff) as settlor and the CIBC Bank (first defendant) which, as the original trustee,

49 *Ibid*.
50 *Ibid* at 490.
51 *Ibid* at 488.
52 [2010] 1 CILR 541.

owned all the shares in the second defendant company. On 25 April 2001, CIBC procured the declaration of a dividend by the company and received it into the assets of the trust under the misapprehension that the tax holiday ended on 6 May 2001, whereas in fact it had terminated on 15 March 2001. The result was that the entirety of the dividend was subject to Canadian tax. Had CIBC realised that the tax holiday had ended, it would not have procured the payment of the dividend through the company but would rather have procured a payment by way of distribution in the company's winding up.

Applying the *Hastings-Bass* principle, Smellie CJ declared void *ab initio* the decision of CIBC to procure the declaration of the dividend and to receive it into the assets of the trust. He explained:[53]

> I am satisfied that CIBC's decision as trustee to procure the declaration of the dividend and to receive it into the assets of the trust falls well within [the formulation of the *Hastings-Bass* principles in *Sieff v Fox*].[54] In deciding to procure the payment of the dividend and to receive it, based on the erroneous advice which had been received, CIBC took into account May 6th as the expiry date of the relevant tax holiday and failed to take into account the correct date for those purposes, March 15th, 2001. That is a decision which I am satisfied CIBC would not have taken had it been aware of the true consequences. On the basis of CIBC's decision as trustee having been so erroneously taken, with the detrimental consequences for its trust, its decision is liable to be set aside as being a decision which CIBC was not authorized to make, because it was not a decision that could operate as intended for the benefit of its trust. As such, it was a decision which was void *ab initio*.

One major uncertainty is whether, in applying the *Hastings-Bass* principle, the court may declare the trustee's action *voidable* rather than void. In *Abacus Trust Co (Isle of Man) Ltd v Barr*,[55] the settlor had requested the trustees, through their agent, to exercise a power of appointment for the benefit of his sons, so as to create a discretionary trust of 40% of the fund. The agent mistakenly informed the trustees that 60% should be appointed, and the trustees acted on that. Proceedings to determine the validity of the appointment were not brought until nine years later, by which time large sums, in depletion of the fund beyond the 40%, had been paid out to the discretionary beneficiaries. Lightman J held that, notwithstanding some authority to the contrary, the effect of the rule was to make the trustees' act voidable rather than void, so that matters such as acquiescence and lapse of time could be taken into account by the court in deciding whether or not to set aside the transaction. In *Sieff v Fox*,[56] however, Lloyd LJ, while finding the 'voidable' solution attractive, felt that it needed further consideration by a higher court.

In *A v Rothschild Trust*,[57] Smellie CJ found the *Abacus* case an attractive precedent in that it gave the court

> the flexibility of deciding whether to avoid the exercise of a trustee's discretion by having regard to the needs and circumstances of the case. Depending on the nature of the misunderstanding or failure to take relevant matters into consideration and the consequences which may follow, the court could determine whether to vitiate the exercise of discretion *ab initio* or *pro tanto* and only from the time the problem is recognized.

Smellie CJ noted[58] that the *Abacus* case constituted an extension of the *Hastings-Bass* principle in two respects, (i) the introduction of voidability gave the court an added discretion which was not

53 *Ibid* at 549.
54 [2005] 3 All ER 693.
55 [2003] 1 All ER 763.
56 [2005] 3 All ER 693 at 718.
57 [2004–05] CILR 485 at 494.
58 *Ibid*.

inherent in the court's power to declare a trustee's actions void *ab initio* on the ground that they were unauthorised; (ii) the new principle that the trustee's misunderstanding or failure need not be shown to have been fundamental, and that it was not necessary to show that the trustee *would* have acted differently; it was sufficient to show that he *might* have acted differently.

It thus remains to be seen whether the leading appellate courts in Caribbean and other Commonwealth jurisdictions will approve the undoubted extensions which the lower courts have been constructing to the rule in *Re Hastings-Bass*. On the other hand, it remains to be seen whether the restrictive approach to the rule recently taken by the English Court of Appeal in *Pilt v Holt*[59] will find favour with the courts in the Caribbean.

DUTY TO INVEST

One of the primary duties of trustees is to make the trust assets productive by purchasing investments from which income and/or capital appreciation might be expected, bearing in mind that a life tenant will benefit from high income yielding investments, whereas a remainderman will benefit from capital appreciation.

It is a *sine qua non* of an 'investment' that it must produce some income. Thus, for example, where trustees purchased a house for occupation by a beneficiary, this was held not to be an investment since no income in the form of rents or profits was thereby produced.[60] For the same reason, articles of value such as gold, silver, jewellery, antiques and paintings are not 'investments' and trustees may not use trust money to purchase such items unless expressly authorised to do so by the trust instrument.

In modern economies there is a wide variety of investments from which trustees may make a selection. First, there are those investments *the capital value of which does not fluctuate* but where the rate of interest may vary with the economic circumstances. These include bank deposit accounts and building society share accounts. Secondly, there are *fixed interest* securities the capital value of which fluctuates, though normally only by a small amount. These include most securities and stock issued by governments. Thirdly, there are *debentures*, which are acknowledgments of indebtedness by a company supported by a floating charge over the assets of the company. Debenture holders are entitled to a fixed rate of interest, but the capital value of debentures will fluctuate according to the performance of the company. Preference shares are similar to debentures in that they carry a fixed rate of interest. They differ from debentures in that whereas debentureholders are in the position of lenders to the company, preference shareholders are in the position of investors. Fourthly, in modern times, ordinary shares in a company (or 'equities'), though more speculative because both capital value and interest (in the form of dividends) can fluctuate widely according to the fortunes of the company and the general economic climate, have proved to be the most lucrative type of investment over the long term. Further, a popular means of investing in equities is through the medium of the managed fund, whether unit trust or investment trust. The unit trust has been described by Hanbury and Martin thus:[61]

> [In a unit trust] the managers receive money from investors, and form a single fund, divided up into units which are owned by the investors. The management is paid expenses and salary. The investors have the advantage of investment expertise, and of the spread of investments. Units in a trust can be bought and sold.

59 [2011] EWCA Civ 197.
60 *Re Power* [1947] Ch 572.
61 *Modern Equity*, 15th edn, 1997, p 516.

An investor in a unit trust thus has 'a minimal stake in numerous companies, and thus spreads the risk',[62] and another advantage of the unit trust is that 'the managers are in a position to keep a day-to-day eye on the investments, and they have the ready opportunity for altering investments at the appropriate time'.[63]

An investment trust, on the other hand, 'is a limited liability company in which shares can be bought and sold through a stockbroker like other shares. The company buys shares in other companies, and the investors receive their return in the form of dividends from the investment trust.'[64]

Trustees' standard of care

The standard of care required of trustees in investing trust funds is different from the test laid down in *Speight v Gaunt* with respect to trustees' duties generally.[65] It is to take such care as an ordinary prudent man would take if he were under a duty to make the investments *for the benefit of other persons for whom he felt morally bound to provide*.[66] As Lord Watson explained:[67]

> As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Businessmen of prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard.

In *Cowan v Scargill*[68] the question arose as to whether, in selecting investments, trustees were entitled to consider non-financial matters. In this case, five of the 10 trustees of a mineworkers' pension fund refused to accept an investment plan submitted to the trustees by a panel of experts, on the ground that the proposed investments were in energies which were in direct competition with the British coal mining industry, and that it was the policy of the National Union of Mineworkers, by whom the five trustees had been appointed, not to invest in competing industries.

It was held that the trustees would be in breach of trust if they failed to adopt the recommended investment strategy. Their duty was to act in the best interests of the beneficiaries, both present and future, and if the purpose of the trust was the provision of financial benefits, a power of investment ought to be exercised in such a way as to yield the best *financial* returns by way of income and capital appreciation. Social and political objectives should be put aside, and the trustees were not entitled to base their investment decisions on purely ideological grounds. Sir Robert Megarry VC said:[69]

> Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet under

62 Parker and Mellows, *Modern Law of Trusts*, 4th edn, 1979, p 295.
63 *Ibid*.
64 Hanbury and Martin, *Modern Equity*, 15th edn, 1997, p 516.
65 See p 163, *ante*.
66 *Re Whiteley* (1886) Ch D 347 at 355, *per* Lindley MR. Cf Trustee Act 1998 (The Bahamas), ss 5, 6.
67 *Learoyd v Whiteley* (1887) 12 App Cas 727; cf *Wight v Olswang* [2000] 2 ITELR 689 at 694.
68 [1984] 2 All ER 750.
69 *Ibid* at 761.

a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the views that they hold.

Powers of investment

An express power of investment may be given to the trustees by the trust instrument, which may authorise any kind of investment. In the absence of any such power, trustees in the United Kingdom are restricted to those types of investment which are authorised by the Trustee Act 2000. In some Commonwealth Caribbean jurisdictions, it is not clear whether these provisions are in force. For instance, s 3 Trustee Act (Jamaica) provides:

> 3. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say—
>
> (a) in any investment authorised by any Act of Parliament of the United Kingdom;
>
> (b) in any securities, the interest of which is for the time guaranteed by any enactment of this Island or the Government of this Island;
>
> (c) on real securities in this Island;
>
> and may also from time to time vary any such investment.

Prima facie, this section gives trustees in Jamaica power to select any investment authorised by, *inter alia*, the Trustee Act 2000.[70] But as the Jamaican Trustee Act dates from 1897, it is arguable that 'any Act of Parliament of the United Kingdom' means any UK Act in force in 1897, not those enacted subsequently. If the Act of 2000 does not apply in the particular jurisdiction, then it would appear that the trustees may select whatever investments they think fit, subject to the general principles that they should aim for diversification, should avoid hazardous investments, should select interest-bearing securities, and should hold the balance evenly between tenant for life and remainderman.

On the other hand, s 3 Trustee Act, Cap 303 (British Virgin Islands) and s 35 Trusts Law 1967 (2009 Rev) (Cayman Islands) clearly contemplate the applicability of the Act of 2000 by providing that a trustee may invest 'in any securities in which trustees in England are *for the time being* authorised by the law of England to invest trust funds'.

One jurisdiction in which there are detailed statutory provisions concerning investments is Barbados, where ss 3–8 and Sch Trustee Act, Cap 250 provide:[71]

> 3(1) A trustee may invest any property in his hands, whether at the time in a state of investment or not, in any manner specified in the Schedule, and may also from time to time vary any such investments . . .
>
> 4(1) In the exercise of his powers of investment a trustee shall have regard to—
>
> (a) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust; and
>
> (b) the suitability to the trust of investment of the description of investment proposed and of the investment proposed as an investment of that description.

70 See *Marley v Mutual Society Merchant Bank and Trust Co* (1993) 30 JLR 390 at 400 (Court of Appeal, Jamaica).

71 See also TA 1975, s 55 and 1st Sched (Bermuda).

(2) Before exercising any power conferred by subsection 3(1) . . . a trustee shall obtain and consider proper advice on the question whether the investment is satisfactory having regard to the matters mentioned in subsections (1)(a) and (b).

(3) A trustee retaining any investment made in the exercise of such power shall determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain such advice and shall obtain and consider such advice accordingly.

(4) For the purposes of subsections (2) and (3), proper advice is the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters, and such advice may be given by a person notwithstanding that he gives it in the course of his employment as an officer or servant.

(5) A trustee shall not be treated as having complied with subsection (2) or (3) unless the advice was given or has been subsequently confirmed in writing.

(6) Subsections (2) and (3) shall not apply to one of two or more trustees where he is the person giving the advice required by this section to his co-trustees, and shall not apply where powers of a trustee are lawfully exercised by an officer or servant competent under subsection (4) to give proper advice.

(7) Without prejudice to section 7, the advice required by this section shall not include, in the case of a loan on the security of freehold or leasehold land in Barbados, advice on the suitability of the particular loan.

5 A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by law . . .

7(1) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—

(a) that in making the loan the trustee was acting upon a report as to the value of the property made by a registered real estate agent of at least five years' standing and instructed and employed independently of any owner of the property; and

(b) that the amount of the loan does not exceed two thirds parts of the value of the property as stated in the report; and

(c) that the loan was made under the advice of the surveyor or valuer expressed in the report[72] . . .

8(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest at the rate payable under the mortgage.

SCHEDULE

Manner of Investment

1 In securities issued by the Government of Barbados.

2 In securities the payment of interest in which is guaranteed by the Government of Barbados.

72 Cf TA 1925, ss 8 and 9 (UK); *Shaw v Cates* [1909] 1 Ch 389.

3 In fixed interest securities issued in Barbados by the Caribbean Development Bank, the International Bank for Reconstruction and Development or the Inter-American Development Bank, being securities registered in Barbados.
4 In debentures issued in Barbados by a company incorporated in Barbados being debentures registered in Barbados.
5 In mortgages of freehold property in Barbados and of leasehold property of which the unexpired term at the time of investment is not less than 20 years.
6 In any securities issued in Barbados by a company incorporated in Barbados, being securities registered in Barbados, to the extent and subject to compliance with the requirements and conditions prescribed from time to time by the Minister responsible for Finance.

DUTY TO CONVERT AND APPORTION

As has been seen, a trustee is under a duty to 'hold the balance evenly' between life tenant and remainderman; he must act impartially and not favour one at the expense of the other. This duty, as we have seen, applies to the selection of investments by trustees.[73] Another manifestation of the duty is the rule in *Howe v Lord Dartmouth*,[74] which has two parts:

(a) Where *residuary personalty* is settled *by will* in favour of persons who are to enjoy it *in succession*, the trustees are under a duty to *convert* (that is to say, *sell*) such part of it as is of a *wasting* or *reversionary* nature, or consists of *unauthorised securities*, and to invest the proceeds in authorised securities, unless there is a contrary provision in the will.
(b) Where there is a duty to convert property under the rule in *Howe v Lord Dartmouth*, there is a duty to *apportion* the income of the property *pending sale*, unless the will shows an intention that the life tenant is to enjoy the income until sale.

Wasting assets

Wasting assets include any items of property which will inevitably diminish in value so that, by the time the life tenant dies, they may be of little or no value to the remainderman. The duty to sell wasting assets and, with the proceeds of sale, to purchase authorised investments, exists for the benefit of the remainderman. Examples of wasting assets which must be converted are leaseholds, copyrights, royalties, motor cars and racehorses.

Hazardous or unauthorised investments

Such investments would include, for example, shares in a South American gold mining company. Whilst such a company's shares might temporarily yield a high dividend, in the course of time the fortunes of the company might change drastically and the shares become worthless, because of the hazardous nature of the enterprise. Such unauthorised investments must be sold and the proceeds invested in authorised securities.

73 See above, pp 19 and 174 *et seq*.
74 (1802) 32 ER 56.

Reversionary interests

A reversionary interest in this context includes any interest in property which is not immediately available on T's death and which will only become available at some time in the future: for example, where T has taken out an insurance policy on the life of V, under which T's estate will be entitled to a sum of money on V's death; and where, under a contract made between T and W, W has agreed to pay T a certain sum in five years' time, and T has died before the five years have elapsed. Such interests produce no income for the life tenant, and the trustees are therefore under a duty under the rule in *Howe v Lord Dartmouth* to sell them and reinvest the proceeds in authorised income-bearing securities. Alternatively, the trustees may, if it is economically advantageous not to sell immediately, wait until the interest falls into possession.

Contrary intention

The rule in *Howe v Lord Dartmouth* seeks to give effect to the presumed intention of the testator, *viz* that neither life tenant nor remainderman should benefit at the expense of one another. Therefore, if the will shows that it was the testator's intention that the residuary personalty should not be sold, effect will be given to such intention and the rule will be excluded. Such contrary intention may be indicated in any one of the following ways:

(a) by an express provision in the will that the rule in *Howe v Lord Dartmouth* is not to apply;
(b) by a direction that no items of residue are to be sold, or that particular items of residue are not to be sold;
(c) by a provision which permits the trustees to retain unauthorised investments;
(d) by a provision which gives the trustees a discretion as to whether or not to sell the residue; or
(e) by a direction or an intention shown that the life tenant is to receive the income of wasting assets or unauthorised investments *in specie*.[75]

Apportionment

Where trustees are under a duty to convert, they are also under a duty to apportion the income fairly between life tenant and remainderman pending sale, unless the will shows an intention that the life tenant should enjoy the income until sale.

In the case of wasting,[76] hazardous or unauthorised investments, it is assumed that they produce income in excess of what the life tenant ought reasonably to receive, and that this could affect the security of the capital. The rule of apportionment, therefore, is that the life tenant is to receive an income which represents the 'current' yield on authorised investments, which has been fixed since 1924 at 4% of the value of the property. If the interest actually produced by the property is less than 4%, the balance should be made up out of subsequent income or from the proceeds of the unauthorised investments when sold.

75 Riddall, *Law of Trusts*, 3rd edn, 1987, p 262.
76 There is no duty to apportion income from leaseholds: *Re Brooker* [1926] WN 93. Accordingly, the life tenant will be entitled to receive all the rents and profits pending sale.

In the case of reversionary interests, which produce no income, it is necessary to make an apportionment in the interest of the life tenant. According to the rule in *Re Earl of Chesterfield's Trusts*,[77] the proportion of the amount actually received on the reversionary interest falling into possession, or on sale, which is to be regarded as capital is the sum which, if invested at the date when the trust came into operation at 4% compound interest with yearly rests, would, after deducting income tax at the basic rate, have produced the amount actually received.

An example may illustrate the application of the rule:

T dies in 1992. The reversionary interest falls into possession and is sold in 1995. Between 1992 and 1995 the life tenant, B, has received no income from the property. It is necessary to apportion the proceeds between life tenant and remainderman, part being regarded as arrears of income and paid to the life tenant, and the balance being treated as capital. The interest is sold for $15,000. The trustees might find, say, that $13,625 invested when the trust came into operation at 4% compound interest with yearly rests would, after deducting income tax at 25%, have produced $15,000 at the date of sale. The $13,625 would therefore be treated by the trustees as capital, and invested accordingly, and the remaining $1,375 would be paid to B as income for the preceding three years.

DUTY NOT TO PROFIT FROM THE TRUST

According to the classic *dictum* of Lord Herschell in *Bray v Ford*,[78]

> It is an inflexible rule of a court of equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.

This principle applies to all fiduciaries, and its application to trustees is seen in the following rules:

(a) that a trustee acts gratuitously and is not entitled to payment or remuneration for his services unless the trust instrument so provides;
(b) that a trustee may not purchase the trust property from himself and his co-trustees (the 'rule against self-dealing'); and
(c) that a trustee is accountable for any incidental profits he makes from his position.

Remuneration

To the rule that a trustee is not entitled to payment for his services there are a number of exceptions which have greatly reduced the rule's practical significance. As Harre J pointed out in *Cayman Islands News Bureau Ltd v Cohen*,[79]

> . . . the development of the rule was due in part to the fact that trustees were then acting in matters of substance in relation to their own families. With the development of the trust

77 (1883) 24 Ch D 643.
78 [1896] AC 44 at 51. For an example of the application of this example, see *Marley v Mutual Security Bank and Trust Co Ltd* (1994) 46 WIR 233 (PC).
79 (1988–89) 1 Carib Comm LR 439.

concept in the modern commercial world, some erosion of the strictness of the rule was inevitable.

The exceptions are classified under the following headings.

Expenses

A trustee is entitled to recover from the trust estate his legitimate out-of-pocket expenses incurred,[80] for example, in paying calls on shares,[81] paying fees to agents who transact work on behalf of the trust,[82] paying the costs of justifiable litigation on behalf of the trust,[83] and even in defending actions brought against the trustees personally, so long as they are not guilty of misconduct.[84]

Remuneration authorised by the trust instrument

Where professional trustees are appointed, it is usual for a 'charging clause' to be included in the trust instrument, authorising payment for their services. In the absence of such provision, it is unlikely that any professional trustee would agree to act. Such clauses are strictly construed against the trustee, so they need to be drafted very widely; for instance, a very wide clause would be necessary to enable a solicitor/trustee to charge for services rendered in the administration of a trust which could have been performed by a person who was not legally qualified.[85]

The presence of a charging clause does not enable an attorney or solicitor to charge whatever he likes, but only what is *reasonable*. Accordingly, the beneficiaries may insist on having the attorney's fees taxed, that is to say, assessed by an officer of the court; and if a trustee takes from the trust fund as payment an amount in excess of what is reasonable, the beneficiaries may bring an action against him for breach of trust.

Remuneration authorised by statute

In some jurisdictions, judicial trustees, corporations appointed as ordinary or custodian trustees, and the Public Trustee are entitled by statute to charge fees for their services, or to charge such fees as are fixed by the court.[86]

Remuneration authorised by the court

The court has an inherent jurisdiction to authorise remuneration where there is no charging clause in the trust instrument, and to authorise an increase in the agreed remuneration where

80 Under Trusts Act, Cap 202, s 35 (Belize), 'a trustee shall be entitled to be reimbursed out of the trust property all expenses properly incurred by him in connection with the trust'.
81 *Hardoon v Belilios* [1901] AC 118.
82 *Speight v Gaunt* (1883) 22 Ch D 727.
83 *Benett v Wyndham* (1862) 53 ER 205. Trust protectors may be entitled to similar indemnity: see *Lloyds Bank International (Cayman) Ltd v Byleven Corp SA* [1994–95] CILR 519 (Grand Court, Cayman Islands).
84 *Re Spurling's Will Trusts* [1966] 1 All ER 745.
85 Eg, by words such as 'including business and acts which a trustee not being engaged in a profession or business could have done personally'.
86 See, eg, Public Trustee Act, Cap 248, s 10 (Barbados); Trusts Law 1967 (2009 Rev), s 11 (Cayman Islands). Trusts Act, Cap 202, s 36(1) (Belize) authorises professional trustees to charge 'their usual professional or other charges'.

there is a charging clause. This jurisdiction was confirmed in *Re Duke of Norfolk's Settlement Trusts*.[87] In this case, a trust company accepted the trusteeship of a discretionary trust on the basis of a charging clause which authorised payment of a low, fixed annual fee. The company became involved in exceptionally onerous work in connection with property redevelopment in Central London and it applied to the court:

(a) for extra remuneration in respect of the property re-development; and

(b) for an increase in its scale of fees for future work in the administration of the trust.

Walton J granted the application in respect of (a) only. The Court of Appeal held that the court had jurisdiction to grant the application in respect of (b) also, and remitted the case to the lower court for a decision as to whether the jurisdiction should be exercised. Fox LJ explained:[88]

> There remains the question whether, upon principle and authority, we can properly infer that the jurisdiction does exist. As to principle, it seems to me that if the court has jurisdiction, as it has, on the appointment of a trustee to authorise remuneration though no such power exists in the trust instrument, there is no logical reason why the court should not have power to increase the remuneration given by the instrument. In many cases the latter may involve a smaller interference with the provisions of the trust instrument than the former . . . The basis [of the court's inherent jurisdiction] in relation to a trustee's remuneration is the good administration of trusts. The fact that in earlier times, with more stable currencies and with a plenitude of persons with the leisure and resources to take on unremunerated trusteeships, the particular problem of increasing remuneration may not have arisen does not, in my view, prevent us from concluding that a logical extension of admitted law which is wholly consistent with the apparent purpose of the jurisdiction is permissible. If the increase of remuneration be beneficial to the trust administration, I do not see any objection to that in principle.

In addition, s 44 Trustee Act, Cap 250 (Barbados) and s 32 Trustee Act 1975 (Bermuda) provide that the court may authorise any person to charge such remuneration for his services as trustee as the court shall determine.

The rule in Cradock v Piper[89]

The effect of this somewhat anomalous rule is that where a solicitor/trustee acts as a solicitor for himself and his co-trustee in litigation[90] concerning the trust, and the costs of acting for both of them do not exceed the expense that would have been incurred if he had been acting for his co-trustee alone, then the solicitor/trustee may be paid his fees. The rule is an exception to the principle that a solicitor/trustee, like any other trustee, may not pay himself or another member of his firm for work done for the trust unless the trust instrument or the court authorises such payment; though he may employ and pay another member of his firm as an agent, provided it has been expressly agreed that the solicitor/trustee will not share in any of the profits.[91]

87 [1982] Ch 61.
88 *Ibid* at 78.
89 (1850) 19 LJ Ch 107.
90 *Re Corsellis* (1887) 34 Ch D 675.
91 *Clack v Carlon* (1861) 30 LJ Ch 639.

Agreement with the beneficiaries

If all the beneficiaries are *sui juris* and between them absolutely entitled to the whole beneficial interest under the trust, they may contract with the trustees for their payment. Such agreements are construed strictly against the trustees,[92] and it seems they must be concluded before the trustees take up office.

Trustee purchasing trust property

The 'rule against self-dealing' is that where a trustee purchases the trust property from himself, the purchase may be set aside by the beneficiaries, however fair the transaction may have been, and however beneficial it may have been to the trust estate. As Georges CJ explained in *Roywest Trust Corporation (Bahamas) Ltd v Savannah NV*:[93]

> It is clear from the authorities that there is an absolute prohibition against self-dealing. In *Ex p Lacey*, Lord Eldon stated:[94]
>
> 'The rule, I take to be this; not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself.'
>
> A trustee buying from himself must inevitably be in a position of conflict. As a purchaser, he would be interested in buying at the lowest price and on the easiest terms of payment. As a trustee selling on behalf of a beneficiary, he should bargain for the best available terms and promptest payment. To obviate this conflict between duty and interest, the inflexible prohibition against a trustee buying from himself has been laid down and enforced. The beneficiary at his or her option may have the self-dealing transaction set aside.

Further effects of the rule are:

(a) A sale to the trustee's nominee will be caught by the rule.[95]

(b) A sale to the trustee's spouse is 'looked upon with suspicion',[96] at least where the couple are living together 'in perfect amity' rather than 'separate and in enmity for a dozen years'.[97]

(c) A sale to a child of the trustee is likely to be set aside.[98]

(d) A sale to a company in which the trustee has a controlling interest is likely to be set aside;[99] but where the trustee is a minority shareholder without control, a sale to the company is not *ipso facto* voidable.[100]

(e) A sale to a third party with an agreement for repurchase by the trustee will be caught by the rule,[101] but a sale with a mere hope of repurchase will not be voidable.[102]

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92 *Ayliffe v Murray* (1740) 26 ER 433.
93 (1987) Supreme Court, The Bahamas, No 431 of 1985 (unreported). Georges CJ also held in this case that where the same person is trustee under two separate trusts, a sale of property by himself as trustee under one of the trusts to himself as trustee under the other trust (ie, where there is a conflict of 'duty and duty' rather than 'duty and interest') will not be set aside, provided the trustee is able to satisfy the court that the transaction was fair to both trusts.
94 (1802) Ves 625 at 626.
95 *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167.
96 *Burrell v Burrell's Trustees* 1915 SC 33; Hanbury and Martin, *Modern Equity*, 15th edn, 1997, p 590.
97 *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 241, *per* Megarry VC.
98 *Gregory v Gregory* (1821) 37 ER 989.
99 *Silkstone and Haigh Moor Coal Co v Edey*, above.
100 *Farrar v Farrar's Ltd* (1888) 40 Ch D 395.
101 *Williams v Scott* [1900] AC 499.
102 *Re Postlethwaite* (1888) 60 LT 514.

Where a trustee retires with the intention of purchasing trust property, a subsequent sale to the trustee will be voidable. This situation arose in the Barbadian case of *Re Cox*.[103] Here, the testator's estate included certain plantations which were held by trustees upon trust for sale. The properties were valued and were advertised for sale by auction. C, one of the trustees, retired from the trust so that he could bid for the properties. The auction was duly held and C was the highest bidder. The trustees entered into a conditional contract for the sale of the properties to C and they sought an order of the court directing that the sale be carried into effect. Chenery J held that C could not be permitted to purchase trust property by retirement from the trust with that object in view. This could be done only if the beneficiaries consented to the purchase. He continued:

> In the absence of such open 'consent of the parties beneficially interested', it would be highly improper for the court to sanction a sale in the circumstances recited in the present petition. The proper course to adopt in cases of this kind is that summarised by *Lewin On Trusts*, 15th edn, p 802:
>
> 'If it be absolutely necessary that the property should be sold and the trustee is willing to give more than anyone else, he may institute proceedings in equity and apply to the court to be allowed to purchase and the court will then examine the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that enquiry will let another person prepare the particulars of sale and allow the trustee to bid (Arden R, in *Campbell v Walter*[104]); and generally, if the court can see clearly that under the circumstances of the case it would be for the benefit of the *cestui que trust* that the trustee should purchase (as at a certain sum beyond what could be obtained elsewhere), the court will sanction a sale to the trustee (*Farmer v Dean*).[105] The application should be made by originating summons under RSC, Ord 55, r 3(t). Except in special circumstances, the court will require the purchasing trustee to pay the costs of the application.'

However, it seems that where the interval between the retirement and the purchase is sufficiently long (for example, 12 years) the sale may be valid, as the trustee could not be said to have taken advantage of any knowledge about the property that he may have acquired as trustee.[106]

A case in which the court declined to apply the strict rule is *Holder v Holder*.[107] Here H, an executor, purported to renounce his executorship, but the renunciation was invalid as he had already performed some minor acts in the administration of the estate. He was the tenant of some farmland belonging to the estate, which the other executors offered for sale by auction, subject to H's tenancy. At the auction, H purchased the land at a price well above the reserve price, which had been fixed by an independent valuer. One of the beneficiaries sought to set the sale aside. The Court of Appeal declined to do so. The circumstances were special, in that H had not played any real part in the administration of the estate, 'and had renounced his executorship long before the sale; since the beneficiaries knew of this, they could not have looked to him to protect their interests', and there was accordingly no conflict of duty and interest. Furthermore, any special knowledge which H had acquired about the property would have been acquired as tenant, and not as executor.

Lastly, it was held in *Arlen Bahamas (Management) Ltd v Trust Corporation of Bahamas Ltd*[108] that the court has power to sanction a purchase of trust property by a trustee if such a purchase would be in the interest of the beneficiaries, for example, where no other purchaser can be found.

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103 (1948–57) 1 Barb LR 26 (Court of Chancery, Barbados).
104 (1845) Ves Jr 678 at 681.
105 (1863) 55 ER 128.
106 *Re Boles* [1902] 1 Ch 244.
107 [1968] 1 All ER 665.
108 (1975) 1 LRB 436.

Directors' fees

Where a trustee becomes a director of a company in which the trust has a shareholding and he is paid directors' fees, the question will arise as to whether he is accountable to the trust for the amount of the fees or whether he may keep them for himself. In *Re Francis*,[109] the company's articles of association provided that the holders of a certain number of shares were entitled to vote directorships for themselves. Trustees, who held shares on behalf of the trust, acquired directorships by using their voting rights, and were held accountable to the trust for the directors' fees they earned, on the principle that a trustee may not profit from his trusteeship. A similar result was reached in *Re Macadam*,[110] where trustees had power under the company's articles by virtue of their office to appoint two directors. They appointed themselves, and were held accountable to the trust for their directors' fees on the ground that they obtained them by using their powers as trustees.

On the other hand, in *Re Dover Coalfield Extension Ltd*,[111] Y, a trustee/director was held not to be accountable for directors' fees. In this case, D Co held shares in K Co with which it did business. In order to protect the interests of D Co, one of its directors was appointed a director of K Co, and D Co later transferred 1,000 K Co shares to him in order that he might qualify as a director under K Co's articles, which required each director within one month of his appointment to hold a minimum number of K Co shares. It was held that Y was not accountable for his directors' fees; although he could not have continued in office without the shares, he had been appointed a director by an independent board before he had acquired the shares, and his directorship was not directly attributable to his position as trustee.

The position as to directors' fees was later reviewed in *Re Gee*[112] by Harman J, who concluded that a trustee is accountable only where (a) he has powers *qua* trustee, which (b) he uses (c) to procure his appointment as director.

If any of these elements is absent, the trustee may retain his directors' fees, as, for instance, in *Re Dover Coalfield*,[113] where he became a director before he became a trustee and where he did not use his trustee's powers to procure his appointment as director; and where the trustee has only a minority shareholding and he is appointed a director by the votes of the majority. 'The court will consider all the circumstances to see whether or not the appointment was truly independent of the voting powers held *qua* trustee.[114]

In any event, a trustee may retain directors' fees where the trust instrument so authorises.[115] The court may also allow retention of directors' fees, taking into account the degree of skill and effort shown by the trustee/director in managing the company's affairs.[116]

The rule in *Keech v Sandford*

This rule is a particular application of the principle that a trustee must not allow his personal interest to conflict with his duty to the trust. In *Keech v Sandford*,[117] a trustee held a market lease

109 (1905) 74 LJ Ch 198.
110 [1946] Ch 73.
111 [1908] 1 Ch 65.
112 [1948] Ch 284.
113 [1908] 1 Ch 65.
114 Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 537.
115 *Re Llewellin's Will Trusts* [1949] Ch 225.
116 See *Cayman Islands News Bureau Ltd v Cohen* (1988–89) 1 Carib Comm LR 439.
117 (1726) 25 ER 223.

upon trust for a minor. Before the lease expired, the trustee applied to the lessor for a renewal on behalf of the trust but the lessor refused; however, he was willing to renew the lease for the benefit of the trustee personally. The trustee accordingly took a renewal in his own name. It was held that he was a constructive trustee of the lease for the minor beneficiary and was liable to account for all the profits. Lord King LC's somewhat cynical reasoning was to the effect that if a trustee, on the refusal of a lessor to renew on behalf of the trust, were to be permitted to renew for his own benefit, few leases would ever be renewed in favour of trusts.

The rule in *Keech v Sandford* was applied to an executor/trustee in the Trinidadian case of *Persad v Persad*.[118] In this case, the plaintiff and the defendant were appointed executors and trustees of the testator's will. The testator had been in undisputed possession of a parcel of land for over 40 years, during which period he had let parts to tenants and allowed various members of his family to build homes thereon. By his will he devised portions of the land to his 11 children and five grandchildren, and devised 'the remaining portion comprising one-and-a-half lots . . . to all my children living at my death for their absolute use and benefit as joint tenants'. After the testator's death, a survey of the land showed that the latter portion was outside the boundary of the testator's land. The defendant made no attempt as executor and trustee to establish the testator's title to the plot, but promptly purchased it and procured a conveyance to himself in fee simple. The plaintiff contended that the circumstances in which the defendant had acquired the plot were such that a constructive trust was created in favour of the beneficiaries.

Cross J held that the defendant was a constructive trustee of the plot. He said:

> In Keeton's *Law of Trusts* (7th edn, p 223), it is stated that:
>
> 'A cardinal rule of equity is that a trustee shall not make a profit from his trust, nor even use his position as trustee to secure a personal advantage at the expense of his beneficiary.'
>
> It is trite law that an executor is clothed with a fiduciary character in relation to the beneficiaries under the will, and if he obtains a personal advantage at their expense he holds it as a constructive trustee for them (see *Keech v Sandford)*.[119] As was pointed out by Lord Russell of Killowen in *Regal (Hastings) Ltd v Gulliver*,[120] 'the rule in no way depends on fraud, or absence of *bona fides*, or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action'.
>
> My reading of the authorities indicates that the rule is widely, strictly and fully applied. If I may paraphrase the words of Buckley J in *Re Biss, Biss v Biss*,[121] the principle is that the trustee owes it to his *cestuis que trust* to obtain the property intended for them if he can do so, on beneficial terms, and that the court will not allow him to obtain it for himself when his duty is to get it for his *cestuis que trust*. The strength of this principle is such that it matters not at all that the plaintiff and the defendant may have agreed that the defendant should purchase the land in his own name, or that the beneficiaries were not in a financial position to purchase it themselves. The decided cases lend strong support to the statement on p 192 of Keeton (*op cit*) that 'in a constructive trust the court imposes a trust upon the parties irrespective of their intentions, actual or presumed, and sometimes even in opposition to those intentions'.
>
> I would submit with respect that neither a want of consideration nor the absence of a note or memorandum in writing is a relevant factor where the conscience of the court is animated.

118 (1979) High Court, Trinidad and Tobago, No 1,827 of 1973 (unreported).
119 (1726) 25 ER 223.
120 [1942] 1 All ER 378 at 386.
121 [1903] 2 Ch 40 at 43.

> The defendant has obtained an advantage in that he is now the owner of the land on which his house and that of at least one of the beneficiaries stands. He has obtained this advantage by virtue of his fiduciary position . . . The central and essential fact is that the portion of land devised by the testator in clause 5(m) of his will has been acquired by the defendant. The conscience of the court of equity cannot permit him to retain it . . . it is accordingly declared that the defendant holds the one-and-a-half lots in trust for the beneficiaries named in the devise.

DUTY TO DISTRIBUTE

Trustees must distribute the income and the capital of the trust fund in accordance with the terms of the trust instrument, and if they hand over any trust property to the wrong person, they will be personally liable to the beneficiaries.

In order to protect themselves from liability, the trustees may have recourse to any of the following:

Application to the court for directions

Where the trustees are in any doubt as to the proper distribution of the trust fund or as to the claims of any beneficiary, they may apply to the court (by originating summons) for directions, and if they follow any such directions, they will be protected from liability.[122] Trustees ought not to apply to the court for directions unless there is a real difficulty, and they are not entitled to surrender the exercise of their discretions to the court.[123]

Payment into court

Trustees may pay trust money into court where the beneficiaries cannot be ascertained or where the trustees for any reason are unable to obtain a good discharge from the trust. An example where this course was permitted is *Re Gillingham Bus Disaster Fund*,[124] where, as we have seen, it was held that there was a resulting trust of the surplus trust moneys in favour of the contributors, including anonymous street donors who could not be traced. The surplus was eventually paid into court.

'Benjamin' Order

A *'Benjamin'* Order is an order of the court authorising trustees or personal representatives to distribute the whole assets of the estate to those creditors or beneficiaries who have been ascertained, although there may be other creditors or beneficiaries who have not been identified.[125] Any creditor or beneficiary who does subsequently come forward will not be able to proceed against the trustees or personal representatives, but he may bring an action against any person who has been overpaid, or he may trace against the property itself.

The order may be particularly useful where the whereabouts or continued existence of a particular beneficiary are not known. In *Re Green's Will Trusts*,[126] for example, a testatrix

122 *Re Londonderry's Settlement* [1964] 3 All ER 855.
123 *Re Allen-Meyrick's Will Trusts* [1966] 1 All ER 740.
124 [1958] 2 All ER 749. See above, p 78.
125 *Re Benjamin* [1902] 1 Ch 723.
126 [1985] 3 All ER 455.

bequeathed property to her son, with a gift over to charity if the son did not claim the property by the year 2020. The son had disappeared in a bombing raid during the Second World War in 1943, and all except the testatrix believed him to be dead. After the testatrix's death in 1984, a '*Benjamin*' Order was granted authorising the trustees to distribute the property to charity, notwithstanding that this was contrary to the testatrix's intention.

Advertisement for claimants

Section 31 Trustee Act, Cap 250 (Barbados),[127] which is modelled on s 27 Trustee Act 1925 (UK), authorises trustees or personal representatives to advertise for claimants to the estate, whether creditors or potential beneficiaries, stating their intention to make a distribution of property among the persons entitled under the will and requiring any person interested to send them particulars of his claim within a stated time from the date of publication of the advertisement, not being less than two months. The advertisement must be published once in the *Official Gazette* and twice in each of the local newspapers. After the expiration of the stated period for applications, the trustees or personal representatives may go ahead with the distribution of the property 'having regard only to the claims . . . of which the trustees or personal representatives then had notice', and they 'shall not . . . be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of the . . . distribution'.

The sections afford protection to the trustees or personal representatives against any future claims made against them personally, but they do not prevent a future claimant from tracing the property into the hands of a recipient other than a *bona fide* purchaser for value.

The s 31 power is frequently used in Barbados, particularly by executors. For example, the following advertisement appeared in *The Advocate* of 7 August 1990:

NOTICE

In the Estate of Eric WINSTON BROWNE, deceased

Pursuant to section 31 of the Trustee Act 1979–83, Notice is hereby given to any person having a claim against the estate of Eric Winston Browne, deceased late of Bayville in the parish of Saint Michael, Barbados who died in Barbados on the 4th day of June 1989 to send particulars of the claim in writing to Beryl Browne and Noel Gray Wilkie c/o Edmund R King, Attorney-at-Law, Suite I, Beacon House, Walrond Street, Bridgetown on or before the 15th day of October 1990, after which date the executors will distribute the assets of the Estate having regard only to valid claims of which the Personal Representatives then have notice.

And all persons indebted to the said estate are requested to settle their indebtedness without delay.

Dated this 31st day of July 1990.

Beryl Browne

Noel Gray Wilkie

Executors of the Will of Eric Winston Browne, deceased.

127 Similar provisions are Cap 303, s 28 (BVI); Trusts Law 1967 (2009 Rev), s 44 (Cayman Islands); TA 1975, s 19 (Bermuda); TA 1998, s 33 (The Bahamas).

CHAPTER 12

POWERS OF TRUSTEES

Trustees may exercise such powers as are given to them by the trust instrument, by statute, or under the general law. A power is to be distinguished from a duty in that, whereas a duty is mandatory, a power is discretionary. The court will not normally interfere with trustees' exercise of their discretions, in the absence of bad faith, and although a trustee is under a duty to consider the exercise of his fiduciary powers, he will not be compelled to exercise them.

POWER OF SALE

1 Under a trust for sale of land, trustees are under a *duty* to sell, but statutes in some jurisdictions give them a *power to postpone* sale,[1] which they may exercise at their discretion. A decision to postpone sale must be unanimous, and if any one trustee wishes to sell, his decision will prevail.[2] In some jurisdictions, a purchaser of land held upon trust for sale requires the receipt of at least two trustees or a trust corporation;[3] but as regards other property, the written receipt by one trustee is a sufficient discharge for the person paying, and exonerates him from being answerable for any loss or misapplication of the money.[4]

2 Trustees have a power to sell trust property in their hands such as unauthorised investments, for the purpose of investing the proceeds in authorised securities.[5] Such a power, if not given expressly, will be implied. Whenever trustees are authorised 'to pay or apply capital money subject to the trust for any purpose or in any manner', they are empowered by Trustee Act (TA) 1925 (UK), s 16 to raise such money by mortgaging or selling the trust assets.[6] However, the section is construed narrowly. In *Re Suenson-Taylor's Settlement*,[7] wide investment powers were given to the trustees who, consistently with those powers, held a large area of land for investment purposes. The trustees wished to mortgage that land in order to raise the money to purchase more land. It was held that the course of action proposed by the trustees was outside the scope of s 16. The court did envisage circumstances where it might be necessary for the trustees to purchase additional land in order to protect the existing investments (for example, where it is desirable to buy land overlooking an existing property in order to prevent another person from building on it), but that was not the position in the present case. It seems, therefore, that the power given by s 16 is restricted to cases where money is required to preserve existing assets.

3 TA 1925, s 12 (UK); TA 1998, s 15 (The Bahamas); Cap 236, s 11 (Barbados); TA, s 13 (Jamaica); TA, Cap 303, s 11 (BVI); Trusts Law 1967 (2009 Rev), s 16 (Cayman Islands); T

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1 See LPA 1925, s 25 (UK); T Ord, Ch 8, No 3, s 12(1) (Trinidad and Tobago); Cap 303, s 12(1) (BVI); Cap 190, s 26(1) (Belize); Trusts Law 1967 (2009 Rev), s 17(1) (Cayman Islands).

2 Re *Mayo* [1943] 2 All ER 440.

3 LPA 1925, s 27(2) (UK); Cap 236, s 35 (Barbados); Cap 190, s 29 (Belize).

4 TA 1925, s 14(1) (UK); TA, s 20 (Jamaica); T Ord, Ch 8, No 3, s 15 (Trinidad and Tobago); Cap 250, s 18 (Barbados); Cap 303, s 15 (BVI); Trusts Law 1967 (2009 Rev), s 20 (Cayman Islands); TA 1975, s 5 Bermuda). Though, according to Pettit, *Equity and the Law of Trusts*, 6th edn, p 394, the sections do not 'alter the rule that where there are two or more trustees, a valid receipt can only be given by all of them acting jointly'.

5 Under the rule in *Howe v Lord Dartmouth* (1802) 32 ER 56.

6 See also Cap 303, s 17 (BVI); Trusts Law 1967 (2009 Rev), s 22 (Cayman Islands); TA 1975, s 7 (Bermuda); T Ord, Ch 8, No 3, s 17 (Trinidad and Tobago); Cap 250, s 20 (Barbados); TA 1998, s 21 (The Bahamas).

7 [1974] 3 All ER 397.

Ord, Ch 8, No 3, s 11 and TA, 1981, s 27 (Trinidad and Tobago); TA, 1893, s 13 (Guyana); and TA 1975, s 3 (Bermuda) give trustees power to:

> . . . sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matters as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

In carrying out a sale, trustees have a duty to obtain the best price possible for the beneficiaries, who may seek an injunction to restrain a sale which they consider to be at an undervalue.[8] Once the sale has been completed, the beneficiaries may not upset the sale as against the purchaser unless they can show that he was acting in collusion with the trustees and that the consideration was inadequate.[9]

POWER TO INSURE

Trustees are not under any duty to insure the trust property, in the absence of an express provision in the trust instrument to that effect. Accordingly, should the trust property be destroyed or damaged, they will not be liable for failure to insure.[10]

TA 1925, s 19 (UK) and TA, s 17 (Jamaica) give trustees power to insure any building or other insurable property against loss or damage by fire and to pay the premiums out of income from any of the trust property. They may not insure the property for more than three-quarters of its value.[11] The power is not available if the trust instrument excludes it, nor does it apply to a bare trust where the trustee is bound forthwith to convey any building or property to a beneficiary absolutely, upon being requested to do so.

If insured trust property is destroyed or damaged, then the money received under the insurance policy may be spent on rebuilding, replacing or repairing the property, provided that any person, whose consent to the investment of trust money is required by the trust instrument, consents to such application of the money. If the insurance money is not so applied, it is to be treated as capital money, and held upon trusts corresponding as closely as possible to trusts affecting the property in respect of which the claim is made.

Section 23 TA, Cap 250 (Barbados) differs from s 19 TA 1925 (UK) and s 17 TA (Jamaica) in three respects. In the first place, the power to insure includes not only loss by fire but also loss by 'explosion, impact, lightning, thunderbolt, hurricane, earthquake, flooding, subsidence or landslip'.[12] Secondly, trustees are not confined to insurance up to three-quarters of the value of the property, but are empowered to insure up to 'the full replacement cost of the building or property'. Thirdly, money received under the policy may be applied for rebuilding only under the direction of the court.

8 *Buttle v Saunders* [1950] 2 All ER 193.
9 See, eg, TA 1925, s 13(2) (UK); TA Cap 236, s 17(2) (Barbados).
10 *Re McEacharn* (1911) 103 LT 900.
11 T Ord, Ch 8, No 3, s 20 (Trinidad and Tobago); TA, Cap 303, s 20 (BVI); and Trusts Law 1967 (2009 Rev), s 25 (Cayman Islands) allow insurance up to the full value of the building or property.
12 TA 1975, s 10 (Bermuda) gives power to insure any building or property against loss or damage from any cause to the full value of the property. See also TA 1998, s 24 (The Bahamas).

POWER TO COMPOUND LIABILITIES AND SETTLE CLAIMS

TA 1925 (UK), s 15, TA, Cap 250 (Barbados), s 19 and TA (Jamaica), s 21 give very wide powers to trustees and personal representatives to enter into compromises and settle claims relating to the trust estate. Section 19 Trustee Act, Cap 250 (Barbados) provides:[13]

> 19(1) A personal representative, or two or more trustees acting together, or (subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation) a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they, as the case may be, think fit—
>
> (a) accept any property real or personal, before the time at which it is made transferable or payable; or
>
> (b) sever and apportion any blended trust funds or property; or
>
> (c) pay or allow any debt or claim on any evidence that he or they think sufficient; or
>
> (d) accept any composition or any security, real or personal, for any debt, or for any property, real or personal, claimed; or
>
> (e) allow any time for payment of any debt; or
>
> (f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust; or
>
> (g) settle and fix reasonable fees of remuneration for any professional person or any trust corporation appointed by him or by them, as the case may be, under section 38 of the Succession Act, to act as trustee of any property and authorise such professional person or trust corporation to charge and retain such remuneration out of that property,
>
> and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or by them, as the case may be, in good faith.

(Note that s 16 of the Trustee Ordinance, Ch 8, No 3 (Trinidad and Tobago) is similarly worded, though sub-paragraph (g) is omitted.)

It has been pointed out[14] that the equivalent s 15 Trustee Act 1925 is concerned with 'external disputes', that is to say, 'cases in which there is some issue between the trustees on behalf of the trust as a whole and the outside world, as opposed to internal disputes where one beneficiary under the trust is at issue with another beneficiary under the trust'. However, the section has been held to extend to the settlement of a dispute with a person claiming to be a beneficiary.[15]

It is obviously desirable that trustees should have wide powers to compromise claims, otherwise they might be obliged to litigate every possible claim or risk liability for breach of trust if they failed to do so. In exercising the powers, the trustees' only duty is to seek a compromise which is fair and desirable as regards all the beneficiaries, and they are not liable for loss caused through the exercise of the powers so long as they act in good faith. On the other hand, it appears that the sections will protect a trustee only where he acts positively in the exercise of his discretion, and not where he 'adopts a mere passive attitude of leaving matters alone'.[16]

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13 See also TA 1998, s 37 (The Bahamas); TA 1975, s 6 (Bermuda); Cap 303, s 16 (BVI); and Trusts Law 1967 (2009 Rev), s 21 (Cayman Islands).

14 Pettit, *Equity and the Law of Trusts*, 5th edn, p 391; *Re Earl of Stafford* [1978] 3 All ER 18.

15 *Eaton v Buchanan* [1911] AC 253.

16 Pettit, *Equity and the Law of Trusts*, 5th edn, 391; *Re Greenwood* (1911) 105 LT 509.

POWER OF MAINTENANCE

The power of maintenance is concerned with the use by the trustees of the *income* of the trust fund for the education and living expenses of *minor beneficiaries*. The trust instrument may expressly authorise the trustees to use income for such purposes but, in the absence of any such authorisation, trustees are given power to use income for maintenance by TA 1925, s 31 (UK); TA 1998, s 37 (The Bahamas); T Ord, Ch 8, No 3, s 32 and TA 1981, s 44 (Trinidad and Tobago); TA, Cap 250, s 35 (Barbados); TA, Cap 303, s 32 (BVI); Trusts Law 1967 (2009 Rev), s 32 (Cayman Islands); and TA 1975, s 23 (Bermuda).[17] Section 35 of Cap 250 (Barbados) provides:

> 35(1) Where any property is held by trustees in trust for any person for any estate or interest whatsoever, whether vested or contingent, then subject to any prior estates or interests or charges affecting that property –
>
> (a) during the minority of any such person, if his estate or interest so long continues, the trustees may, at their sole discretion pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—
>
> (i) any other fund applicable to the same purposes; or
>
> (ii) any person bound by law to provide for his maintenance or education; and
>
> (b) if such person on attaining the age of majority has not a vested estate or interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (3) to him, until he either attains a vested estate or interest therein or dies, or until failure of his estate or interest.
>
> (2) In deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes mentioned in subsection (1), the trustees shall have regard to the age of the minor and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid, or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

Occasions for application

The statutory power of maintenance may be exercised in two particular types of circumstance:

1 Where a minor beneficiary has a vested interest in property, but, because he is below the age of majority and cannot give a valid receipt to the trustees for the income of the trust property in which he has the vested interest, the trustees could not otherwise apply the income for his benefit (for example, where T bequeaths 2,000 shares upon trust for B, who is five years old at the date of T's death).

2 Where a minor beneficiary has a contingent interest in property, and the trustees would otherwise be unable to apply the income for his maintenance because they do not know, until the contingency is fulfilled, whether he will become entitled to the capital and the income which goes with it (for example, where T bequeaths 2,000 shares upon trust for B if he qualifies as an attorney-at-law).

17 Cf TA, Cap 202, s 38 (Belize), which is differently worded.

Intermediate income

The statutory power may be exercised only where the minor beneficiary is entitled to the income of the property, whether by virtue of his having a vested interest, or because, in the case of a contingent interest, the gift 'carries the intermediate income'. Where there is a prior life interest, and the interest of the minor beneficiary is in remainder, the statutory power of maintenance cannot be used, as the income will belong to the life tenant and so there will be no income available for the minor beneficiary (for example, where property is held upon trust for A for life, remainder to B if he attains the age of 25. Here, the income of the property belongs to A, and so there is no income available for B's maintenance).

As to 'intermediate income', the general rule is that where a person has a contingent interest in property, any income earned by the property (such as dividends from shares) between the date of the gift and the time when the interest vests, belongs to the donee, provided that he eventually acquires a vested interest. However, not all gifts do carry the intermediate income. In the first place, the donor may specify that the income is to be paid to some person other than the donee, in which case the gift will not carry the intermediate income (for example, where T bequeaths 2,000 shares upon trust for B if he attains the age of 25, but directs that in the meantime any dividends from the shares should be paid to C). Secondly, it is established that certain types of gift do not, unless the donor so provides, carry the intermediate income. They are:

(a) *deferred gifts of residue* (for example, where T bequeaths a share of residuary personalty to B 'two years after the date of my death, if he attains 25' (a deferred contingent gift) or to B 'three years after the date of my death' (a deferred vested gift));
(b) *deferred pecuniary legacies* (for example, where T bequeaths $10,000 to B 'two years after the date of my death'); and
(c) *contingent pecuniary legacies* (for example, where T bequeaths $20,000 to B 'if he qualifies as an attorney-at-law').

All other gifts are presumed to carry the intermediate income.

The above principles reflect the *prima facie* position, but they are subject to any contrary intention in the trust instrument.[18] Further, in the case of a contingent pecuniary legacy, where the legacy is given by the testator to his minor child, or to a minor to whom he stands *in loco parentis*, and no other fund is applied for his maintenance, then the gift is presumed to carry the intermediate income, which can therefore be used for maintenance.[19] Another exception is that where a legacy has expressly or impliedly been set aside by the testator so as to be available for the legatee as soon as the contingency occurs, such legacy will carry the intermediate income.[20]

Accumulations

A direction in the will to accumulate income precludes the income from being used for the beneficiary's maintenance[21] or for his advancement.[22]

18 *Re McGeorge* [1963] 1 All ER 519.
19 *Re Raine* [1924] 1 Ch 716.
20 *Re Medlock* (1886) 54 LT 828.
21 *Re Turner's Will Trusts* [1936] 2 All ER 1435.
22 *IRC v Bernstein* [1961] 1 All ER 320.

When a beneficiary reaches the age of majority, and his interest is still contingent, from that time onwards the trustees must pay him the income of the property as it arises. Any accumulations of income held by the trustees at the time the beneficiary attains the age of majority are added to the capital, and will not be passed to him until the interest becomes vested. However, these provisions are subject to any contrary intention in the will (for example, where the testator provides that income arising after the beneficiary reaches 18 years should be accumulated, or paid to some other person).

POWER OF ADVANCEMENT

The power to advance *capital* of the trust fund to *beneficiaries of any age* is given to trustees by TA 1925, s 32 (UK); TA 1998, s 38 (The Bahamas); T Ord, Ch 8, No 3, s 33 and TA 1981, s 45 (Trinidad and Tobago); TA, Cap 250, s 36 (Barbados); TA, Cap 303, s 33 (BVI); Trusts Law 1967 (2009 Rev), s 33 (Cayman Islands); and TA 1975, s 24 (Bermuda).[23] Section 36 of Cap 250 (Barbados) provides:

> 36(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the estate or interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs, so however, that—
>
> (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share, estate or interest of that person in the trust property; and
>
> (b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property, the money so paid or applied shall be brought into account as part of such share; and
>
> (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other estate or interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of the age of majority and consents in writing to such payment or application.

'Advancement' was originally interpreted to mean 'the establishment in life' of a beneficiary, for example by purchasing for him a business, a commission in the army or a medical practice, or by advancing capital to a young lady on her marriage. But the statutory power is much wider than this, for it speaks of *advancement* or *benefit*. The words are read disjunctively, to mean 'any use of the money which will improve the material situation of the beneficiary'.[24]

The statutory power can be excluded by the trust instrument, either expressly or by implication. The power can be used to advance capital to a beneficiary who has a vested interest in property but because he is below the age of majority could not otherwise receive it. It also authorises advancement of capital to a beneficiary having a contingent interest in property, irrespective of his age. Thus, for example, if T bequeaths $10,000 to B 'when he reaches the

23 Cf TA, Cap 202, s 39 (Belize).
24 *Pilkington v IRC* [1962] 3 All ER 622 at 628, *per* Viscount Radcliffe.

age of 25', the trustees can advance to B up to $50,000 (half of his 'presumptive share') on his graduation at the age of 22. Similarly, where T bequeaths $120,000 'to the first of C's daughters to qualify as an attorney-at-law', and C has three daughters, the trustees may advance up to $20,000 to each daughter (half of the presumptive share of each). The first daughter who does in fact qualify as an attorney-at-law will receive the balance of the capital ($60,000), but the other two daughters will not be required to give back the money they have received by way of advancement.

Prior interests

Where A has a life interest in the trust property and B is entitled in remainder, the trustees may advance up to half of the capital to B only where A is *sui juris* and gives his written consent to the advancement. The consent of the life tenant is necessary because, where capital is advanced, it will reduce the amount of income available for the life tenant.

Supervision by trustees

Trustees who decide to advance capital to a beneficiary must 'pay or apply' the money. They may therefore either hand over the money to the beneficiary (if he is above the age of majority), or apply it for some purpose on his behalf. If they take the former course, they are under a duty to ensure as far as possible that the money is spent for the purpose for which it was advanced. In *Re Pauling's Settlement*, Willmer LJ explained the position:[25]

> If the trustees make the advance for a particular purpose which they state, they can quite properly pay it over to the advancee if they reasonably think they can trust him or her to carry out the prescribed purpose. What they cannot do is prescribe a particular purpose and then raise and pay the money over to the advancee, leaving him or her entirely free, legally and morally, to apply it for that purpose or to spend it in any way he or she chooses . . . This much is plain, that if such misapplication [of the money advanced] came to [the trustees'] notice, they could not safely make further advances for particular purposes without making sure that the money was in fact applied to that purpose, since the advancee would have shown him or herself quite irresponsible.

POWER TO APPOINT AGENTS

Because of the maxim '*delegatus non potest delegare*', a person entrusted with fiduciary duties, such as a trustee, is generally not entitled to delegate his responsibilities to another person or persons. But this rule was never strictly followed, and it has always been recognised that a trustee may delegate certain functions to specialists where ordinary business practice requires it. For example, a trustee may employ an attorney or solicitor to do legal work and a banker or stockbroker to deal with financial matters on behalf of the trust;[26] and the effect of the leading cases of *Speight v Gaunt*[27] and *Learoyd v Whiteley*[28] is that delegation is permissible if the trustees can show that it is 'reasonably necessary in the circumstances or is in accordance with ordinary business practice'. The trustees must exercise proper care in the selection of the agent, must

25 [1964] 1 Ch 303 at 334.
26 *Ex p Belchier* (1754) 27 ER 144.
27 (1884) 9 App Cas 1.
28 (1887) 12 App Cas 727.

employ him in his proper field, and must exercise general supervision.[29] If the trustees follow this approach, they will not be liable for the defaults of the agent. However, trustees are not entitled to delegate their *discretions*.[30] It is only ministerial acts or professional work which can be delegated.

Statutory provisions in some jurisdictions have widened trustees' powers to appoint agents. Section 23(1) TA 1925 (UK) is the prototype modern provision concerning the appointment of agents. The section provides that trustees or personal representatives may employ agents 'to transact any business or do any act required . . . to be done in the execution of the trust or the administration of the testator's or intestate's estate . . . *and shall not be responsible for the default of any such agent if employed in good faith*' (emphasis added). Almost identical provisions are in force in Trinidad and Tobago (Trustee Ordinance, Ch 8, No 3, s 24), the British Virgin Islands (Trustee Act, Cap 303, s 24(1)), Cayman Islands (Trusts Law No 6 of 1967 (2009 Rev), s 29(1)) and Bermuda (Trustee Act 1975, s 15(1)). The effect of the sections, in Maugham J's words, is 'to revolutionize the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not'.[31]

The relationship between s 23(1) TA 1925 and s 30 of the same Act has caused difficulty. Section 30, which has its counterparts in TA, Cap 303, s 31 (BVI); Trusts Law 1967 (2009 Rev), s 47 (Cayman Islands); TA 1975, s 22 (Bermuda); T Ord, Ch 8, No 3, s 31 (Trinidad and Tobago); and TA, Cap 250, s 34(1) (Barbados), provides that

> . . . a trustee . . . shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for those of any banker, broker, or other person with whom any trust money or securities may be deposited . . . nor for any other loss, unless the same happens through his own wilful default.[32]

Before 1926, it had been held in *Re Brier*[33] that, where there was a provision exempting a trustee from liability for loss caused by an agent unless the loss was attributable to the trustee's wilful default, the trustee would nonetheless be liable for the loss if he failed to exercise reasonable supervision over the agent. But it is possible to interpret s 23(1) of the Trustee Act 1925 and its equivalents as exonerating a trustee from any liability for an agent's default so long as the agent was appointed in good faith. In other words, under s 23(1) *supervision* of the agent is not required of the trustee; all he is obliged to do is to *appoint* in good faith.

The effect of the two sections was considered in *Re Vickery*,[34] where an executor appointed a solicitor to wind up the deceased's estate. At the time of the appointment, the executor had no cause to believe that the solicitor was an undesirable person. Three months after the appointment, one of the beneficiaries informed the executor that the solicitor had been suspended from practice, but had later been allowed to practise again. The beneficiary requested that the executor employ another solicitor, but the executor did not do so, and in fact gave the solicitor a signed authority to obtain money on behalf of the estate from the Post Office. The solicitor failed to hand over the money when pressed to do so, and ultimately absconded. The beneficiary brought an action against the executor to recover the money lost, but was unsuccessful.

29 Hanbury and Martin, *Modern Equity*, 15th edn, 1997, 560.
30 *Speight v Gaunt* (1884) 9 App Cas 1.
31 *Re Vickery* [1931] 1 Ch 572 at 581.
32 TA 1998, s 36(1) (The Bahamas) is similarly worded, except that the words 'wilful default' are replaced by 'individual act or omission'.
33 (1884) 26 Ch D 238.
34 [1931] 1 Ch 572.

The grounds for Maugham J's decision were (i) that the solicitor had been appointed in good faith, within s 23; and (ii) that the executor had not been guilty of wilful default, within s 30, 'wilful default' being defined as 'a consciousness of negligence or breach of duty, or recklessness'; in other words, either deliberate or reckless breach of duty.

The reasoning (though not the actual result) in *Re Vickery* has been much criticised by academic writers on the grounds *inter alia* that:

(a) the definition of wilful default given by Maugham J is inappropriate, as it was derived from a case concerning not executors or trustees but company directors,[35] who are subjected to a lower standard of care than that applicable to trustees or executors; as applied to trustees or executors, 'wilful default' has a wider meaning including lack of reasonable care; and

(b) s 23(1) should not be interpreted as exonerating trustees or executors from the duty to supervise agents, because the Trustee Act 1925 was a consolidating statute which must be presumed not to have altered the existing law (*viz* the *Re Brier*[36] principle, requiring supervision).

The Barbados legislature has commendably avoided the pitfalls of the *Re Vickery* decision by enacting in s 27(1) of Cap 250 the words, 'shall not be responsible for the default of any such agent if employed in good faith and supervised with a reasonable degree of care'. And under Trustee Act 1998, s 30(6) and (7) (The Bahamas), trustees who have made reasonable efforts to satisfy themselves that an agent has appropriate knowledge, experience and integrity, and to keep themselves informed concerning the performance of an agent, shall not be responsible for any default or wrongful act which occurs at a time when the agent appeared to be performing honestly and competently. Similarly, Trusts Act, Cap 202, s 34 (Belize) provides that a trustee will not be liable for the default of his agent, provided that the trustee exercised the standard of care of a reasonable and prudent man of business in (a) the selection and (b) the supervision of the activities of the agent. There is therefore no doubt that in these three territories, trustees must not only select their agents carefully but must also supervise their actions after their appointment, and, by virtue of the Trustee Act 2000, s 1, the same now applies in England and Wales.[37]

35 *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407. Maugham J's definition was, however, adopted by the English Court of Appeal in *Armitage v Nurse* [1998] Ch 241, *per* Millett LJ (p 215 below).

36 (1884) 26 Ch D 238.

37 Another useful delegating provision in Barbados is s 29(1) of Cap 250, which provides: 'A trustee intending to remain out of Barbados for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from Barbados of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person, so, however, that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this subsection.' Section 26(1) of T Ord, Ch 8, No 3 (Trinidad and Tobago) is similarly worded.

CHAPTER 13

VARIATION OF TRUSTS

It is a basic principle that trustees must adhere strictly to the terms of the trust, and any deviation will constitute a breach of trust for which they will be liable. However, if all the beneficiaries are *sui juris* and consent to a deviation, the trustees will be protected. Furthermore, under the rule in *Saunders v Vautier*[1], beneficiaries who are *sui juris* and between them absolutely entitled[2] may put an end to the trust, and the trustees must hand over the *corpus* of the trust property as the beneficiaries direct. For instance, property is held upon trust for X for life, with remainder to Y and Z. X, Y and Z may, if *sui juris*, agree to partition the fund and direct the trustees to hand the capital over to them immediately in such shares as they decide. Such a course may be beneficial in order to avoid liability for estate duty on the death of the life tenant. On the other hand, where any of the beneficiaries is a minor or subject to a disability, such beneficiary is incapable of consenting to a deviation from the terms of the trust. The question may then arise as to whether the court can sanction such deviation for the benefit of any such beneficiary.

Variation of the terms of trusts fall into two classes:

(a) variations concerned with the *management and administration* of trusts, and
(b) variations of the *beneficial interests* arising under trusts.

The jurisdiction of the court to sanction variations includes the following:

INHERENT JURISDICTION

The court has an inherent jurisdiction to sanction a departure from the terms of a trust where an 'emergency' has arisen in its management or administration, that is to say, where a situation has arisen for which no provision was made in the trust instrument and which could not have been foreseen by the settlor. The jurisdiction is very limited in its scope. A case in which the jurisdiction was utilised is *Re New*,[3] where the court approved a scheme under which the trustees were authorised to exchange shares in a company with more realisable shares in a new company. The court's sanction was needed because the trustees had no power under the trust instrument to invest in the new shares. This was later categorised as a situation involving the 'salvage' of the trust property and was said to be the 'high-water mark' of the emergency jurisdiction. Accordingly, in *Re Tollemache*[4] the court refused to sanction a widening of the trustees' investment powers as it was not an 'emergency' situation, and the mere fact that the proposed variation would benefit the beneficiaries was not sufficient.

The court also possesses an inherent jurisdiction to approve compromises on behalf of minor or unborn beneficiaries, but only in cases where there is a genuine dispute as to rights.

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1 (1841) 49 ER 282.
2 In *Bank of Nova Scotia Trust Co (Caribbean) Ltd v Tremblay* [1998–99] 1 ITELR 673 (Court of Appeal, Barbados), it was held that, on a true construction of the trust deed, the beneficiaries had not obtained absolute interests in the trust property and so were not entitled to put an end to the trust.
3 [1901] 2 Ch 534.
4 [1903] 1 Ch 457, affd at 955.

This inherent jurisdiction was invoked in the Cayman case of *Re S Trust*,[5] where Schofield J emphasised that 'provided the terms of compromise arise out of a real dispute as to parties' rights this court may, in the exercise of its inherent powers, approve such terms if it is satisfied that they will be for the benefit of the infant and unborn beneficiaries and that it is expedient to do so'. In this case there were a number of ambiguities in the trust deed. The beneficiaries, who were the settlor's wife and her three infant children, through the guardian *ad litem*, had negotiated and agreed the terms of a compromise which would, *inter alia*, enable annual maintenance to be paid out of the children's shares of the fund, and enable the wife to continue to operate two companies owned by the trust whose assets, according to the provisions of the trust deed, would otherwise have had to be converted into cash. Schofield J was satisfied that there was a real dispute as to the parties' rights in view of the ambiguities in the trust deed, on which the wife, the guardian *ad litem* and the trustee had sought independent written opinions of senior counsel in London. These opinions differed on several important issues. It was accordingly a proper case for compromise, and the fact that a provision in the compromise operated contrary to the settlor's intention was 'a serious but by no means conclusive consideration'. On this latter point. Schofield J followed the principle in *Re Remnant's Settlement Trusts*,[6] a case decided under the Variation of Trusts Act 1958.

Trustee Act 1925, s 53

Under this section and its equivalents in Commonwealth Caribbean jurisdictions,[7] the court may make an order authorising certain dealings with the property of a minor 'with a view to the application of the capital or income thereof for the maintenance, education, or benefit of' the minor, and 'appointing a person to convey such property'. The section extends the courts' inherent power to make provision for the maintenance of minors and can be used where, for instance, the trustees are unable or unwilling to use their power to apply income for maintenance under TA 1925, s 31 or the equivalent sections in other jurisdictions. The word 'benefit' is interpreted widely and the court may authorise a transaction whose object is to reduce estate duty for a minor's benefit.[8] A case in which the statutory power was utilised is *Re Meux*,[9] where property was settled on X for life, remainder to Y in tail. The court used its power under s 53 to appoint a person to convey Y's interest to X absolutely in consideration of a sum of money to be paid by X to trustees upon trust for the benefit of Y. This arrangement not only had the effect of varying the beneficial interests of X and Y but also of extinguishing the interests of Y's heirs.

Trustee Act 1925, s 57

This section and its Commonwealth Caribbean equivalents[10] provide that where, in the management or administration of the trust property, any transaction 'is in the opinion of the

5 (1990–91) 4 Carib Comm LR 290 at 294.
6 [1970] 2 All ER 554. See p 204, below.
7 Cap 303, s 54 (BVI); Trusts Law 1967 (2009 Rev), s 59 (Cayman Islands); TA 1975, s 56 (Bermuda); T Ord, Ch 8, No 3, s 54 (Trinidad and Tobago).
8 *Re Meux* [1958] Ch 154.
9 *Ibid.*
10 Cap 303, s 59 (BVI); Trusts Law 1967 (2009 Rev), s 63 (Cayman Islands); TA 1975, s 47 (Bermuda); TA, s 43 (Jamaica); T Ord, Ch 8, No 3, s 58 (Trinidad and Tobago); TA 1998, s 71 (The Bahamas).

court expedient' but cannot be effected by the trustees owing to the absence of any power in the trust instrument or in the general law to do so, 'the court may by order confer upon the trustees . . . the necessary power . . . on such terms . . . as the court may think fit'.

The sections give a wider power than the court's inherent power (above) in that it is exercisable whenever it is 'expedient' to do so, and is not confined to cases of 'emergency'. The statutory power has been used, for instance, to authorise the sale of land where necessary consents had been withheld:[11] to extend the investment powers of trustees of a pension fund;[12] to blend two charitable funds into one;[13] to authorise the purchase of a residence for a life tenant;[14] and to authorise the sale of a reversionary interest which the trust instrument had specified was not to be sold until it fell into possession.[15]

The purpose of s 57, according to Lord Evershed and Romer LJ,[16] is:

> . . . to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because there was no actual 'emergency' or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust.

The wording of s 58 Trustee Act, Cap 250 (Barbados) is similar to that of s 57 of the UK statute and its equivalents, but, as Douglas CJ pointed out in *McConney v Public Trustee*,[17] it confers a wider power in that the court's discretion to sanction a transaction is not confined to matters concerning 'the management or administration' of a trust; though the transaction approved in *McConney's* case was in fact a matter of management and administration. The facts of the case were that, under the provisions of the testator's will, three freehold properties were devised to trustees upon trust to let the same and pay the net income to the testator's three daughters or the survivor of them for life. On the death of the survivor, the properties were to be sold and the proceeds of sale divided amongst the daughters' issue, or, in default of issue, amongst such charitable institutions as the trustees should select. During the lifetime of the sole surviving daughter, two of the properties were severely damaged by fire and the third became dilapidated. One of the properties was declared unfit for occupation, and the valuer recommended that all three be sold. The Public Trustee had been appointed trustee in place of the original trustees named in the will. The sole surviving daughter and her children sought an order of the court for the sale of the properties, and the daughter sought to relinquish her life interest in exchange for a corresponding interest in the proceeds of sale. Douglas CJ granted the orders sought under s 58 of Cap 250:

> In the instant case, there is no power in the Public Trustee to sell the trust property during the lifetime of the first-named plaintiff. In view of the dilapidated condition of the trust property, and by reason of the damage done to two of the buildings by fire, it seems to me expedient that the Public Trustee be empowered to sell on the terms and conditions set out in the summons. Further, the order of the court will be that the first-named plaintiff, as tenant for life, be at liberty to relinquish her life interest in the said properties in exchange for a corresponding interest in the net

11 *Re Beale's Settlement Trusts* [1932] 2 Ch 15.
12 *Mason v Farbrother* [1983] 2 All ER 1078.
13 *Re Harvey* [1941] 3 All ER 284.
14 *Re Power* [1947] Ch 572.
15 *Re Cockerell's Settlement Trusts* [1956] Ch 372.
16 Re *Downshire Settled Estates* [1953] Ch 218 at 248.
17 (1981) 16 Barb LR 90 (High Court, Barbados).

proceeds of the sale together with any moneys received by the Public Trustee as a consequence of the damage by fire to Nos 48 and 49 Swan Street.

Variation of Trusts Act 1958, s 1 and its Caribbean equivalents[18]

These sections give the court 'a very wide and, indeed, revolutionary discretion'[19] to approve, on behalf of certain specified categories of persons, arrangements which vary the original terms of the trust. The Acts cover not only matters of management or administration but also variation of beneficial interests. However, it is expressly provided that the court has power to approve an arrangement only where it is satisfied that it is for the benefit of the person or persons on whose behalf approval is sought. Applications under the UK Act have often been made in order to minimise estate duty or other forms of taxation, or to export a trust to an offshore jurisdiction.

Persons on whose behalf the court may approve a variation

The purpose of the Acts is to approve variations on behalf of beneficiaries who cannot give their own consent because, for instance, they are minors or unborn. If a beneficiary is *sui juris*, the court cannot approve a variation on his behalf; accordingly, before an application is made to the court for its approval, the consent of all the beneficiaries who are *sui juris* should first be obtained. For instance, property is held upon trust for X for life, with remainder to Y (a minor) and Z. It is proposed to vary the trust by dividing the capital between X, Y and Z in equal shares. The court can approve the variation only on behalf of Y; therefore, before the application is made, X and Z should give their express consent to the scheme.

The categories of persons on whose behalf the court may approve an arrangement are:

(a) any person who is a *minor*, or who is incapable of assenting to the proposed arrangement by reason of some other incapacity, such as insanity;

(b) any person 'who may become entitled . . . to an interest under the trusts, as being at a future date or on the happening of a future event'. This category includes persons entitled to contingent interests;[20]

(c) any person who is *unborn* (for example, where property is held upon trust for X for life, with remainder to the first son of X to marry, and X has no children, the court may approve a variation on behalf of the prospective and unborn son); and

(d) any person who has a discretionary interest under a protective trust, where the interest of the principal beneficiary (that is to say, the life tenant) still subsists (for example, where property is held upon protective trusts for X for life, and X is married to Y, Y is a member of the discretionary class and so the court may approve a variation on her behalf). It will be noticed that:
   - there is no requirement that the member of the class be a minor;
   - approval may be given notwithstanding that the member does not concur with the proposed arrangement; and
   - the variation need not be for the benefit of such person.

18 TA 1998, s 70(1) (The Bahamas); TA, Cap 202, s 48 (Belize); TA 1981, s 68(1) (Trinidad and Tobago); TA, Cap 250, s 59(1) (Barbados); Trusts Law 1967 (2009 Rev), s 72(1) (Cayman Islands); TA 1975, s 48(1) (Bermuda); TA, Cap 303, s 58 (BVI).

19 *Re Steed's Will Trusts* [1960] Ch 407 at 420, *per* Evershed MR.

20 On the interpretation of this provision, see *Re Suffert's Settlement* [1960] 3 All ER 561; *Knocker v Youle* [1986] 2 All ER 914.

Benefit

The court must be satisfied (except in category (d)) that the proposed arrangement is for the benefit of those on whose behalf the application is made. 'Benefit' is not defined by the Acts, but the case law shows that the following matters may be taken into account.

(a) Financial benefit

The most usual financial benefit sought from a variation of a trust is the avoidance of estate duty,[21] capital gains tax[22] or income tax,[23] and many variations have been approved which have had tax avoidance as their principal purpose. However, in *Re Weston's Settlements*[24] it was emphasised that 'benefit' is not only financial, and the court must be satisfied that the scheme, taken as a whole, is for the general welfare of the beneficiaries. In this case a settlor sought approval for an arrangement under which property settled by him on his sons and their issue would be transferred from England to Jersey. The settlor moved to Jersey in 1967, and the sons followed him shortly afterwards. The application sought:

(a) the appointment of new trustees under TA 1925, s 41; and
(b) the insertion into the settlement of a power for the trustees to discharge the English trusts and to create almost identical Jersey settlements.

The proposed transfer would have avoided a capital gains tax liability of £163,000. It would have required the settlor's sons leaving England and going to live in Jersey. The Court of Appeal refused to approve the arrangement because:

> . . . the court should not consider merely the financial benefit to the infant and unborn children, but also their educational and social benefit. There are many things in life more worthwhile than money . . . I do not believe that it is for the benefit of the children to be uprooted from England and transported to another country simply to avoid tax.[25]

Apart from the reasoning that the proposed arrangement in *Re Weston's Settlements* was not for the benefit of the children, another basis for the decision was that, in the view of Stamp J and Harman LJ, the arrangement was nothing but 'a cheap exercise in tax avoidance'[26] and 'an essay in tax avoidance, naked and unashamed',[27] as distinct from 'a legitimate avoidance of liability to taxation'.[28] The hostility of Stamp J and the Court of Appeal towards the proposed scheme in *Re Weston's Settlements* seems to have been due to two factors:

(a) The beneficiaries had moved to Jersey only a few months prior to the hearing, and there was no evidence of any genuine intention on the part of the beneficiaries to live there permanently. As Lord Denning remarked, there was a strong possibility that, after the arrangement had been approved and the investments sold free of tax, the beneficiaries would return to England 'to enjoy their untaxed gains'.[29]

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21 *Re Druce's Settlement Trusts* [1962] 1 All ER 583.
22 *Re Sainsbury's Settlement* [1967] 1 All ER 878; *SG v Royal Bank of Canada Trust Co (Cayman) Ltd* [1998] CILR N15 (Grand Court, Cayman Islands).
23 *Re Clitheroe's Settlement Trusts* [1959] 3 All ER 789.
24 [1969] 1 Ch 223.
25 [1969] 1 Ch 223 at 246.
26 [1968] 2 WLR 1154 at 1162.
27 *Ibid* at 245.
28 [1968] 2 WLR 1154 at 1162.
29 [1969] 1 Ch 223 at 245, 246.

(b) As one leading text has suggested,[30] the court may have looked with disfavour on the notion that the settlor, who was a Russian immigrant, and who had built up his fortune in England during the Second World War, could be allowed to escape his normal tax liability in this way.

It seems, therefore, that in view of the general practice of the courts to approve variations for the single purpose of tax avoidance in other cases, the decision in *Re Weston's Settlements* must be regarded as being confined to the special facts of the case and not as an authority against permitting variations of trusts for tax avoidance purposes. Furthermore, to attempt to distinguish between 'legitimate' and 'illegitimate' tax avoidance schemes would appear to be a futile exercise.

A Caribbean case in which the court approved a variation for tax avoidance purposes is *SG v Royal Bank of Canada Trust Co (Cayman) Ltd.*[31] Here, the principal beneficiaries (resident in the United Kingdom) of a Cayman trust applied under sections 60 and 68 of the Trusts Law (1996 Rev) for the Cayman court's approval of a variation of the trust, in order to avoid UK capital gains tax which would be payable on a distribution of capital to the principal beneficiaries, who were solely entitled to the capital under the existing trust provisions. The proposed variation would permit the establishment of sub-trusts to which capital would be transferred for the benefit of the children of the principal beneficiaries and remoter issue. Under the existing trust instrument, the children and remoter issue were only contingent discretionary beneficiaries. In addition, it was proposed that all beneficiaries' spouses would receive distributions of trust income, which would spread income payments among a wider group of recipients and thus reduce the amount of income tax payable. It was held that the court could approve the variation only if it would benefit each minor or unborn beneficiary. That requirement was satisfied in this case, in that the scheme would confer financial benefits on hitherto contingent minor beneficiaries and their future children, and the proposed variation was approved notwithstanding that it was uncertain whether the beneficiaries as a whole would obtain tax benefits from the distribution to the spouses.

(b) Moral or social benefit

As we have seen, in *Re Weston's Settlements* the Court of Appeal regarded the proposed variation as not being for the moral or social benefit of the children, and that outweighed any possible financial benefit. Another case in which the moral or social benefit to the beneficiaries was treated as decisive is *Re T's Settlement Trusts*,[32] where a minor beneficiary, who was immature and irresponsible, was entitled to a vested interest on attaining her majority. Wilberforce J approved a variation under which the vesting of the capital was postponed until a later age, the property in the meantime being held on protective trusts. This decision was followed in *Re Holt's Settlement*,[33] where a variation postponing the vesting of interests in children from 21 years to 30 years was approved by Megarry J, who emphasised that 'the word "benefit" in . . . the Act . . . is plainly not confined to financial benefit, but may extend to moral or social benefit'.[34] Such

30 Parker and Mellows, *Modern Law of Trusts*, 5th edn, 1983, p 440.
31 [1998] CILR N 15.
32 [1964] Ch 158. See also *Re Elizabeth K Gates Estate Trust* (2000) 3 ITELR 113 (Royal Court of Jersey), where the court emphasised that it was 'not generally in the interests of young persons to come into possession of large sums of money which might discourage them from achieving qualifications and from leading settled and industrious lives'. The court therefore approved a variation deferring the 16 year old beneficiary's entitlement to the trust fund.
33 [1968] 1 All ER 470.
34 *Ibid* at 479.

benefit was also the basis for the decision in *Re Remnant's Settlement Trusts*.[35] In this case the trust instrument gave contingent interests to the children of two sisters, D and M. There was also a provision that any of the children of either sister who practised Roman Catholicism or married a Roman Catholic would forfeit their interest, which would accrue to the children of the other sister. D's children were Protestant, but M's were Roman Catholic. An application to delete the forfeiture provision was granted by Pennycuick J. Although the variation was clearly not for the financial benefit of D's children, it was for their moral and social benefit, as it prevented very serious dissension between the families of the two sisters';[36] moreover, the forfeiture clause might have acted as a deterrent in choosing a spouse, and it was more beneficial to the children to have their freedom of choice than to acquire some more money.

A Bahamian case in which a variation was held to be for the benefit of minor and unborn beneficiaries, and therefore approved, is *Re Marien*.[37] In this case, an application was made under the Variation of Trusts Act (Ch 79) Laws of the Bahamas on behalf of:

(a) two beneficiaries, who were minors, and

(b) future grandchildren of the deceased,

seeking the approval of the court for a family arrangement which, if sanctioned, would vary the trusts of the deceased's will.

Malone J granted the application. He said:

> There have been disputes within the deceased's family which have resulted in litigation here and in California, and the proposed family arrangement represents a compromise of those disputes; a compromise to which counsel, who represents the only two minors, has given it as his unqualified opinion that the arrangement would be for the benefit of the minors. In that regard, it is to be noted that the two minors, and indeed any future grandchildren of the deceased, are of the class which constitutes the principal beneficiaries, and that the majority of those beneficiaries are adults who have expressed their approval for the arrangement.
>
> It is no secret that the family arrangement has been conceived not only to bring peace to the family, but also to avoid unnecessary depletion of the family assets by taxing authorities of the USA, where one son of the deceased and his children reside, and by those of Canada, where two other sons and their families reside. The fact that the arrangement may reduce the taxes payable is not, however, a factor that prevents it being sanctioned. That has been made very clear by Lord Denning in *Re Weston's Settlements*[38] where he said:
>
> 'Nearly every variation that has come before the court has tax avoidance for its principal object, and no one has ever suggested that this is undesirable or contrary to public policy.'
>
> Because tax avoidance is one of the reasons for the family arrangement and the principal property of the trust is without the jurisdictional areas in which the beneficiaries reside, the need for trustees without those jurisdictions has clearly been a factor which has led to provisions being made in the family arrangement for the appointment of a trust corporation as one of the trustees and for the payment of the services rendered by that corporation as a trustee.
>
> In those respects, the family arrangement is in contrast to the provisions of the will and, of course, by providing for the payment of the corporation trustee it subjects the assets to an expenditure which previously might not have been incurred. The special financial circumstances, however, to my mind justify those variations and as also they are variations which have the approval of the beneficiaries and so have contributed to bringing peace to the family, I think they should be sanctioned.

35 [1970] 2 All ER 554.
36 *Ibid* at 566.
37 (1981) Supreme Court, The Bahamas, No 784 of 1980 (unreported).
38 [1969] 1Ch 223 at 245.

> The other variations are primarily, to my mind, of an administrative nature, the principal object of which is to ensure the payment of whatever taxes are due to the USA, Californian and Canadian tax authorities before making any disbursements, so that as far as practicable all will share equally the burden of taxation. From a practical point of view, the variations are, I think, an improvement on the provisions of the will. But fundamentally, the family arrangement preserves the substratum of the trusts expressed in the will and in the attempted *inter vivos* settlement so that it is an arrangement which effectuates the original purpose of the trusts and is, therefore, one which I think falls properly within this court's jurisdiction under the Variation of Trusts Act. Further, it is one which I think satisfies not only one but many of the alternative requirements in the definition of family arrangement to be found in *Halsbury's Laws of England* (4th edn) vol 18 at p 135. That is to say it is:
>
> '. . . an agreement between members of the same family intended to be generally and reasonably for the benefit of the family . . . by:
>
> (a) compromising doubtful or disputed rights;
>
> (b) preserving the family property;
>
> (c) preserving the peace and security of the family; and
>
> (d) avoiding litigation.'
>
> As, therefore, taken as a whole, I am satisfied that the arrangement is for the benefit of the minors and any future grandchildren of the deceased, I sanction it.

The intention of the settlor

Another issue which arose in *Re Remnant* was whether the court should approve a variation which was clearly contrary to the settlor's intention. It was held that to defeat the intention of the settlor was a serious matter, but the court was not bound to uphold such intention. In *Re Steed's Will Trusts*,[39] on the other hand, the court refused to sanction an arrangement which was clearly contrary to the testator's intentions. In this case, it was clear that the testator was apprehensive that the plaintiff beneficiary, his faithful housekeeper, would be 'sponged upon' by one of her brothers. He accordingly settled property in her favour on protective trusts, and after her death to whomsoever she should appoint. A proposal to eliminate the protective element in the life interest which would have resulted in the plaintiff becoming absolutely entitled to the property was rejected by the court, since such a variation would have been clearly contrary to the testator's purpose.

Exporting trusts

Trusts may be 'exported' to a foreign jurisdiction for a variety of purposes, most often:

(a) because the beneficiaries are resident abroad, or are intending to take up residence abroad, and it would be more convenient for the trust to be administered in the jurisdiction where the beneficiaries are resident;

(b) in order to minimise taxation. It is common to export a trust from a 'high-tax' jurisdiction, such as the United Kingdom, to an offshore jurisdiction, such as Jersey, The Cayman Islands, or The Bahamas;

39 [I960] Ch 407.

(c) to avoid the potentially catastrophic effects of a severe devaluation of the currency in the jurisdiction where the trust is situated; or

(d) to avoid a threatened imposition or re-imposition of exchange control regulations.

The Variation of Trusts legislation provides a method whereby a trust can be exported. The court has power under the Acts to approve a variation which will result in:

- the trustees being replaced by 'foreign' trustees in the jurisdiction to which the trust is to be exported,[40] and
- the transfer of the trust funds to the foreign jurisdiction.

However, the court will not approve a scheme to export a trust unless it is clear that the beneficiaries have settled permanently in the new jurisdiction. As we have seen, one of the reasons for the court's refusal to approve the exporting scheme in *Re Weston's Settlements*[41] was that there was a doubt as to whether the beneficiaries genuinely intended to settle in Jersey. On the other hand, in *Re Windeatt's Will Trusts*,[42] where the beneficiaries had been resident in Jersey for 19 years prior to the application, the court approved an arrangement for two Jersey trustees to be appointed and for the trust fund to be transferred to them. Similarly, in *Re Seale's Marriage Settlement*,[43] the court approved a variation whereby the trust was exported from the United Kingdom to Quebec, where the beneficiaries under a marriage settlement had been resident for several years and intended to remain. Buckley J considered it to be in the interests of all the beneficiaries that the trust be exported, notwithstanding that certain protective life interests, which were not recognised by Quebec Law, had to be deleted.

40 It is not necessary that the foreign trustees be appointed by the court. The appointment may be made out of court by the resident trustees appointing the new 'foreign' trustees, and then retiring.
41 [1969] 1 Ch 223.
42 [1969] 2 All ER 324.
43 [1961] Ch 574.

CHAPTER 14

REMEDIES FOR BREACH OF TRUST

A trustee commits a breach of trust if he fails to carry out his duties in relation to the trust or if he exceeds his powers. There are many varieties of breach ranging from, on the one hand, serious misconduct (such as misappropriating trust funds) to 'innocent' breaches (such as failing to follow directions in the trust instrument concerning the appointment of additional trustees). So long as a trustee strictly observes the terms of the trust instrument and the requirements laid down by statute or the general law, he will not be in breach; though it would be unusual if a trustee never committed a minor or technical breach during his term of office; indeed, in one case the court gave its approval to trustees committing 'judicious breaches of trust'.[1] Other examples of breaches are:

(a) investing trust funds in unauthorised investments;
(b) paying trust money to the wrong person;
(c) making an unauthorised profit from the trust;
(d) carelessly allowing trust money to remain in the hands of one trustee only; and
(e) failing to exercise a discretion in relation to trust matters.

If a trustee is in any doubt as to whether he has authority to do a particular act, he would be well advised to seek the directions of the court, otherwise he might be held personally liable for any loss to the trust; the measure of liability for a breach being generally the loss, direct or indirect, caused to the trust estate.

The remedies available to the beneficiaries where a trustee has committed or is about to commit a breach of trust are:

(a) injunction to restrain a breach;
(b) action against the trustee or trustees personally for loss suffered;
(c) proprietary remedy (that is to say, tracing) to recover the trust property or its proceeds; and
(d) action against wrongful recipients of trust property.

INJUNCTION

Beneficiaries need not wait until a breach of trust has actually been committed before bringing an action. If they believe that a breach is imminent, they may obtain an injunction to restrain the threatened breach. Thus, for example, injunctions have been granted to restrain a sale of trust property for a price lower than that offered by a prospective purchaser;[2] to restrain trustees from distributing an estate contrary to the provisions of the trust instrument;[3] and from selling land held upon trust for sale without appointing a second trustee and without consulting the beneficiary.[4]

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1 *Perrins v Bellamy* [1905] AC 373.
2 *Buttle v Saunders* [1950] 2 All ER 193.
3 *Fox v Fox* (1870) LR 11 Eq 142.
4 *Waller v Waller* [1967] 1 All ER 305.

PERSONAL LIABILITY OF TRUSTEE

A trustee is, in general, liable only for his own breaches of trust and not for those of his co-trustees. There is no vicarious liability in the law of trusts.[5] This principle has been put into statutory form in most jurisdictions:[6]

> A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

It is important to note, however, that the sections do not give a trustee a complete indemnity against breaches committed by his co-trustees. They merely make it clear that a trustee is not vicariously liable for the defaults of his co-trustees. Accordingly, a trustee may be liable for a co-trustee's breach if he was himself at fault by not adequately supervising the co-trustee and by allowing the breach to be committed; for example, where he allows trust money to remain in the sole control of a co-trustee, or where he leaves a matter in the hands of a co-trustee without inquiry.[7] Such conduct on the trustee's part will constitute wilful default for which he will be liable.

A new trustee is not liable for breaches of trust committed before he took up his appointment, for he is entitled to assume that the other trustees have performed their functions correctly.[8] However, he is under a duty, on assuming office, to familiarise himself with the business of the trust, including examining the books and trust documents, and if he discovers a breach of trust he is under a duty to take steps to obtain redress for the trust estate, if necessary by legal action against the defaulting trustees, and he may be liable for failure to do so unless he can show a well-founded belief that such proceedings would have been futile.[9]

A retiring trustee remains liable for any breaches committed by him during his tenure of office, but he is not liable for breaches by his successors unless he retired with knowledge that a particular breach was likely to take place after his retirement. Parker and Mellows explain the position thus:[10]

> It may sometimes happen that a breach of trust may occur shortly after one trustee retires. The retiring trustee will be liable if he contemplated that a breach of trust would occur, and he retired with the intention of facilitating it, or, believing that it would occur, he retired to avoid being involved in it. He is liable because his motive in retiring was to enable the breach of trust to occur. If he merely realised that his retirement would facilitate the breach of trust, he will not *ipso facto* be liable, but he will be liable if, in addition to realising that his retirement would facilitate the breach, he foresaw, or ought reasonably to have foreseen, that such breach would in fact take place. In this case he would be failing in his duty to prevent a breach of trust occurring. It follows that, if the retiring trustee did not foresee what would happen, but the remaining trustees took

5 *Townley v Sherborne* (1634) 123 ER 1181.
6 See, eg, TA 1925, s 30(1) (UK); T Ord, Ch 8, No 3, s 31(1) (Trinidad and Tobago); TA, Cap 236, s 34(1) (Barbados); TA 1975, s 22(1) (Bermuda); Trusts Law 1967 (2009 Rev), s 47 (Cayman Islands); TA, Cap 303, s 31(1) (BVI); TA, s 24 (Jamaica); TA 1998, s 36 (The Bahamas).
7 *Bahin v Hughes* (1886) 31 Ch D 390 (p 216, below).
8 *Re Straham* (1856) 44 ER 402.
9 *Re Forest of Dean Coal Co* (1878) 10 Ch D 450.
10 *Modern Law of Trusts*, 6th edn, 1994, p 578.

> advantage of his absence to perpetrate the breach, the retiring trustee has not himself failed in any of his duties and he will not be liable.

These principles were applied in *Head v Gould*.[11] In this case, property was settled on Mrs H for life, with remainder to her three children. The settlement contained an express power of advancement. Mrs H was continually in financial difficulties and one of her daughters persuaded the trustees to advance capital to her to help her mother. When the daughter's share was exhausted, she pressed for more. The trustees refused to advance more and they decided to retire, suggesting that they be replaced by others who might be willing to make the advances. The trustees were replaced by the daughter and G, a solicitor, who made further advances to help Mrs H, which resulted in the loss of one of the other children's entitlement. It was held that the new trustees were liable for breach of trust, but the retired trustees were not liable, as it had not been shown that the breach committed by the new trustees was in fact contemplated by the old ones when they retired. It was not sufficient that the breach was facilitated by the change in trustees. Although it may be thought that the court produced a fair result in *Head v Gould*, it seems difficult to accept on the facts that the retiring trustees did not foresee the particular breaches which occurred (namely the improper advancements), and on principle they should have been held liable for them.

Measure of liability

An award made in a case of breach of trust is essentially one for restitution of the property lost and not one for damages, as in an action for tort or breach of contract. For instance, the rules relating to the measure of liability for breach of trust in relation to investments may be summarised thus:

(a) If a trustee makes an unauthorised investment (for example, where he has authority to invest in government securities, but he invests in foreign stocks which are sold at a loss), he will be liable for any loss incurred.[12]

(b) If a trustee improperly retains an unauthorised investment, he will be liable for the difference between the price for which it is eventually sold and the price which would have been obtained for it if it had been sold at the proper time.[13]

(c) If a trustee improperly sells authorised investments, he must replace them, or pay the difference between the price received and the cost of replacement.[14] Also, where authorised investments are sold and the proceeds reinvested in unauthorised investments, the trustee is liable for the difference between the amount yielded by the unauthorised investments and the amount which would have been received if the authorised securities had been retained.[15]

Profits and losses

Where a breach of trust results in a profit, the beneficiaries are entitled to claim it as accruing to the trust fund.[16] And where trustees have made several unauthorised investments, some of

11 [1896] 2 Ch 250.
12 *Knott v Cottee* (1852) 51 ER 705.
13 *Fry v Fry* (1859) 71 ER 659.
14 *Re Massingberd's Settlement* (1890) 63 LT 296.
15 *Ibid*.
16 *Docker v Somes* (1834) 39 ER 1095.

which produce a profit and others a loss, the general rule is that the trustees cannot set off the profits against the losses;[17] they will be liable for the losses, and the beneficiaries may claim the profits. However, if the profits and losses result from the same transaction[18] or the same policy decision to adopt a particular course of action, then the profits may be set off against the losses. In *Bartlett v Barclays Bank Trust Co Ltd (No 1)*[19] the defendant bank was held liable for breach of trust in failing to supervise the actions of the board of directors of a private company whose shares were almost wholly owned by the trust. The board had embarked upon two speculative property developments, one of which was a disaster, and the other a success. Brightman J allowed the gains in the successful project to be set off against the losses in the unsuccessful one since, although the gains and losses did not arise out of the same transaction, they did result from the same policy decision, *viz* the decision to embark upon speculative property development. He said:[20]

> I think it would be unjust to deprive the bank of the element of salvage in the course of assessing the cost of the shipwreck.

Interest

Where trustees are in breach of trust, they are liable to replace the amount lost plus interest. The court has a discretion as to the amount of interest it will order and as to whether to charge simple or compound interest. Conventionally, the rate ordered has been 4%, with an increase to 5% where the trustee has been guilty of fraud or misconduct, or where he ought to have received more than 4% (for example, where trustees improperly called in a mortgage which was returning 5%[21]). Recent decisions have recognised that the 4% rate is not consistent with current commercial interest rates, and the courts have awarded interest at 1% above the banks' minimum lending rate in force at the time.[22]

Defences

Where action is brought against a trustee for breach of trust, apart from attempting to refute the allegations, he may rely on certain defences.

Acquiescence of beneficiary

If a beneficiary (a) *participated* in, (b) *affirmed*, (c) *acquiesced* in, or (d) *released* the trustees from a breach of trust, he will be precluded from bringing an action in respect of the breach, provided the beneficiary was *sui juris* and had full knowledge of all material facts.[23] Such beneficiary cannot be heard to complain of a breach of trust which he himself authorised, but this does not preclude the other non-acquiescing beneficiaries from bringing an action.

17 *Dimes v Scott* (1827) 38 ER 778.
18 *Fletcher v Green* (1864) 55 ER 433, 467.
19 [1980] 1 All ER 139.
20 *Ibid* at 155.
21 *Jones v Foxall* (1852) 51 ER 588.
22 See *O'Sullivan v Management Agency and Music Ltd* [1985] 3 All ER 351; *Guardian Ocean Cargoes Ltd v Banco do Brasil (No 3)* [1992] 2 Lloyd's Rep 193.
23 *Fletcher v Collis* [1905] 2 Ch 24; *Marley v Mutual Security Merchant Bank and Trust Co* (1993) 30 JLR 390 (Court of Appeal, Jamaica), where the beneficiaries had ratified certain deposits by the trustee bank with itself, which allegedly amounted to self-dealing.

Impounding beneficiary's interest

A trustee who has committed a breach of trust at the *instigation* or *with the consent* of a beneficiary may claim to have the beneficiary's interest impounded to rectify the breach. This right exists both in equity and under TA 1925 (UK), s 62 and its equivalents in Commonwealth Caribbean jurisdictions.[24] The differences between the equitable and the statutory rights are that:

(a) the equitable right to impound in cases of *consent* to a breach arises only where the beneficiary has obtained a benefit from the breach (it is available in cases of instigation irrespective of benefit);[25] the statutory right, on the other hand, is available irrespective of benefit in any case; and

(b) the statutory right to impound in cases of *consent* is available only if the consent is *in writing;* the equitable right does not depend upon writing in any case.[26]

In order that the court may exercise its discretion under the statutory power, it must be proved that the beneficiary knew that what he was instigating, requesting or consenting to was a breach of trust; it is not sufficient that he merely requested the trustees to do some act which he did not know to be a breach of trust, leaving them to decide whether or not to do it. In *Re Somerset*[27] a husband who was entitled under a marriage settlement wrote to the trustees requesting that they sell part of the trust assets and invest the proceeds in a mortgage of certain land. The trustees complied with the request, but lent an excessive amount on mortgage, and, as a consequence of the inadequacy of the security, the trust suffered a loss. The husband and his children brought an action against the trustees, who admitted the breach but claimed to impound the husband's beneficial interest. It was held that although the husband had clearly requested and consented to the investment in the mortgage, it did not appear that he intended to be a party to the breach of trust as he had left it to the trustees to decide whether or not the property was an adequate security. Accordingly, his interest would not be impounded. Lindley LJ explained the decision thus:[28]

> If a *cestui que trust* instigates, requests or consents in writing to an investment not in terms authorised by the power of investment, he clearly falls within the section: and in such a case his ignorance or forgetfulness of the terms of the power would not, I think, protect him – at all events, not unless he could give some good reason why it should, for example, that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, request or consent in writing to an investment which is authorised by the terms of the power, the case is, I think, very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him unless they can show that he instigated, requested or consented in writing to their non-performance of their duty in this respect. This is, in my opinion, the true construction of this section.

Limitation of actions

Actions against trustees for breach of trust become statute-barred after the expiration of the period specified in the particular limitation statute. For instance, in the United Kingdom such

24 See T Ord, Ch 8, No 3, s 63 and TA 1981, s 73 (Trinidad and Tobago); TA, s 50 (Jamaica); TA, Cap 250, s 70 (Barbados); TA, Cap 303, s 64 (BVI); Trusts Law 1967 (2009 Rev), s 68 (Cayman Islands); TA 1975, s 53 (Bermuda); TA 1998, s 74 (The Bahamas).
25 *Chillingworth v Chambers* [1896] 1 Ch 685.
26 TA, Cap 202, s 55 (Belize) provides for impounding with no requirement of writing.
27 [1894] 1 Ch 231.
28 *Ibid* at 265.

actions become statute-barred 'six years from the date on which the right of action accrued'.[29] In Belize, this period is 'three years from delivery of the final accounts of the trust, or three years from the date on which the plaintiff first has knowledge of the breach of trust, whichever period first begins to run'.[30] In Trinidad and Tobago, this period is 'four years from the date on which the right of action has accrued'.[31]

The majority of the statutes also provide that no period of limitation applies where the action is in respect of a fraudulent breach of trust, or where the action is to recover from the trustee trust property or its proceeds in the possession of the trustee, or previously received by him and converted to his use.

Relief from liability

Section 61 TA 1925, which has been reproduced in several Commonwealth Caribbean jurisdictions,[32] provides as follows:

> If it appears to the court that a trustee . . . is or may be personally liable for any breach of trust . . . but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

It has been pointed out that the court has a very wide discretion under the section, and 'it would be impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section . . . Each case must depend upon its own circumstances'.[33]

In order to be granted relief, the trustee:

(a) must have acted honestly;
(b) must have acted reasonably; and
(c) ought fairly to be excused for the breach.

'Honestly' in this context means 'in good faith',[34] but Kekewich J seems to have envisaged a more stringent standard by characterising as 'dishonest' 'a trustee who does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations'[35] – attributes which suggest gross carelessness rather than dishonesty.

'Reasonably' probably means 'according to the standard of the prudent man of business managing his own affairs' (that is to say, the *Speight v Gaunt*[36–37] standard). The amount of money involved may be a relevant factor in assessing relief. In *Re Kay*,[38] for instance, the executor/trustee of a will sought relief. The testator had left more than £22,000, with apparent liabilities of only about £100. Before advertising for claims, the executor paid to the testator's widow a legacy of £300, believing that it was safe to do so in view of the large sum left by the testator.

29 Limitation Act 1980, s 21(3).
30 Trusts Act, Cap 202, s 56(2).
31 T Ord, Ch 8, No 3, s 66(1). See *Cox v Prescott* (1985) High Court, Trinidad and Tobago, No 95 of 1981 (unreported).
32 Eg, T Ord, Ch 8, No 3, s 62 and TA 1981, s 72 (Trinidad and Tobago); TA, Cap 202, s 54 (Belize); TA, Cap 236, s 69(1) (Barbados); TA 1975, s 52(1) (Bermuda); Trusts Law 1967 (2009 Rev), s 67 (Cayman Islands); TA, Cap 303, s 63 (BVI); TA, s 44 (Jamaica); TA 1998, s 73 (The Bahamas).
33 *Re Turner* [1897] 1 Ch 536 at 542, *per* Byrne J.
34 Parker and Mellows, *Modern Law of Trusts*, 6th edn, p 597.
35 *Re Second East Dulwich Building Society* (1899) 79 LT 726 at 727.
36–37 (1883) 9 App Cas 1.
38 [1897] 2 Ch 518.

Later, however, the executor discovered that the testator's liabilities exceeded the value of the estate, and the estate was really insolvent. It was held that the executor would be granted relief from liability for breach of trust as it was reasonable for him to assume that liabilities would not exceed the value of so large an estate, and that he could safely pay the legacy. On the other hand, in *Re Rosenthal*,[39] a solicitor/trustee transferred property to a beneficiary under the will without ensuring that the beneficiary paid the estate duty due on the property, and he later improperly used £270 of residue in partial payment of the duty. It was held that he could not be granted relief under s 61 since, although he had acted honestly, he had not acted reasonably and had not shown that he ought fairly to be excused. Account was taken of the fact that the trustee was a paid professional of whom, as will be seen, a higher standard of conduct is expected.

'Ought fairly to be excused'—notwithstanding that trustees have acted honestly and reasonably, the court may decide that they ought not to be excused. 'The question is essentially a matter within the discretion of the judge',[40] and in considering whether it is fair to excuse the trustee, the court will consider the consequences not only for the trustee himself but also for the beneficiaries and the creditors.

A Jamaican example of an application for relief is *Davis v Administrator-General*,[41] where the court found the Administrator-General guilty of certain breaches of trust in relation to an estate of which he was trustee for sale. These breaches included failure to give information to the beneficiaries, failure to keep proper accounts, and failure to maintain and manage the trust property. It was argued on behalf of the Administrator-General that he had acted honestly and reasonably and ought fairly to be excused under s 44 Trustee Act, Cap 393. Douglas J said that:

> . . . in *National Trustee Co of Australasia v General Finance Co of Australasia*[42] it was pointed out that it is a very material circumstance that the trustee is a trustee for remuneration. As Harman J said in *Re Waterman's Will Trusts*:[43] 'A paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee.' What are the circumstances in which the Administrator General asks the court to hold that he ought fairly to be excused? He entered on this straightforward trust in 1960. He waited fourteen months before seeking a valuation and two years before advertising, in an inadequate way, the sale of this large property. Throughout his stewardship, he failed to deal in any businesslike way with enquiries from interested persons. He failed to see that proper estate accounts were kept, and did nothing to supervise the work of his overseer, and he allowed the property to continue its decline. In my view, he seems to have adopted an attitude of indifference as to whether frustration or loss was occasioned to aged and impecunious beneficiaries. In any trustee, so many failings would be deplorable—in a public trustee for remuneration, they constitute unreasonable conduct and are inexcusable.

The defendant could not, therefore, rely on s 44.

Another example is the Trinidadian case of *Ramdin v Maharaj*.[44] Here the defendants were the executors and trustees of the deceased's estate, which included a two-storey building. The defendants were unable to co-operate with one another in the administration of the trust, and this led to the management of the trust property being neglected. The trustees made no attempt to sell or let the building, and it eventually became derelict.

39 [1972] 3 All ER 552.
40 *Marsden v Regan* [1954] 1 All ER 475 at 482, *per* Evershed MR.
41 (1965) 9 JLR 200.
42 [1905] AC 373.
43 [1952] 2 All ER 1054 at 1055.
44 (1985) High Court, Trinidad and Tobago, No 171 of 1978 (unreported).

Edoo J held that the trustees were guilty of wilful default and could not rely on s 62 Trustee Ordinance, Ch 8, No 3, whereby a trustee who has acted honestly and reasonably may be relieved from liability by the court. He said:

> There is little doubt that, on obtaining probate of the will of the deceased, the defendants became trustees of the estate for all intents and purposes, with all the duties and powers and subject to the liabilities attendant on such an office.
>
> How a trustee should deal with trust property is succinctly stated in this passage taken from the judgment of Lord Blackburn in *Speight v Gaunt:*[45]
>
> 'The authorities cited by the late Master of the Rolls I think show that, as a general rule, a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which any ordinary prudent man of business would take in managing similar affairs of his own . . .'
>
> I have already given my findings as to the condition of the building at the time of Ramdin's death. The ideal conduct on the part of the defendants would have been to get together and determine what was best in the circumstances, whether to sell the property or have it let so as to produce an income necessary to sustain the infant plaintiffs in some measure. Their failure to take any such steps fell woefully short of what was required of them as trustees. They failed to act in the manner of prudent businessmen managing their own affairs (see *Speight v Gaunt* (above)).
>
> In *Bartlett v Barclays Bank Trust Co Ltd (No 2)*,[46] Brightman LJ gave a definition of the term 'wilful default' which is appropriate to the circumstances of this case, *viz:*
>
> 'Wilful default by a trustee in this context means a passive breach of trust, an omission by a trustee to do something which, as a prudent trustee, he ought to have done, as distinct from an active breach of trust, that is to say, doing something which the trustee ought not to have done. If an instance of such wilful default is pleaded and proved . . . the court is entitled to order an account on the footing of wilful default.'
>
> The context in which these words were used was in relation to an application for a declaration that the bank was liable to make good the loss suffered in consequence of the enjoyment by directors (or their families) of residential accommodation at less than the full market value. *A fortiori* would trustees who stand by and allow property to go to waste be guilty of breach of trust on the footing of wilful default.
>
> Counsel for the defendants in their addresses sought to rely on section 62 of the Trustee Ordinance, Ch 8, No 3, which states as follows:
>
> 'Section 62. If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Ordinance, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court on the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.'
>
> This provision in the Ordinance is a statutory rule originally introduced by s 3 of the Judicial Trustees Act 1896 (UK). It is now contained in s 61 of the Trustee Act 1925 (UK).
>
> To rely on the provision, however, it is necessary for the trustee to prove that he has acted honestly and reasonably with respect to the trust property. The decided cases show that in order to be excused or to obtain relief from the court, the trustee must show that he has acted honestly and reasonably in the administration of, or in his dealings with, the trust property. The provision is not applicable where the trustee stands passively by and allows the trust property to go to waste as has been the case here. I have no hesitation in ruling out this defence.

45 (1883) 9 App Cas 1 at 19.
46 [1980] 2 All ER 92 at 99.

Trustee exemption clauses

The extent to which a trustee may avoid liability by means of an exemption clause in the trust instrument is not free from doubt. Certainly, it is established (i) that an exemption clause will be construed strictly against the trustee, and (ii) that it is against public policy to allow a trustee to be exempted from the consequences of his fraud. However, it remains unclear whether a trustee can be exempted from liability for loss caused by a deliberate act done with good intentions but in circumstances where, objectively, the act would be regarded as reckless, and indeed whether liability for a breach of trust caused by a trustee's recklessness, falling somewhere between gross negligence and dishonesty, can validly be excluded by an exemption clause.[47]

The scope and effect of trustee exemption clauses was discussed by Millett LJ in *Armitage v Nurse*,[48] where a clause in the settlement provided that 'No trustee shall be liable for any loss or damage which may happen . . . from any cause whatsoever unless such damage or loss shall be caused by his actual fraud.' As a matter of construction, the English Court of Appeal first held that the clause exempted the trustee from liability 'for loss or damage to the trust property, no matter how indolent, imprudent, lacking in diligence, negligent or willful he may have been, so long as he has not acted dishonestly'. The Court took the view that a clause excluding a trustee's personal liability in all situations, including loss caused by his gross negligence, would be valid and would protect a trustee, so long as he was not guilty of dishonesty. In *Armitage*, the trustees of the settlement were also directors of a company which farmed agricultural land forming part of the trust estate. The value of the land had depreciated considerably, allegedly owing to negligent management by the trustees. It was held that the trustees could rely on the exemption clause. Lord Millett said:[49]

> I accept . . . that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust. If the beneficiaries have no rights enforceable against the trustees, there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient . . . The submission that it is contrary to public policy to exclude the liability of a trustee for gross negligence is not supported by any English or Scottish authority . . . At the same time, it must be acknowledged that the view is widely held that these clauses have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence should not be able to rely on a trustee exemption clause excluding liability for gross negligence.

Contribution and indemnity

Where two or more trustees are liable for a breach of trust, their liability is joint and several, and any or all of them may be sued by the beneficiaries. Moreover, judgment may be executed

47 In *Walker v Stones* [2001] QB 902, it was held that a solicitor-trustee of a discretionary trust could not rely on an exemption clause covering defaults other than 'wilful fraud or dishonesty', where he had committed a deliberate breach of trust, honestly believing it to be in the interests of the beneficiaries, but in circumstances where no reasonable solicitor-trustee could have held such belief. See also *Barraclough v Mell* [2006] WTLR 203; *Lemos v Coutts and Co (Cayman) Ltd* [2003] CILR 381 at 403.

48 [1998] Ch 241.

49 *Ibid*, at 253–254. The *Armitage* approach has been followed in subsequent cases, such as *Bogg v Raper* (1998/99) 1 ITELR 267; *Wight v Olswang (No 2)* (1999/2000) 2 ITELR 689; *Baker v J E Clark & Co* [2006] EWCA Civ 464.

against any of them. The purpose of contribution is to ensure that each defaulting trustee bears his share of the loss; in certain cases, however, one trustee may be required to indemnify the other or others, that is to say, he will be required to pay both his own and the others' shares.

The equitable rule is that all trustees liable for loss must bear that loss equally, and if one has been called upon to pay more than his share, he can claim a contribution from the others.[50] On the other hand, one trustee, X, may be ordered by the court to indemnify the others in the following circumstances:

(a) Where X was fraudulent[51] or entirely to blame for the breach, or where he obtained all the benefit from the breach; however, it is important to note that where 'sleeping trustees' leave decision making to an active trustee, who commits a breach, the sleeping trustees will not be entitled to be indemnified by the active one, as they will themselves have been responsible for the breach through their inactivity. This is illustrated by *Bahin v Hughes*.[52] There, a testator left a sum of money to be held upon trust by his daughters H, E and B for the benefit of X for life, remainder to X's children. H managed the trust affairs alone, without the participation of E or B, and she invested the funds in an unauthorised mortgage. The security proved to be inadequate and the trust incurred a loss. E and B claimed an indemnity from H on the ground that they had not participated in the breach. The indemnity was refused by the court as it would be unjustifiable to award an indemnity where one trustee, acting honestly, though erroneously, commits a breach while the other trustees stand by passively and thereby neglect their duty more than the active trustee.

(b) Where X was an attorney or solicitor whose advice or control was relied upon by the other trustees, and the breach was committed on his advice.[53]

(c) Where X is also a beneficiary under the trust, his beneficial interest may be impounded to make good the loss as far as possible before the other trustees are required to contribute anything.[54]

In Barbados, the Civil Liability Contribution Act, Cap 194B, which is modelled on the identically named UK Act of 1978, has altered the equitable rule by providing that the amount recoverable against any defendant (including a trustee who is in breach of trust) shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question. In other words, the court is given a discretion as to what amount each defaulting trustee must contribute; but the Act does not apply where one trustee is entitled to indemnity.

TRACING TRUST PROPERTY

An action against a defaulting trustee to recover the loss suffered by the trust estate is a personal action and will depend for its success on the solvency of the individual trustee. If, owing to insolvency or bankruptcy, the trustee is unable to satisfy a judgment awarded against him, the beneficiaries may resort to tracing the trust property, a proprietary remedy which does not depend for its effectiveness on the solvency of the trustee. Tracing enables the beneficiaries to

50 *Bahin v Hughes* (1886) 31 Ch D 390.
51 *Re Smith* [1896] 1 Ch 171.
52 (1886) 31 Ch D 390.
53 *Re Partington* (1887) 57 LT 654.
54 *Chillingworth v Chambers* [1896] 1 Ch 685.

recover the trust property itself, or the proceeds of such property, not only as against the trustee himself but also as against any person into whose hands the trust property has come, other than a *bona fide* purchaser for value of a legal estate in the property having no notice of the interests of the beneficiaries. Thus, for instance, if a trustee in breach of trust mixes trust money with his own money in a bank account and later becomes bankrupt, his trustee in bankruptcy will be in no better position then he is vis-à-vis the money, and the beneficiaries will be able to recover the trust funds by tracing into the account.

For tracing to be available in equity there are three requirements:

(a) an initial fiduciary relationship;
(b) property in traceable form; and
(c) no inequitable result.

Fiduciary relationship

The requirement of an initial fiduciary relationship will clearly be satisfied where a trustee misappropriates or deals wrongfully with trust funds. The relationship need only be initially fiduciary, so that where, for example, a trustee distributes trust funds to C when he should have paid them over to B, B can trace against the funds in the hands of C or any other person to whom C has transferred them, as there was an initial fiduciary relationship between the trustee and B. The initial fiduciary relationship will be present whether the trustee was an express, resulting or constructive trustee.

Fiduciary relationships are not confined to the trustee/beneficiary relationship, and they may arise from transactions between parties who might ordinarily be treated as debtor and creditor. In the leading case of *Sinclair v Brougham*,[55] a building society, on being wound up, was found to have operated an *ultra vires* banking business. There were insufficient funds to meet the claims of both the shareholders and the depositors in the banking business. The depositors claimed to be able to trace into the general assets of the building society, and the House of Lords upheld the claim on the ground that an initial fiduciary relationship existed between the depositors and the directors of the society, even though the relationship between the parties would ordinarily have been treated as one of creditor/debtor.

A tracing claim can be brought against personal representatives in respect of a wrongful distribution of property in the course of the administration of an estate, as the personal representatives stand in a fiduciary relationship with all those who are interested in the deceased's estate. In *Ministry of Health v Simpson*[56] the next of kin were held entitled to trace. Unpaid creditors of the deceased can also trace, since the personal representatives stand in a fiduciary position towards them for the payment of debts.

Traceable property

Tracing is possible only where there is traceable property, as explained by Lord Greene MR:[57]

> The equitable remedies presuppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on

55 [1914] AC 398.
56 [1950] 2 All ER 1137.
57 *Re Diplock* [1948] 2 All ER 318 at 347.

> the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent on a dinner, equity, which dealt only in specific relief and not in damages, could do nothing.

A common situation is where a trustee or a recipient from a trustee pays trust money into a bank account where it becomes mixed with other money. The consequences may be summarised as follows:

(a) Where a trustee mixes trust money with his own money in an active bank account (for example, where he pays in $20,000 trust money together with $10,000 of his own money), it is for the trustee to prove what proportion of the mixed fund belongs to him, otherwise the whole will be treated as trust property. Assuming, in this example, that the trustee can prove that $10,000 was his own money, the beneficiaries can trace against and recover the $20,000, as they will be treated as having a charge on the mixed fund for that amount.[58]

(b) Where a trustee draws money out of his account to purchase an asset, a distinction is drawn between the situation where only the trust money is used to buy the asset and where both the trust money and the trustee's own money are used in the purchase. In Jessel MR's words:[59]

> I will, first of all, take his (the beneficial owner's) position when the purchase is clearly made with what I will call, for shortness, the trust money . . . In that case . . . the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase . . . he is entitled at his election to take either the property, or to have a charge on the property for the amount of the trust money . . . But . . . where the trustee has mixed the money with his own . . . the beneficial owner can no longer elect to take the property, because it is no longer bought with trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee . . .

(c) Where a trustee draws money out of an account in which he has mixed trust money with his own money, according to the rule in *Re Hallett's Estate*[60] he is deemed to draw his own money out first so as to leave the trust money as intact as possible. Thus, for example, if T pays $10,000 trust money into an account and later pays in $10,000 of his own money and he then withdraws $10,000 which he spends on a holiday, he is deemed to have drawn out and dissipated his own $10,000, so that the remaining $10,000 is treated as trust money and can be claimed by the beneficiaries.

(d) The rule in *Re Hallett's Estate* was qualified in *Re Oatway*,[61] where a trustee paid £3,000 trust money into his bank account which then had substantial funds. He then withdrew £2,137 to purchase shares and later dissipated the balance of the account. He died insolvent, and his executors claimed that the shares belonged to him because, under the rule in *Re Hallett's Estate*, he must be deemed to have drawn out his own money first in order to purchase the shares. This argument was rejected, and it was held that the beneficiaries were entitled to a charge over the whole mixed fund and anything purchased with it. They could therefore assert their claim to the shares.

58 *Brinks Ltd v Abu-Saleh* [1995] 4 All ER 65; *Universal Investment Bank v Lawla* (1997) Supreme Court, Jamaica, No CL U-005 of 1996 (unreported).
59 *Re Hallett's Estate* [1874–80] All ER Rep 793 at 796.
60 *Ibid*.
61 [1903] 2 Ch 356.

(e) Where a trustee, having dissipated the mixed fund, later pays into the account money of his own, the money will not be treated as belonging to the trust unless the trustee showed an intention to replace trust money.[62] For example, T pays $10,000 of trust money into his bank account which has a zero balance at the time, then dissipates $8,000, leaving a balance of $2,000. He later pays in $10,000 of his own money. The beneficiaries can claim only the $2,000 left before the $10,000 was paid in (the 'lowest intermediate balance') and not $10,000. The rule is designed to take into account the interests of the trustee's general creditors on the insolvency of the trustee.

(f) Where the trustee gives trust money to an 'innocent volunteer' (that is to say, a recipient having no notice that it is trust money) who mixes it with his own money in a bank account, the rule in *Clayton's Case*[63] applies, which is that withdrawals from the account are deemed to have been made in the order of payment in (in other words, 'first in, first out'). For example, T, a trustee, wrongly gives V, an innocent volunteer, $10,000 of trust money, which V pays into his bank account already containing $5,000 of his own money, and then withdraws and spends $6,000 in the purchase of shares and $6,000 on living expenses. Applying the 'first in, first out' rule, the balance of $3,000 will be trust money. The same rule applies where a trustee mixes funds belonging to two or more trusts.

(g) Where a trustee mixes moneys belonging to two separate funds of which he is a trustee or other fiduciary agent, the basic rule is that the beneficiaries of the separate funds will share *pari passu*,[64] with neither gaining priority. However, it has been held that where the mixing is in a single bank account, the rule in *Clayton's Case* applies.[65]

(h) Where trust funds, against which the beneficiaries have a right to trace, have been applied *unmixed*, and have yielded substantial profits, the question will arise as to who is entitled to the profits. The position seems to be that where a trustee uses trust money and makes a profit, for example, where he uses trust money to buy shares which double in value, he holds the shares and any accretions thereto upon a constructive trust for the beneficiaries, since a trustee may not profit from the trust. On the other hand, where an innocent volunteer makes profits from an unmixed fund, he will only be obliged to return the sum he received and not the profits, as he is not in a fiduciary relationship with the beneficiaries.

(i) Where a trustee or an innocent volunteer mixes trust money with his own money and uses the mixed fund to purchase an asset which increases in value, it seems that in the case of a trustee who has acted dishonestly or in wilful breach of trust, he should disgorge the whole profit, but in other cases only that part of the profit which is proportionate to the original claim of the beneficiaries will be subject to a charge.[66] Thus, for example, if T, a trustee, gives $10,000 of trust money to V, an innocent volunteer, who uses it, together with $10,000 of his own money, to purchase $20,000 worth of shares, and the shares produce dividends of $2,000 and are eventually sold for $30,000, the profits will be divided equally between V and the beneficiaries tracing the $10,000 trust money.

The tracing remedy has been considered in a number of Commonwealth Caribbean cases. In *Amerasia Industrial Corporation v Rasco*,[67] for instance, the defendant, who was the vice-president,

62 *Roscoe v Winder* [1915] 1 Ch 62.
63 (1816) 35 ER 781.
64 *Re Diplock* [1948] 2 All ER 318; *Barclays Bank plc v Kenton Capital Ltd* [1994–95] CILR 489 at 500 (Grand Court, Cayman Islands).
65 *Re Stenning* [1895] 2 Ch 433.
66 *Re Tilley's Will Trusts* [1967] Ch 1179; *Foskett v McKeown* [2001] 1 AC 102.
67 [1980–83] CILR 133 (Grand Court, Cayman Islands).

secretary and a member of the board of directors of the plaintiff company, fraudulently misappropriated US $265,000 from the company and paid the amount into his and his wife's joint bank account. The sole question was whether the company could trace the amount and recover it from the account. The court answered this question in the affirmative. Sir John Summerfield QC said:

> The principles that apply are clear and can be conveniently extracted from the headnote in *Re Hallett's Estate*.[68] They are:
>
> 'If money held by a person in a fiduciary character, though not as trustee, has been paid by him into his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands.
>
> If a person who holds money as a trustee or in a fiduciary character pays it into his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case*,[69] attributing the first drawings out to the first payments in, does not apply; the drawer must be taken to have drawn out his own money in preference to the trust money.'
>
> There can be no doubt that Brown and Rasko in their capacity as president and vice-president and directors of Amerasia, occupied a fiduciary position in relation to that company and the company's funds are impressed with the qualities of a trust fund.
>
> It follows that Amerasia can follow the misappropriated funds into the account of Rasko with the trust company and has a charge on the balance in the trust company's hands. Rasko's drawings of any nature and for any purpose (other than by way of direct refund to Amerasia) must be taken to have been drawn out of his own money in preference to the trust money.
>
> As the balance, at the time when the account was frozen, was less than the total amount misappropriated and paid into that account, the whole of that balance is due and payable to Amerasia. Equally, the interest earned on that balance since the account was frozen was interest on the 'trust' money and is due and payable to Amerasia. Rasko cannot be allowed to profit from his wrongdoing.

In *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd*[70] the Mercantile Bank and Trust Co Ltd (MBT) was appointed trustee of a settlement which contained a clause empowering the trustee 'to open and maintain one or more savings accounts or current accounts . . . with any bank . . . even if . . . such bank . . . shall be acting as trustee . . . and to deposit to the credit of such account or accounts all or any part of the funds belonging to the trust. . . .' It was not disputed that the effect of the clause was to empower MBT as trustee to deposit trust money with itself as banker. When MBT went into liquidation, the question arose as to whether trust money which MBT had deposited with itself as banker was still impressed with a trust in favour of the beneficiaries, so that the beneficiaries could trace the money and thereby gain precedence over the bank's unsecured creditors.

It was held by the Privy Council that the beneficiaries had no right to trace the trust money since the money had become the property of the bank. The beneficiaries were merely entitled to claim as unsecured creditors for the amount standing to the credit in the trust deposit account at the date of the liquidation.

Lord Templeman said:

> The question is whether, in the winding up of an insolvent bank trustee, the liquidator must pay the trust deposit accounts lawfully maintained by the bank trustee in priority to payment of the

68 [1874–80] All ER Rep 793.
69 (1816) 35 ER 781.
70 [1986] 3 All ER 75 (Privy Council appeal from The Bahamas).

customers' deposit accounts and the debts owed by the trustee bank to other unsecured creditors.

A customer who deposits money with a bank authorises the bank to use that money for the benefit of the bank in any manner the bank pleases. The customer does not acquire any interest in or charge over any asset of the bank or over all the assets of the bank. The deposit account is an acknowledgment and record by the bank of the amount from time to time deposited and withdrawn and of the interest earned. The customer acquires a chose in action, namely the right on request to payment by the bank of the whole or any part of the aggregate amount of principal and interest which has been credited or ought to be credited to the account. If the bank becomes insolvent, the customer can only prove in the liquidation of the bank as unsecured creditor for the amount which was, or ought to have been, credited to the account at the date when the bank went into liquidation.

On the other hand, a trustee has no power to use trust money for his own benefit unless the trust instrument expressly authorises him so to do. A bank trustee, like any other trustee, may only apply trust money in the manner authorised by the trust instrument, or by law, for the sole benefit of the beneficiaries and to the exclusion of any benefit to the bank trustee unless the trust instrument otherwise provides. A bank trustee misappropriating trust money for its own use and benefit without authority commits a breach of trust and cannot justify that breach of trust by maintaining a trust deposit account which records the amount which the bank has misappropriated and credits interest which the bank considers appropriate. The beneficiaries have a chose in action, namely, an action against the trustee bank for damages for breach of trust and in addition they possess the equitable remedy of tracing the trust money to any property into which it has been converted directly or indirectly.

But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee to protect the interests of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation, that equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors. This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settlor of the trust and the beneficiaries interested under the trust never accept any risks involved in the possible insolvency of the trustee bank. On the contrary, the settlor could be certain that if the trusts were lawfully administered, the trustee bank could never make use of trust money for its own purposes and would always be obliged to segregate trust money and trust property in the manner authorised by law and by the trust instrument free from any risks involved in the possible insolvency of the trustee bank. It is therefore equitable that where the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially, merely acknowledging and recording the amount in a trust deposit account with the bank, then the claims of the beneficiaries should be paid in full out of the assets of the trustee bank in priority to the claims of the customers and other unsecured creditors of the bank.

Although, as a general rule, a trustee is not allowed to derive a benefit from trust property, that general rule may be altered by the express terms of the trust instrument. One illustration is an express provision in a settlement which permits a trustee to charge and deduct from trust money remuneration for the services of the trustee. A settlement may also confer on a trustee power to make use of trust money in other ways. Certain of the settlements of which Mercantile Bank and Trust Co Ltd ('MBT') was appointed trustee conferred power on MBT: 'To open and maintain one or more savings accounts or current accounts . . . with any bank . . . even if . . . such bank . . . shall be acting as trustee . . . to deposit to the credit of such account or accounts all or any of the funds belonging to the trust fund whether or not such funds may earn interest from time to time . . . [and] to withdraw a portion or all of the funds so deposited . . .'

The trial judge, Da Costa CJ, sitting in the Supreme Court of the Commonwealth of The Bahamas held, the Court of Appeal (Luckhoo P, Smith and Zacca JJA) agreed, and it is not

disputed that: 'The effect of that clause was clearly to empower MBT as trustee to deposit with MBT as banker moneys that they received in trust.'

The effect of the clause was also to empower MBT to treat trust money so notionally deposited as if MBT were beneficially entitled to the trust money, just as MBT was entitled to treat customers' money deposited with MBT as if MBT were beneficially entitled to that money. Trust money deposited with MBT as banker and customers' money deposited by customers with MBT as banker were alike lawfully available to MBT for payment of MBT's expenses, for making investments for the benefit of MBT, and in any other manner for the benefit of MBT as money belonging absolutely and beneficially to MBT, to be disposed of without regard to the interests of beneficiaries or customers.

When a customer deposited money with MBT and the amount of the customer's money was credited to a customer's deposit account, the customer did not become entitled to any interest in any asset or in all the assets of MBT. The sole right of the customer was to be paid at his request a sum equal to the amount standing to the credit of his deposit account. There was nothing to trace.

When MBT as trustee lawfully deposited trust moneys with MBT as banker pursuant to the authority in that behalf conferred by the settlement, and the amount of the trust fund so deposited was credited to a trust deposit account, the beneficiaries interested under the trust did not become entitled to any interest in any asset or in all the assets of MBT. The sole right of the beneficiaries was for a sum equal to the amount standing to the credit of the trust deposit account, to be applied by MBT in any manner authorised or requested by the settlement or by law as and when MBT decided to make such application in the proper exercise and discharge of its discretionary powers and duties in the due course of administration of the trust. If MBT ceased to be trustee and a new trustee were appointed then it would be for the new trustee to decide whether to close the trust deposit account with MBT and to require MBT to pay to the new trustee the amount standing to the credit of the trust in the MBT trust deposit account. There would be nothing to trace.

When MBT became insolvent and went into liquidation, the beneficiaries were entitled to obtain and have obtained the appointment of a new trustee in the place of MBT. The new trustee can only prove in the winding-up of MBT for the amount standing to the credit of the trust with MBT in the trust deposit account at the date of liquidation. The claim of the new trustee will be as an unsecured creditor ranking *pari passu* with the claims of a customer proving for the amount standing to his credit with MBT in the customer's deposit account.

There is no justification for the intervention of equity. The settlor has allowed trust money to be treated as if it were customer's money. The settlor has allowed MBT to appropriate trust money and to treat the trust money as belonging absolutely and beneficially to MBT. By depositing money with MBT a customer accepted the risk of MBT's insolvency. By allowing MBT to treat trust money as a deposit with MBT the settlor accepted the risk of MBT's insolvency. In these circumstances it would be inequitable if the trust were in a better position than the customer.

The trust fund did not continue to be the money transferred into the banking business of MBT. The trust fund became the obligation of MBT to treat the trust deposit account with MBT as banker in the same manner as MBT would have dealt with a deposit account credited with trust money lawfully transferred and deposited by MBT as trustee with another independent bank as banker. On the insolvency of that independent bank the trustee MBT could only rank as unsecured creditor for the amount of the deposit account. Similarly, on the insolvency of MBT which lawfully appropriated trust money to itself and credited the amount of the moneys so appropriated to a trust deposit account, the new trustee of the trust can only rank as an unsecured creditor on behalf of the trust.

On the other hand, in *Re Mercantile Bank and Trust Co Ltd*,[71] MBT as trustee had deposited funds belonging to the Van Am Trusts, totalling $750,000, with the Central European Bank (CE), an affiliate of MBT, as it was empowered to do by the trust instrument, but on terms unfavourable

71 (1990) 3 Carib Comm LR 262.

to the trust. On the liquidation of MBT, the new trustee of the Van Am Trusts sought to trace the funds for the beneficiaries. It was held that the funds were traceable because the purpose of banking with CE was not to benefit the beneficiaries but to alleviate MBT's liquidity problems, which amounted to a breach of trust. Smith J,[72] in the Supreme Court of the Bahamas, took the view that:

> . . . it was incumbent on MBT, as trustee, to have done all that was necessary to avoid the possibility of the arrangement adversely affecting the trust funds . . . MBT did not, and the Van Am Trusts were subsequently deprived of [the trust] funds . . . Freedom from liability in choosing any bank to use as a depository for trust funds does not prevent the act of choosing from being a breach of trust when the choice was for the reason MBT had, and it turns out to be something that is contrary to what MBT ought to have done as trustee . . . The funds here were impressed with the Van Am Trusts, and MBT, as trustee, acted in breach of trust by depositing them with CE with troublesome strings attached. If the funds had been banked by MBT without the arrangements MBT had with CE, it could have been legitimately said that MBT was banking the trust funds with CE as it was entitled to do; and there might not have been any possibility of tracing.

72 *Ibid* at 266.

CHAPTER 15

OFFSHORE TRUST DERIVATIVES AND AFFILIATES

The trust, as explained previously, originated under Common Law with the three components of settlor, trustee and beneficiary. The absence of a beneficiary would therefore cause the trust to fail; and, in a similar vein, a trust created for a purpose rather than for a beneficiary was not valid unless the purpose was charitable. The trend developed where businesses began to use charities as the ultimate but inconsequential beneficiaries in their financial planning by way of trust structures. The offshore financial centres have taken the concept to its logical and expected extension by authorising a trust for non charitable purposes.

Many of the Caribbean off-shore jurisdictions, with the exception of the Turks and Caicos Islands, have introduced legislation validating non-charitable purpose trusts, in certain defined circumstances. Section 12(2)(a)(iii) of Turks and Caicos Trust Ordinance 1990 retains the rules that a non-charitable purpose trust created for a purpose in relation to which there is no beneficiary is invalid and unenforceable.

Bermuda was in the forefront of purpose trust legislation and Part II of its Bermuda Trusts (Special Provisions) Act 1989 introduced the purpose trust which expanded the concept of a trust as it existed at the time in English law.

A trust for 'purpose or purposes' was there defined in the negative as:

> a trust other than a trust:
>
> (a) is for the benefit of particular persons whether or not immediately ascertainable; or
>
> (b) that is for the benefit of some aggregate of persons ascertained by reference to some personal relationship.

The purpose trust could be validly created for a purpose or purposes, whether charitable or not, subject to certain criteria inter alia, that:

(a) the purpose or purposes are specific, reasonable and possible;

(b) the purpose or purposes or purposes are not contrary to public policy or unlawful;

(c) the sole trustee or at least one of the trustees is a designated person;

(d) the instrument creating the trust appoints a person to enforce the trust and provides for the appointment of a successor to such a person.

The 1989 Bermuda Act also made provision for the trustee to be a designated person who was defined by the Act to be a person in a limited group made up of lawyers, charted accountants, trust corporations or persons designated by the Minister of Finance. In Bermuda, section 9 of the Trusts (Regulation of Trusts Business) Act 2001, provides that unless a person is exempted by or under an exemption order, a person shall not carry on trust business in or from within Bermuda unless that person is for the time being a licensed undertaking. Additionally, the Trusts (Regulation of Trust Business) Exemption Order 2002, provides that a trust company is exempted from the requirements of section 9 of the Act if it is authorised to provide the services of a trustee only to the trusts specified in its memorandum of association; or in the case of an overseas company, in its permit and to such other trusts as the Minister may approve from time to time.

In addition to the trustee, the purpose trust was required to have a person appointed by the trust deed itself whose job it was to enforce the trust. The Act was silent on the question of what duties were owed by this 'enforcer' and whether or not the enforcer was not required to be independent of the trustees, the testator or settlor. However, he could be replaced in the event

of his death or if he failed to carry out his obligations, and the Attorney General was empowered to make the necessary applications to the court for a declaration in respect of the new person to be appointed to enforce the trust. The designated person was required to notify the Attorney General of the default of the enforcer, and the failure of the designated person to take reasonable steps to do so made him guilty of an offence punishable by fine.

In 1998, Bermuda policy makers recognised elements of the 1989 law which required technical classification and improvement. Accordingly, the Trusts (Special Provisions) Amendment Act[1] (the 'Amendment Act') made technical improvement to the purpose trust provisions of the Trusts (Special provisions) Act 1989 (the 'Act') which, among other things, provided for increased flexibility in the structuring of purposes and also clarified the definition of purpose trust.[2] The amendments were introduced to apply to all purpose trusts, whether created before or after the Amendment Act.

PURPOSE TRUSTS—GENERALLY

A purpose trust is a trust to fulfil purposes rather than one for beneficiaries.[3] A trustee receives property from some person (or may declare a trust over property the trustee already has) and holds and distributes that property in accordance with fiduciary obligations to administer the trust property in fulfilment of the stated purposes. The state purposes may be such that they are carried out by the trustee holding specific property and managing it or controlling it in a certain way for a particular purpose.

Common uses of purpose trusts in the corporate setting include promotion of the incorporation of Bermuda companies to participate in transactions (such as off-balance sheet financing involving an 'orphan company') or to perform specific activities (such as owning a private trustee company which acts as the trustee of a particular trust or group of trusts). Typically these deals are structured so that there is no accumulation of profit in the trust.

Under the 1989 Act a purpose trust was defined in the negative as a trust which was not 'for the benefit of particular persons . . . or . . . some aggregate of persons ascertained by reference to some personal relationship'. In practice, it was found that the definition created limits on the circumstances for which purpose trusts could be used. It was therefore decided that there was no need for a specific statutory definition and, in an effort to create greater flexibility, it was removed.

The law simply states that a trust may be created for non-charitable purposes as long as the purposes are (a) sufficiently certain to allow the trust to be carried out, (b) lawful and (c) not contrary to public policy.

The removal of the old definition facilitated referent to more readily available English judgments dealing with purpose trusts under English law (which does not have a definition). The new language therefore removed any risk of construction that the indirect or intangible benefit to a company or a person (where the company or person does not have a beneficial interest in the trust fund) would disqualify the trust as a purpose trust.

1 The Amendment Act became law on 1 August 1998.
2 Throughout this chapter the term 'purpose trust' is used to denote a trust for non-charitable purposes.
3 There is not a person who has an enforceable equitable interest in the trust fund. Although a person may benefit from a purpose trust, the benefit must be sufficiently indirect or intangible so as not to constitute an enforceable equitable interest.

The matter of enforcement was also considered in the new Act. The prior law had required a valid purpose trust to provide for a person to be appointed in the trust instrument as having power to enforce the trust ('the enforcer'). This was clearly overly restrictive and the perennial issue was to determine how in practice the enforcer should carry out his duties. The new provisions[4] recognised that enforcement can only take place through the court, and gave to the court the right to make an appropriate order to enforce on the application of any of the following persons:

(a) any person appointed by or under the trust for this purpose;
(b) the settlor, unless the trust instrument provides otherwise (the settlor may not want this right if he wants to divorce himself completely from the trust);
(c) a trustee of the trust (this would apply where there are co-trustees and one trustee is blocking the proper carrying out of the trust);
(d) any other person whom the court considers has sufficient interest in the enforcement of the trust.

Furthermore, the Attorney General may also make an application to enforce the trust if he satisfies the court that none of the above persons are able and willing to do so. Hence, it is possible to call the trustee to account and so ensure that the trust can be enforced against the trustee.

The new law also dealt with the matter of trustee qualification and registration by abolishing the need for one of the trustees of a purpose trust to be a 'designated person' (previously defined as a barrister, chartered accountant, or trust company licensed in Bermuda or some other person designated by the Minister of Finance). The general trust law rules concerning appointment of trustees, therefore, now apply to purpose trusts: a feature which gives greater flexibility and removes any difficulties arising from not having a 'designated person' as a trustee. Nor is there any longer a requirement to keep in Bermuda a register of purpose trusts.

With respect to variation of trusts, the new legislation provided specific provisions to confer power on the court to vary a purpose trust on the application of:

(a) any person appointed under the trust for the purpose of varying the trust;
(b) the settlor (unless the trust instrument provides otherwise); or
(c) a trustee.

This ability to vary proves to be useful during the course of the trust as circumstances change and, in practice, many trusts will include their own powers to vary, thereby reducing the need for recourse to the court in those cases.

While the old law allowed a purpose trust to last for up to one hundred years, the Trusts (Special Provisions) Amendment Act 1998 made possible the ability to have perpetual purpose trusts. This Act further provided in section 12A(5) that, the rule against remoteness of vesting was still applicable and, accordingly, any transfer from one purpose trust to another must be done within the applicable perpetuity period; and a purpose trust which is to go beyond one hundred years cannot be followed by another trust. However, section 12A(5) of the Trusts (Special Provisions) Act 1989, which applied the rule against perpetuities to a purpose trust, was repealed by section 11 of the Perpetuities and Accumulations Act of 2009.

The new Bermudian legislation has made for effective use of the class of activities in which the purpose trusts which the purpose trusts are able to engage, and this has made Bermuda a very attractive jurisdiction. Some of these uses of purpose trusts include:

4 Bermuda Trusts (Special Provisions) Amendment Act 1998, s 12B(2).

(a) To operate and fund a wide-purpose social cause that might not specifically qualify as a charitable cause.

(b) To deal with off-balance sheet transactions. As a vehicle for parties who are prohibited from owning an interest in certain types of companies or investments, or for those in need of strict privacy, a purpose trust may hold the ownership of business or investment assets.

(c) To take away voting or ownership interests in entities for business or tax purposes by escaping controlled foreign corporation type rules in the jurisdiction of the settlor or real beneficiary.

(d) To create, own and operate a trust company whose trustees will manage the purpose trust for the settlor and other purpose trusts that may be created by a family or business—to manage and run a business or investments—essentially to operate a family office.

(e) To segregate a potentially high-risk business venture from the main business operation.

Purpose trust legislation has also been enacted in the British Virgin Islands[5], Barbados[6] Grenada,[7] and St Vincent,[8] with attempts to improve upon certain aspects of the original Bermuda model. In these jurisdictions, the rule against perpetuities and remoteness of vesting has no application:[9] a properly created purpose trust may continue in force without any limit as to time.

As regards the relationship between the enforcer and trustee, beneficiary and settlor, the British Virgin Islands legislation states that as a condition of validity of the purpose trust 'the person appointed to enforce the trust is a party to the trust instrument' or must consent in writing to the trustee. In Barbados and Grenada the person charged with the enforcement of the trust is the 'protector', and the legislation expressly states that a person holding that post 'may not be a trustee thereof'. However, in St Vincent, the protector of a non-charitable purpose trust may also be the trustee.[10]

In all of the jurisdictions there is an individual who is empowered by the statute, in the event of a failure by the protector of a purpose trust to exercise his powers, to take action. In St Vincent it is the 'Offshore Finance Inspector', while in Dominica and Nevis it is 'the Minister'. In Barbados, there is no requirement that the trustee should be a 'designated person' as in the other jurisdictions, so the trustee of a purpose trust in Barbados may apply to the court *himself* for the appointment of a new protector – and therefore need not go through the Attorney General as required in the other jurisdictions. In Barbados and Grenada the trustee is liable to stiffer punishment on failing to report inaction or default on the part of the protector: in Grenada, the punishment is a fine or imprisonment for two years, or both;[11] in Barbados, the court may, in addition to the fine, order the trustee to cease to be a trustee of non-charitable purpose trusts for two years.[12]

In Barbados, Grenada and St Vincent, a statutory *cy-près* jurisdiction similar to that for charitable trusts is provided in case non-charitable purpose trusts fail to be effective for the purpose in question.

5 Section 84, Trustee Ordinance 1994.
6 Part III, International Trusts Act 1995.
7 Part V, International Trusts Act 1996.
8 Part V, International Trusts Act 1996.
9 Section 84(3) British Virgin Islands Trustee Ordinance 1994; section 7(2) Barbados International Trusts Act 1995; s 9(2) Grenada International Trusts Act 1996.
10 Section 13 International Trusts Act.
11 Section 16(5) International Trusts Act 1995.
12 Section 12(4) International Trusts Act 1996.

Belize, Dominica and Nevis have also passed legislation[13] validating trusts for non-charitable purposes where the purpose is specific, reasonable, capable of fulfilment and not immoral, unlawful or contrary to public policy, and where a protector is appointed to enforce the trust. However, the issue is not given as detailed treatment as in the above-mentioned territories.

The concept of the purpose trust has been given special treatment in the Cayman Islands by its incorporation into PART VIII of the Trusts Law (2009 Revision). This part of the Act is referred to as Special Trusts-Alternative Regime ('STAR'). The Cayman legislation was designed to improve upon the old Bermudian model which, as we indicated, until the Trusts (Special Provisions) Amendment Act 1998, could only be used for pure purpose trusts. The key features of the legislation are:

(a) the creation of a specific regime for a special kind of trust, to be called a 'special trust';
(b) special trusts may be perpetual;
(c) special trusts may be established to benefit a mixture of persons and purposes;
(d) the purposes may be public or private and may be of any description provided they are lawful and not contrary to public policy;
(e) under a special trust the issues of who has standing to enforce and who is a beneficiary are entirely separate;
(f) beneficiaries may (but need not) be enforcers; and
(g) the court can reform, on a *cy-près* basis, a STAR trust where the purposes can no longer be carried out.

The Cayman STAR legislation provides a regime for purpose trusts, both charitable and non-charitable, and an alternative regime for ordinary trusts for persons. The flexibility of such a trust allows it to be for charitable or non-charitable purposes or for persons, or for any combination of the three. They can be perpetual and must have an enforcer (which can be one or more individuals or companies, or a committee of them). Only the enforcer can enforce the trust and, therefore, beneficiaries have no standing to do so or to obtain information in relation to the trust. However, a beneficiary may be made an enforcer.

The STAR trust may be used in a variety of circumstances. It may be used for the purpose of holding non-standard assets, for investing and assisting in the development of a particular company or business. It is useful in succession planning within a family business. Accordingly, income and principal can be paid to members of the family as appropriate, but access to information relating to the trust and the underlying business can be restricted to only those members of the family who are appointed as enforcers.

In the commercial world, the STAR trust is now frequently used in place of the charitable trust as the owner of Special Purpose Vehicles (SPVs) in international asset and structured finance transactions. The critical issue as to whether to use a STAR trust relates to who should be the enforcer. In a true 'orphan' SPV transaction, the commercial parties will frequently not wish any connection with the SPV or ownership trust; and it then becomes necessary to use one of the growing number of well equipped Caymanian organizations to act as enforcer.

STAR trusts have increasingly been used as substitutes for the traditional trusts for persons. The ability to restrict the application of the rule in *Saunders v Vautier*,[14] and to restrict certain beneficiaries' rights to information, is now very popular, particularly with persons from

13 Section 15 Trusts Act 1992; s 8 Dominica International Exempt Trust Act; s 8 Nevis International Exempt Trust.
14 (1841) 4 Beav 115; 49 ER 282.

jurisdictions with forced heirship rules. The STAR trust allows more flexibility where the client is trying to effectively create 'spendthrift' provisions, namely restraining the alienation of interests. The perpetual nature of the STAR trust also allows for structuring of the equivalent United States 'dynasty' trust.

STAR trusts have been used as the ownership vehicles of private trust companies. The private trust company (PTC) is often used to act as trustee of various family trusts, thereby giving consistency and control over the administration of the family trusts. The STAR trust can be perpetual and the trustees will be relieved of much of the burden of diversification of the trust assets and other risk related problems.

STAR trusts are also being used with deferred emolument and pension plans. In this regard, they are sometimes used to create an offshore 'Rabbi' trust, referred to later in Chapter 18, and also in Appendix 9, which is an approved US deferred payment scheme. The trust may also stand in the place of an onshore pension arrangement for the offshore employees of an international group.

The question has been raised of the possible non-recognition, by some jurisdictions, of STAR trusts. It has not proved to be a problem in the Cayman Islands and, in any event, it is possible for the trust assets to be first transferred to a Cayman company in exchange for the shares of the Cayman company into the STAR trust. Furthermore, on the issue of perpetual trusts, it is now becoming the conventional wisdom for many jurisdictions to adopt this feature.

As far as the appointment of a protector to an offshore trust is concerned, this is increasingly seen as an essential part of its operation. This office provides a degree of protection for the settlor and the beneficiaries which is otherwise unavailable, and acts as a check on the powers of the trustees without compromising the tax status of the trust itself.

The settlor of an offshore trust faces natural and obvious uncertainties. For reasons of tax and confidentiality, it is considered essential that the settlor relinquishes actual control over assets. He therefore must alienate ownership and control of part or all of the estate immediately so as to clearly disavow any interest under the settlement but at the same time make it available for other members of the family or other nominated beneficiaries.

Concern is further compounded by the fact that trust agreements often deliberately give trustees almost unfettered power over the trust funds in order to facilitate prompt reaction to unforeseen situations. The settlor is often left in a position where the trustees may be geographically distant and possibly unknown. Should things go wrong, the settlor is separated from the original estate and has no way of influencing either the way money is distributed or how the trustees act. By giving the trustees a letter of wishes, the settlor may hope to influence the trustees' future conduct, but, since the letter cannot be legally binding, this does not materially alleviate the problem.[15]

Consequently, settlors will frequently appoint a protector to provide an independent check on the powers of the trustees and to control distributions of funds. The protector will also be of assistance to the settlor in cases where the trustee fails or has been unable properly to administer the trust.

English law gives no statutory definition of a protector and there is also relatively little judicial acceptance of the protector's role. However, one of the positive elements about the lack of statutory recognition of the role of the protector is that the settlor can determine how many powers to grant to the protector. Typically, the powers of the protector will include:

15 *Bank of Nova Scotia Trust Co (Bahamas) Ltd v De Barletta* (1984) Eq No 550 (unreported).

(a) power to dismiss or replace trustees;
(b) power to add additional trustees;
(c) power to veto distributions of capital by the trustees; and
(d) power to veto trustees' decisions to add or remove beneficiaries.

The British Virgin Islands has cushioned, in its legislation, certain rights to which a protector might be entitled. In its Trustee Ordinance, as amended by the Trustee Act, it gives the protector the right to:

(a) determine which jurisdiction's law will be held as the proper law of the trust;
(b) remove trustees;
(c) change the forum of administration of the trust;
(d) appoint new or additional trustees;
(e) exclude any beneficiaries as a trust beneficiary;
(f) include any person as a beneficiary of the trust in addition to any existing beneficiary of the trust; and
(g) withhold consent from specified actions of the trustees, either conditionally or unconditionally.

It is the settlor who will normally decide what rights are to be given to the protector, and due care will normally be taken not to give the protector the kind and number of duties which would risk classification as a 'quasi-trustee'.

There has been debate as to whether these powers are indeed fiduciary powers.[16] It is said that a protector, being in a fiduciary position, should not also be a beneficiary under the trust and should not be entitled to any payments other than for his or her professional expenses.[17] By the same token, the protector should not be subject to the control of another involved party (such as a trustee or fund manager). The settlor is entitled to expect independent and objective action from the protector.

The more recent Isle of Man Court of Appeal decision of *Steele v Paz Ltd*[18] has recognised a role for the protector, where the principles that apply to a trustee will apply as well to a protector. For the court will step in and appoint a protector in circumstances where there is none.

The settlor may appoint as many or as few protectors as he wishes. The more numerous the protectors, however, the less able they will be to react speedily to given situations.[19] Usually the best route is to appoint one or, at most, two protectors with perhaps a reserve or clear provision for successors if anything should happen to an existing protector.

In most Caribbean offshore jurisdictions there are legislative provisions giving statutory force to the concept of the protector. In Belize,[20] Anguilla,[21] Dominica[22] and Nevis[23] the

16 Compare *Rawson Trust Co Ltd v Perlman* (1989) Supreme Court of Bahamas, Equity No 194 (unreported); *Von Knieriem v Bermuda Trust Co Ltd* (1994) Supreme Court of Bermuda, Eq Nos 154 and 162 (unreported).
17 However, s 16(3) Anguilla Trusts Ordinance 1994 states that the protector of a trust may also be a settlor, a trustee or a beneficiary of the trust.
18 *Steele v Paz*, Isle of Man Chancery 1992–95.
19 Anguilla Trusts Ordinance 1994, s 16(6); Belize Trusts Act 1992, s 16(6); Barbados International Trust Act, s 26(4); St Vincent Trusts Ordinance 1996, s 16(6); Dominica International Exempt Trust Act 1997, s 9(6); all state that any function conferred on the protectors may be exercised by a majority of the protectors who agree thereto.
20 Trusts Act 1992, s 16.
21 Trusts Ordinance 1994, s 16.
22 International Exempt Trust Act 1997, s 9.
23 International Exempt Trust Ordinance, 1994, s 9.

legislation prescribes that the person appointed to the office of protector shall have certain powers, including, *inter alia*, the power to remove a trustee, to appoint a new or additional trustee, the power to change the proper law of the trust, in addition to 'such further powers as are conferred by the terms of the trust'.

In the British Virgin Islands[24] and the Bahamas,[25] the legislation is of similar effect but is differently worded. The trust instrument may contain provisions by virtue of which the exercise by the trustees of any of their powers and discretions shall be subject to the previous consent of the settlor or some other person, whether named as protector or any other name. If it is so provided in the trust instrument, the trustees shall not be liable for any loss caused by their actions if the previous consent was given. However, under the Bahamian Act, there exists a further requirement that the trustees must have acted in good faith.

Legislation in all the jurisdictions states that the protector shall not, in the exercise of his office, be deemed to be a trustee, yet in Anguilla, Belize, Dominica, Nevis and St Vincent, the respective statutes declare that he owes a fiduciary duty to the beneficiaries of the trust or the purpose for which the trust is created.

In Grenada,[26] the statutory encapsulation of the protector exists only in relation to international *purpose* trusts, where his role is equivalent to that of the 'enforcer' mentioned in other jurisdictions. International *purpose* trusts are treated in the same way in Barbados,[27] however Part VI of the International Trusts Act 1995 provides generally for the office of protector in relation to other international trusts. It appears that s 26(2) of the Barbados Act fetters the freedom of the settlor to determine the number and content of the powers to be conferred on the protector. The section lists certain powers and states that:

> . . . *the following* or *any of them* may be conferred on the protector by the terms of the trust:
>
> (a) the power to appoint and remove trustees;
>
> (b) the power to change the proper law of the trust;
>
> (c) the right to receive notice in advance of specified actions of the trustees;
>
> (d) the right to receive information relating to or forming part of the accounts of the trust.

The family office had its origins with the founders of the great family wealth of the 19th century who sought to ensure flexibility and certainty in the management of their vast holdings through succeeding generations. The Private Trust Company (PTC) has been the recent outgrowth of the family office whereby the more recent generators of wealth have sought to have their trusts managed by a trustee who is more accessible to the family needs than would be found in the traditional trust company.

An institutional trust company is not always in a position to make immediate decisions that may be critical in cases where the trust is in control of a large multinational business, or group of family enterprises. However, if the directors of the PTC are carefully selected advisers of the settlor and are familiar with the business operations, then they may be able to act with more speed and less indecision.

The PTC also affords limited liability and may therefore avoid the danger of exposing trustees to personal liability. It is a protection which has its limits for, in the Turks and Caicos Islands, directors of trust companies may be liable as guarantors in respect of breaches of trust committed by the corporate trustee. A similar situation obtains in Guernsey in the Channel

24 Trustee Ordinance 1994, s 86.
25 Trustee Act 1998, s 81.
26 International Trusts Act 1996, s 15.
27 International Trusts Act 1995, Part III.

Islands and was brought under careful scrutiny in the case of *Cross v Benitrust International (CI) Limited and Others*.[28]

The costs of forming and operating a PTC, either with its own personnel or on a sub-contract basis as a 'managed trust company', will be substantial and is probably only justifiable if the trust assets are in excess of US $20 million. However, such costs may compare favourably with the fees of an institutional trust company (which will inevitably take into account the risk element of fiduciary business).

The presence of a private trust company will facilitate easier changing of administrators and management personnel. For such changes within its structure can be facilitated without major pieces of documentation or discussion over indemnity for the retiring trustees. The PTC is also able to dismiss and appoint investment counsel or other professionals with a greater willingness to accede to the views of the family.

Since the PTC is generally not a profit-making entity, its share structure is generally not a matter of concern. Hence, it may be held by the settlor or his family, the directors of the company, a charitable trust, a guarantee company, a private foundation, a purpose trust or a STAR trust. Use of a PTC owned by a trust, guarantee company or a private foundation affords scope for obscuring the settlor's involvement and provides an increased level of secrecy. The PTC can also act more speculatively than would be the case of a professional trust corporation with respect to investment strategies. However, if things do go wrong, it may be very difficult for beneficiaries to acquire adequate recompense with PTCs are used, unlike where professional trust companies are used. For the latter will in the usual course of events have more resources available to satisfy a judgement.

Some Caribbean jurisdictions offer scope for incorporation of private trust companies by way of providing the necessary regulatory framework. In Bermuda it is possible to incorporate the entity to act as trustees of family trusts or for closely related groups of trusts. Exempted companies, however, cannot act as general trust corporations unless a trust licence has been issued under the Trust (Regulation of Trust Business) Act 2001. When applying to incorporate, it is, however, necessary to submit to the Bermuda Monetary Authority detailed financial information, names, addresses and occupations of those parties who will beneficially own the private trust company. While it is necessary to state the name of the family which will constitute the class of beneficiaries, each individual need not be named. The information is treated confidentially by the Bermuda Monetary Authority. The memorandum of association of the private trust company will contain objects, which specifically state the name of the trust or the name of the family or group. When it is planned to administer further trusts for different classes of beneficiaries, it is again necessary to apply to the Minister of Finance for permission, with information as to the class of beneficiaries and the name of the new trust. It is a private document in the sense that neither the details of the trust nor the specific names of the beneficiaries are available to the public unless the names are stated in the Memorandum of Association.

In the Cayman Islands, the private trust company is licensed under the provisions of the Banks and Trust Companies Law (2009 Revision). The Banks and Trust Companies Act 1989 had provided that if the private trust company proposes to act as trustee for a limited number of family trusts, it may apply for a Restricted Licence. In such a case, the capital requirements and annual fees payable will be much lower than those required for a trust company with an Unrestricted Licence. However, the 'restricted license' procedure has been removed by the Private Trusts Companies Regulations 2008 as amended by the Regulations of 2009. Section 4 of the Regulations state that:

28 (1998) Royal Court of Guernsey, 6th April (unreported).

(1) A company that is a private trust company and is registered under paragraph (2), does not require a licence to carry on connected trust business.

(2) . . . . a private company shall register with the Authority and, in order to be registered, shall at the time of registration and on or before the 31st day of January every year thereafter during the continuation of the registration–

(a) File with the Authority an annual declaration in such form as the Authority may approve . . .

(b) Pay to the Authority an initial registration fee of seven thousand dollars and thereafter an annual registration fee of seven thousand dollars.

The private trust company is, however, subject to an annual audit and, if it does not have its own qualified staff in Cayman, it must appoint a local Class A Bank and Trust Company as an authorised agent.

In the British Virgin Islands, a company formed to act as trustee is required to be licensed under the Banks and Trust Companies Act 1990, unless it falls within a relevant exemption. The particular exemption was stated in clause 7(d) of the Banks and Trust Companies (Application Procedures) Directions 1991 which stipulates that a company not having a physical presence in the British Virgin Islands is regarded as not carrying on trust business under the Act. However, the Banks and Trust Companies (Application Procedures) Directions, 1991 was revoked by the Financial Services (Exemptions) Regulations 2007. Section 5 of the Financial Services (Exemptions) Regulations states that:

(1) . . . a private trust company is exempt from the requirement to obtain a trust licence under the Banks and Trust Companies Act, 1990 where its trust business consists solely of

(a) unremunerated trust business; or

(b) related trust business.

The Regulations provide that trust business carried on by a private trust company is unremunerated trust business if no remuneration is payable to, or received by, the private trust company, or any person associated with the private trust company, in consideration for, or with respect to, the services that constitute the trust business.[29] Additionally the term 'related trust business' means trust business provided in respect of a single qualifying trust; or a group of related qualifying trusts.[30]

The legislation in the Turks and Caicos Islands is The Trustees (Licensing) Ordinance 1992. An exemption can be obtained for:

(a) A company which is the trustee of a single trust only, and

(i) whose share capital is entirely beneficially owned by the settlor of the trust or any of its beneficiaries; or

(ii) which has its registered office outside the Turks and Caicos Islands in a jurisdiction which the Financial Secretary has approved as satisfactory as regards its regulation and supervision of trust companies.

(b) A company which acts as a bare trustee only, and holds property upon trust with no duty other than to convey the property on the direction of the beneficiary.

29 Section 2.
30 Section 1.

CHAPTER 16

SETTLOR CONTROL, FORCED HEIRSHIP AND ASSET PROTECTION: CONTINUING ISSUES OF THE OFFSHORE TRUST REGIME

The offshore trust regime, not unlike a domestic trust structure, seeks to give maximum protection and comfort to settlors both in terms of how assets are distributed as well as to the specific beneficiaries. While the principles are common to both trust regimes, the legislative and practical responses in the offshore financial centres seek to make the use of such centres attractive by facilitating the implementation of those principles. The areas of settlor control, forced heirship and asset protection have not surprisingly benefited from this legislative thrust.

SETTLOR CONTROL

It is accepted that it is legally necessary for the settlor to relinquish actual control over assets which are subject to a trust. The retention of settlor control over the assets may lead to the trust being declared a *sham* because the court finds that, as a fact, the underlying beneficial interest remains in the settlor. Where the trustee, in accordance with the settlor's express instructions, holds the trust fund on trust for the settlor as sole beneficiary, or where the settlor does not confer upon so-called 'beneficiaries' any rights to make the trustee account to them for what he does with the trust fund, a resulting trust may be implied.

The resulting trust may be one of 'form', arising from construing the terms of the trust instrument which reserve so much benefit and power to the settlor that it is tantamount to the settlor having an absolute interest. Alternatively, it may be 'substantive' where as a matter of form the beneficiaries appear to have rights against the trustees. It will however be construed as a sham since the settlor and the trustee mutually recognise that the trust fund really remains to be regarded as the settlor's property and that the trustees will do as the settlor directs. In such a case, the trust may be framed as an irrevocable discretionary trust, with a letter of wishes (at variance with the trust instrument) and expressed to be non-binding. Hence, everything turns upon whether the trustees will consciously exercise an independent discretion in a way which may coincide with the settlor's wishes or whether they are automatically performing as requested, pursuant to the arrangement with the settlor.

In the case of *Abdel Rahman v Chase Manhattan Bank (CI) Trust Co Ltd*,[1] the plaintiff brought an action challenging the validity of a settlement made by her late husband. In 1977 the deceased, KAR, constituted a settlement under Jersey law directing the first defendant trust corporation to hold the trust fund and income therefrom upon such trusts as he should appoint in his lifetime. The trustee was empowered to pay or apply the capital or income to or for the benefit of KAR and was directed to have regard exclusively to his interests in determining whether or not to exercise such power. Many of the administrative powers contained in the settlement required KAR's prior consent for their exercise in his lifetime. KAR referred to the fund as 'my assets' and to the trustee as his 'trust manager'. The trustee made no independent investment decisions and invariably complied with KAR's instructions. Moreover, KAR obtained moneys and made distributions from the fund of which the trustee was only later informed.

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1 1991 (JLR) 103.

The Court held that as a consequence of the fact that, from the date on which KAR purported to constitute the settlement and throughout his lifetime, he exercised dominion and control over the trust fund and treated the assets in the trust fund as his own, with the trustee meekly acting as his agent or nominee, the trust itself would be set aside as a sham.

An important message in the case of *Private Trust Corporation v Grupo Torras*[2] surrounds the importance of the trustees taking an active part in the administration of the trust and taking independent legal advice. In that case, not only did the declaration of trust reserve very substantial powers to the person named as the primary beneficiary, but the Bahamas Court of Appeal further commented that the fact underlying companies were being run for the benefit of a particular beneficiary, and the beneficiary's lawyer (rather than the trustees' lawyer) was used in relation to the completion of various financial transactions, cast doubt upon the independence of the trust structure.

The facts of the case were that F was being pursued by GT for alleged misappropriation of funds while F was the CEO of GT. F had established a trust in the Bahamas of which the trustee was P, a reputable banker. In the High Court, a Mareva injunction and an order for discovery were imposed upon P as trustee of the trust. P appealed contending, *inter alia*, that as the two year Bahamian limitation of actions provision under the Fraudulent Dispositions Act 1991 was applicable, the assets could not be attacked, the action could not be maintained against the trustees and the injunction ought not to have been granted.

The Bahamas Court of Appeal carefully considered the relevant provisions of the Trust and made specific reference to the following powers:

(1) Article 1.1 empowered the Trustee to invest trust monies in its sole discretion but subject to the written consent of F or his nominee.
(2) Article 1.2 gave any beneficiary, including F, the right to request that the Trustee make a distribution to himself, at the Trustee's discretion.
(3) Article 5.1 provided that the Trustee was liable to be removed from office at any time by the Protector (originally appointed by F).

In the Court's view, whilst in the safe keeping of the Trustee under the cover of the Trust, the Trust Fund was in reality F's money available to himself as an object of the Trust, in the lawful exercise of the Trustee's discretion upon F's request. Further, the Court considered that it was wholly unrealistic to think the Trustee, relying only on its sole discretion, would refuse if F requested distribution to himself of the trust funds.

The Court considered the fact that in the Bahamas and other offshore tax advantaged jurisdictions many trusts are set up to take advantage of asset protection legislation designed to protect assets settled in the trust against creditors, if the creditors' cause of action has not arisen and no action commenced until after the expiration of a fixed statutory period. However, the Court indicated that a judge in Mareva proceedings ought not to avoid the conclusion that the settlor of a trust in the present circumstances is in a position virtually equivalent to having substantial and effective control over the Trust Fund.

In the specific circumstances of a case involving alleged fraudulent transactions on the part of the settlor, the Court may consider whether on a true construction of the facts, the settlor had 'substantial or effective control', and in so doing will look closely not only at the relevant provisions of the trust deed, but also whether the entity in question 'danced to the bidding' of some dominant person. If it was established that the Trust was such a vehicle, then the Court

2 Court of Appeal of Bahamas, 27 October 1997.

could in effect pierce the structure of the Trust and regard the settlor as the beneficial owner of the assets. In all the circumstances of the case, the Court of Appeal saw no reason to disturb the decision of the High Court.

At the time, *Grupo Torras* stood for the position that the mere fact that trustees may, without questioning, follow the wishes of a powerful settlor or beneficiary without obtaining necessary independent legal advice where appropriate, may of itself enable aggrieved third parties (whether they be creditors, heirs, spouses, revenue or government agencies) to attack specific actions of the trustees or the trust structure itself on the basis that it is under the substantial or effective control of a settlor/beneficiary. Similarly, where it could be shown that underlying companies of the Trust are being run for the benefit of the settlor, the courts were also likely to pierce the veil by extending Mareva injunctions to such underlying companies.

However, the Bahamas Court of Appeal made it clear that its decision was in no way intended to encourage potential plaintiffs in the belief that injunctions and discovery against trustees in the Bahamas will be automatically easily available, or that trusts or corporate veils would be pierced at the whim of a litigant.

The positions advanced in *Rahman* and *Grupo Torras* were seriously weakened by the 2003 Jersey case of *In Re Esteem Settlement*.[3] The trust at issue in this case, the Esteem Settlement, was settled by F of *Grupo Torras* fame before he became CEO of GT, in order to avoid Kuwaiti laws on forced inheritances and to avoid UK taxation. F settled the trust with various gifts of his own personal funds from 1981 to 1986. These assets were used to purchase farms in England and to hold title to the family residence. In 1992, after F became CEO of GT, he transferred into the Esteem Settlement funds stolen from GT. The Jersey Court later set these transfers aside in separate proceedings, but *In Re Esteem Settlement*, the Court was concerned with the efforts by GT and the Trustee in Bankruptcy for F to attack the original sums settled into the trust before the perpetration of the frauds, referred to as 'clean funds'.

The lawyers on behalf of GT attacked the trust on three grounds, only two of which are relevant outside of Jersey, namely:

1. The trust was a sham, based on the principles enunciated in *Rahman, or*
2. After the valid settlement of the trust, the trust could be subsequently held invalid by 'lifting the trust veil' or 'piercing the trust veil' similar to the concept of piercing a corporate veil.

It may be noted that the first argument is based on the position that the trust was never created while the second argument admits its validity *ab initio* but holds that the trust subsequently became invalid.

In contemplating whether the trust was a sham, the Court referred to the decision of Diplock LJ in *Snook v London & W. Riding Invs. Ltd*,[4] where he held that 'for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating'. In the present case, there was no evidence put forward by the plaintiff that the trustee of the Esteem Settlement intended to deceive anyone with respect to its role as trustee, nor was it a party to the frauds perpetrated by F and his associates. While the trustee did generally act on the wishes of F with respect to the dealings with the trust assets, no intention to deceive was evident. As such the Court distinguished *Rahman* and stated clearly that there must be an intention on the part of both the Settlor and the Trustee to deceive third parties in order to create a sham in regards to a trust.

3 [2003] JLR 188.
4 [1967] 2 QB 786 at 802.

Regarding the plaintiffs' argument urging the Court to pierce the 'trust veil', the Court reasoned that the principle did not apply to trusts as it did to corporations. The concept of piercing the corporate veil concerns the elimination of the corporate entity where the shareholder maintains effective control of the corporate assets. With a trust, the beneficial interest in the assets is not vested in the same entity that is alleged to be wrongfully controlling them. Overt control by the settlor, over an otherwise valid trust, does not penetrate the trust nor transfer the beneficiary's assets to the settlor; it simply creates a breach of trust. The corporate concept of piercing the veil does not fit a trust relationship.

Thus, the decision in *Re Esteem Settlement* significantly narrows the application of *Rahman*, in that it makes it clear that in order to have a sham in respect of a trust, the trustee must be acting dishonestly in concert with the settlor to deceive the outside world and that a gift into a trust is not invalid based on the settlor's subsequent actions.

Settlor control at company level: VISTA trusts

The 'prudent man of business' rule

The trust has always been regarded as one of the better 'succession vehicles', but its use to cater for the succession of shares in companies has traditionally been impeded by the common law rule that a trustee must deal with trust investments as would a prudent man of business. This rule effectively requires trustees to monitor and intervene in the affairs of underlying companies as was held in *Bartlett v Barclays Bank Trust Co. Ltd*.[5] *Bartlett* provides that where trust property includes the shares of a company, the trustees should take a positive role in the affairs of the company.

This requirement will often create problems for the settlor and trustee alike as there is an inherent conflict between the prudence required of trustees and the entrepreneurial acumen and quick decision taking which are required to run a successful business. Furthermore, most settlors find equally unwelcome the prospect of a compulsory sale of shares merely to satisfy short-term financial considerations. Professional trustees rarely have, or can be expected to have, the skills relevant to the particular business. Furthermore, the monitoring procedures necessary to ensure that trustees avoid exposure to claims often add substantially to the cost of trust administration. Additionally, professional indemnity insurance for trustees may be and become problematic or prohibitively expensive.

Family businesses typically carry a significantly greater degree of financial risk than a well spread investment portfolio and diversification. While a diversified portfolio is usually a priority for the trustees, such a goal can sometimes be in direct conflict with the settlor's wishes. To many settlors and their families the self-managed company represents much more than an impersonal investment. Among the factors which may be taken into account when contemplating a trust are: family tradition, social concerns for employees or the environment, career opportunities for descendants, and business projections looking further ahead than the long or medium term. Moreover the owner will often prefer to leave to the directors, rather than to the trustee/shareholders, the question as to whether the company expands, contracts, or even goes out of business. Managing the company to enhance the value of its shares will not necessarily be and often is not in its long term best interests. Furthermore, economic commentators have safely pointed out that some of the more successful companies are those whose owners have

5 [1980] 1 Ch 515.

remained at the helm and have not been managed (and the shares of which have not been disposed of) merely for short term gain. Hence, trustees have faced the prospect of being caught between, on the one hand, an exposure to potential liability for failure to dispose of shares and, on the other hand, settlor pressure to retain such shares.

The British Virgin Islands Special Trusts Act 2003 (the 'VISTA Act'), which came into force on 1 March 2004, enables special new trusts, commonly referred to as VISTA trusts, to be created to circumvent these difficulties. The VISTA Act allows settlors to essentially exclude the operation of the 'prudent man of business' rule. It enables a shareholder to establish a trust of his company which disengages the trustee from management responsibility and permits the company and its business to be retained as long as the directors think fit. This result may be achieved in the following ways:

- authorising the entire removal of the trustee's monitoring and intervention obligations, except to the extent that the settlor otherwise requires;
- permitting the settlor to confer on the trustee a role more suited to a trustee's abilities, namely a duty to intervene to resolve specific problems;
- allowing trust instruments to lay down rules for the appointment and removal of directors, so reducing the trustee's ability to intervene in management by appointing directors of its own choice;
- giving both beneficiaries and directors the right to apply to the court if the trustee fails to comply with the requirements for non-intervention or the requirements for director appointment and removal; and
- giving to the trustee if required, the power to sell the shares with the consent of the directors.

In order for the VISTA Act to apply, the trust instrument must explicitly direct the Act to apply. Where the VISTA Act applies, designated shares will be held on 'trust to retain' and the trustee's duty to retain the shares as part of the trust fund will have precedence over any duty to preserve or enhance their value. The trustee will not therefore be liable for the consequences of holding (rather than disposing of) the shares. Subject to any contrary provisions in the trust instrument, unless the trustee is acting on an 'intervention call' (as defined in the VISTA Act), the trustee may not exercise its voting or other powers so as to interfere in the management or conduct of any business of the company; the management or conduct of the company's business will be left to those appropriate to deal with it, namely its director or directors, whose fiduciary duties to the company will remain intact, except to the extent that the trustee/shareholder is restrained in his capacity as trustee from exercising some of the powers of a shareholder. The VISTA Act further provides that the trust instrument may specify that the trustee is able to intervene in the affairs of the company in specified circumstances, i.e. when required to do so by an 'intervention call' by a beneficiary, an object of a discretionary power of appointment, a parent or guardian of either of them, the Attorney General (in relation to charitable trusts), the enforcer (in relation to purpose trusts) or other specified persons. The court may also intervene, upon application, to authorise the trustees to sell designated shares where retaining them is no longer compatible with the wishes of the settlor. The VISTA Act is confined to shares in British Virgin Island ('BVI') companies, but some VISTA trusts have been set up for BVI companies holding shares in non-BVI companies.

This innovative legislation, by excluding the trustees from management of the underlying companies and removing their discretion to sell the shares of the company, except in prescribed situations, allows settlor control to be retained at the director/company level without running the risk that the trust will be considered a sham.

Critics in onshore jurisdictions have suggested that these specialised trusts have provisions which so fundamentally undermine the nature of a trust that they should not be recognised in

an onshore jurisdiction. Yet whatever may be the view of onshore tax authorities and regulators, it is unlikely that the courts in onshore jurisdictions would be prepared to derogate from the Hague Convention on the Law Applicable to Trusts and on their Recognition.

FORCED HEIRSHIP

One of the objectives of the trust legislation in the off-shore jurisdictions is to allow the free disposition of property and to provide some protection from challenge by persons seeking to claim either under the mantle of custom or the statutory authority of the laws of a foreign country which, if followed, would defeat the intention of the original owner to dispose of the property as he saw fit. The expression given to such claims is 'forced heirship'.

Legislation in all of the Caribbean offshore jurisdictions,[6] with the exception of Grenada[7] and Belize,[8] expressly declares that all questions as to the capacity of any settlor or any disposition of property under the trust are to be determined according to the law of the particular jurisdiction without reference to the law of any other jurisdiction save where the property is immovable or in respect of testamentary trusts where the law of the testator's domicile applies.

Typically, the various Acts, e.g. the Bermuda Trusts (Special Provisions) Act 1989, provide for the capacity of a settlor to create a trust which it is intended should be governed by the law of Bermuda and the question as to his capacity to do so will be dealt with in accordance with the law of Bermuda. The wording is clear in providing that the determination in accordance with Bermudian law is without reference 'to the law of any other jurisdiction with which the trusts or disposition may be concerned'. The Act is not intended to validate any testamentary trust or disposition which may be invalid according to the law of the testator's domicile.

Section 11 of the Bermuda Act specifically prohibits the court, once it is determined that a trust is validly created under the law of Bermuda, to vary or set aside the trust pursuant to the law of another jurisdiction in respect of, *inter alia*, 'succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives'.[9]

Legislation in Anguilla, the Bahamas, Belize, Cayman Islands, Dominica,[10] Grenada, St Kitts,[11] St Vincent,[12] and the Turks and Caicos Islands takes into account, in even more direct fashion, the issue of forced heirship. Such provisions expressly provide that no trust governed by the law of the Cayman Islands or any disposition to such a trust is invalid or defective or the settlor's capacity questioned because the trust or disposition avoids or defeats the right, claim or interest of a person held by reason of a personal relationship to the settlor or by way of heirship rights.

Section 83 of the British Virgin Islands Trustee Ordinance 1994 differs from legislation in the previously mentioned jurisdictions as it applies to both *inter vivos* and testamentary

6 Sections 62–63 Anguilla Trusts Ordinance 1994, ss 7–8 Bahamas Trusts Law Act 1989; ss 17–18 Barbados International Trusts Act 1995; ss 10–11 Bermuda Trusts (Special Provisions) Act 1989; Cayman Islands Trust Law 1998 (Rev.); s 13(1)–(2) Turks and Caicos Trust Ordinance 1990.
7 Grenada International Trusts Act 1996.
8 Belize Trusts Act 1992.
9 *Greta Garner v Bermuda Trust Co Ltd and Kurt Schindler*, Supreme Court of Bermuda, Equity No 318 of 1991 (unreported).
10 Section 47 International Exempt Trust Act 1997.
11 Section 15(6)(b) Trusts Act 1996.
12 Section 51 International Trust Act 1996.

dispositions. A settlor or any person domiciled outside the British Virgin Islands who transfers or disposes of personal property to the trustees of a British Virgin Islands trust is deemed to have the capacity to make such disposition or transfer if at the time of the disposition or transfer he was, according to the laws of his domicile, of full age and sound mind. Any laws relating to inheritance or succession in the domicile of the person making such bequests shall not affect the transfer, disposition or validity of the trusts.

The legislation in Grenada, Dominica and Belize may also apply to both *inter vivos* and testamentary dispositions as, unlike the other offshore jurisdictions, there is no provision expressly excluding from the application of the Act any validation of testamentary trusts or dispositions which are invalid according to the laws of the testator's domicile.

ASSET PROTECTION

Asset Protection is essentially a method by which an individual organises assets and business affairs in advance so as to protect them against later financial harm. Offshore trust planning has traditionally been long term in nature with two or three generations as the focal point. The Asset Protection Trust is a more recent form of planning and deals with a specialised aggressive form of trust planning which is geared to put specific assets out of reach of future creditors.

Asset Protection Planning assumed prominence during the decade of the 1980s essentially as a response by professionals in the United States who were facing great difficulties in obtaining professional liability insurance coverage. This type of offshore trust seeks to provide a safety net in those potentially adverse circumstances where there could result a judgment in the jurisdiction of the professional resident. While Asset Protection Planning is part of the general scheme of estate, yet, the plans which are made during the lifetime of the individual take immediate effect and as a result are able to restructure assets and give to the client immediate protection over their ownership.

The professionals who have contributed to a large degree in this form of planning have been United States surgeons and anaesthetists, obstetricians as well as architects, civil engineers and lawyers. These individuals all suffered as a result of the costly nature of litigation in the United States. The causes have been well documented and include a contingent fee system, a widely expanding theory of legal liability, the ability of the courts to set awards for punitive damages, and the increasingly large number of available lawyers. In addition to the structural causes, there are many practical areas of potential liability as a result of the increasingly complex nature of social organisation. Hence, new areas of environmental liability potentially may affect persons as diverse as real estate developers, property owners, and operators of high risk business ventures. Asset Protection Planning has to some degree taken on some of the mantle of commercial insurance.

Most of the Caribbean offshore jurisdictions have effected major changes to the legal principles that affected the disposition of assets made with fraudulent intent as formerly governed by the Statute of Elizabeth 1571. Legislation has to varying degrees removed the doubts under the pre-existing law, substantially improving the position with regard to the establishment of asset protection trusts from the perspective of the settlor, the beneficiaries and the trustee, and providing certainty to creditors.

The most troublesome points of the Statute of Elizabeth included:

(1) There was no limitation period for actions brought under the Statute of Elizabeth. Hence, a trust or transaction could be attacked many years after it had been established.

(2) Intention to defraud was interpreted broadly and was held to mean merely depriving creditors of timely recourse to property which would otherwise be available for their benefit.[13]

(3) Future creditors could attack the transaction even if those creditors were not in existence at the time of the transaction.[14]

The Statute of Elizabeth principles were available to a broad range of persons such as existing and future commercial creditors, dissatisfied spouses and dissatisfied heirs, all wishing to attack a trust or transaction established or effected even by a clearly solvent person.

Legislation has been enacted in several Caribbean offshore jurisdictions to facilitate settlors in estate planning by safeguarding their assets in the event of insolvency or fiscal emergency, and to ensure that existing creditors are not prejudiced. The statutory provisions in the Bahamas and the Cayman Islands adopt a moderate approach and follow a similar pattern, whilst the Turks and Caicos Islands model is more aggressive.

Section 4(1) of the Cayman Islands Fraudulent Dispositions Law 1989 provides that: 'every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced'. 'Undervalue' is defined to mean the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property which is the subject of the disposition. Thus the Law applies only to a disposition which contains an element of gratuity and to that extent it reverses many of the nineteenth century English cases in which the Statute of Elizabeth was applied to dispositions for full value.

'Intention to defraud' is narrowly defined as 'an intention of a transferor wilfully to defeat an obligation owed to a creditor'. Hence, it is no longer sufficient for a creditor to show that he was delayed or hindered by the disposition of assets to the Cayman Island trust, as was the position under the Statute of Elizabeth. Rather the creditor has to show that the transferor had a wilful intention to defeat an obligation owed to a creditor. Further, by s 4(2) of the Law, the burden of establishing such intent to defraud is specifically stated to be upon the creditor seeking to set aside the disposition.

The twin elements of the Law are the definitions of creditor and obligation. 'Creditor' means a person to whom an obligation is owed; and 'obligation' means an obligation or liability (which shall include a contingent liability) which existed on or prior to the date of a relevant disposition and of which the transferor had notice. The effect of these definitions is to reverse the nineteenth century English cases by providing that a creditor may only be regarded as such if he could show that the obligation in respect of which he claims he has been defrauded, existed prior to the disposition of assets to the trust. The term obligation, however, has a wider meaning than debt and includes all forms of debt and contractual claims.

Section 4 of the Law imposes a limitation period of six years from the date of the disposition. Section 6 provides that if a disposition is set aside by the court pursuant to the Law, it may only be set aside to the extent necessary to satisfy the obligation to a creditor at whose instance the application is brought.

After the enactment of the Cayman Law, various other jurisdictions, including Bahamas,[15] Barbados[16] and Grenada[17] followed with similar legislation. However, the limitation period in the various jurisdictions varies: in Grenada there is none, while in the Bahamas and Barbados it is two years and three years, respectively.

13 *Lloyds Bank Ltd. v Marcani* [1973] 3 AER 754; *Freeman v Pope* (1870) LR 5 Ch App 538.
14 *Mackay v Douglas* (1872) LR 14 Eq 106; *Re Butterworh* (1882) 19 Ch D 588.
15 Fraudulent Dispositions Act 1991.
16 Part V, International Trusts Act 1995.
17 Part VII, International Trusts Act 1996.

Section 8 of the Cayman Islands Law provides that nothing in the Law shall create or enable any right, claim or interest on behalf of a person which right, claim or interest would be avoided or defeated by the Trust (Foreign Element) Law 1987.[18] The effect of Section 8 is to prevent a person who is precluded by the 1987 Law from bringing a claim based on a personal relationship with the settlor or heirship rights, from bringing an alternative claim as a defrauded creditor.

The Turks and Caicos Trust Ordinance 1990, s 61, provides that where a settlor is an individual, a settlement cannot be set aside by a creditor unless the creditor can show that at the time of the settlement, or as a result of the settlement, the settlor was insolvent. The burden of proving the insolvency of the settlor at the relevant time is upon the creditor seeking to have the settlement invalidated. A six year limitation period is imposed.

The British Virgin Islands Conveyancing and Law of Property Act (Cap 220), s 81, is similar to s 172 of the Law of Property Act 1925 (UK) which is based on the Statute of Elizabeth and is therefore plagued by the difficulties which have been outlined. The section provides that any conveyance made with intent to defraud creditors is voidable at the instance of any persons thereby prejudiced (other than a conveyance for value to a bona fide purchaser without notice). There is, however, no legislation limiting the period during which such a conveyance may be set aside.

Section 7(6)–(7) of the Belize Trusts Act 1992 provides that a trust may not be set aside on the basis of claims from creditors or the order of a foreign court on account of divorce, bankruptcy, and the like.

The Bermuda Conveyancing Amendment Act 1994 introduced a new Part IV A to the Conveyancing Act 1983, and its terms sought to bring into effect legislation to give some certainty as to the circumstances in which creditors of a settlor could or could not petition the Supreme Court of Bermuda to set aside a trust.

The new legislation provides that a disposition will not be set aside by reason only that it was made at an undervalue but that it is for the court to determine, on the balance of probabilities, whether the disposition was made with the 'requisite intention'. The phrase is defined as an intention of a transferor to make a disposition, the dominant purpose of which is to put the property beyond the reach of a person or class of persons who could make a claim against the settlor. The potential claimant, if not a person to whom an obligation was owed at the date of the transfer, must satisfy the court that he was a person who was reasonably forseeable by the transferor as a person to whom an obligation might become owed at that time. 'Eligible creditor' is defined as being a person owed an obligation on or within two years after the date of the disposition ('the material date'). The eligible creditor has six years from the date of the disposition or transfer of property or, if the claim arose within two years after the disposition, six years from the date when the cause of action accrued.

The eligible creditor has the burden of proof of showing that the transferee had not acted in good faith. Even where the eligible creditor succeeds in the action to set aside the disposition, it is only set aside to the extent necessary to satisfy the eligible creditor's claim.

The 1983 Act, as amended, now makes it clear that, while legislation is intended to give security to individuals by creating a suitable environment for the protection of their assets, and property which is not within the power of a transferor to be disposed of. The test of which is in accordance with Bermuda conflict of law principles or by virtue of a foreign law, will not receive the validation or protection of the Bermuda courts.

18 The relevant section of the 1987 Law is now contained in s 91 of the Trusts Law (1998 Revision).

Perhaps the most comprehensive asset protection legislation to be found in the Caribbean are the models adopted in Dominica, Nevis and St Vincent, where the Statute of Elizabeth is expressly excluded.[19]

In these jurisdictions a creditor challenging an asset protection trust (APT) or a disposition into an APT must prove not only that the settlement or disposition was made with the principal intent to defraud him, but that at the time it took place it rendered the settlor insolvent. This heavy burden is accentuated by the fact that the required standard of proof to be met by the creditor is 'beyond a reasonable doubt' – the criminal standard. Furthermore, the settlor shall not have imputed to him an intent to defraud a creditor solely by reason that the settlor made the settlement or disposition within two years from the date that the creditor's cause of action accrued. If the defrauded creditor is successful in meeting these requirements, the settlement or disposition is not considered void or voidable, but the trust will be liable to satisfy the creditor's claim out of the trust property.

The legislation also makes it clear that the judiciary will not recognise any non-domestic court orders regarding its domestic asset protection trusts. This forces a foreign judgment creditor to proceed *ab initio*, retrying in the local courts the original claim giving rise to the foreign judgment. A plaintiff who brings an action in relation to such an asset protection trust must first post a US$25,000 bond with the government to cover court and other costs, before a suit will be accepted for filing. The statute of limitations for filing legal challenges to an APT runs for one year from the date of the trust creation.

Professional advisers are particularly in an area of potential risk when structuring asset protection trusts and are therefore best advised to explore risk control techniques. It is imperative for advisors to conduct due diligence examination prior to advising so as to ensure that they themselves are not exposed to liability. A variety of issues need to be considered such as whether the client is in violation of any money laundering statutes. Furthermore, it is necessary to clarify whether the client is entering into an asset protection plan with the intention of defrauding or evading existing creditors, and whether the client will still be solvent after the plan has been put into operation. While the issues will vary according to each jurisdiction and its particular laws, nevertheless, there are certain overriding general and universal laws of practice which cannot be avoided.

THE EVOLVING BENEFICIARY PRINCIPLE

It has already been established in previous chapters that the essential feature of a trust is the recognition of ownership as divided into two parts – legal ownership and equitable ownership. The beneficiary of a trust holds the equitable ownership in the trust property – although a beneficiary may also be a trustee over that same property. While the trustee holds legal ownership, it is however essentially for the benefit of the equitable owner that the trust is established. The rights of a beneficiary and who can be a beneficiary pose significant questions.

Who can be a beneficiary?

Generally, anyone including minor children is capable of holding an equitable interest in property. Trusts in which some beneficiaries are children have come under increased attention since

19 Section 50, St Vincent International Trust Act 1996; s 49, Nevis International Exempt Trust Ordinance 1994.

Caribbean jurisdictions have enacted legislation which eliminates the distinction between legitimate and illegitimate children. For a child born in or out of wedlock to benefit under a trust, it must be established that the child is the intended beneficiary under the instrument in question. In the 2009 Trinidad High Court Case of *Seeta Grover v Susheila Maharaj et al*,[20] Pemberton J was forced to construe a Settlement Deed which was executed in 1958, when there was still a distinction in law between legitimate and illegitimate children. The settlors as grandparents settled property to the following successive uses: on the settlors as joint tenants during their joint lives and the life of the survivor; thereafter to the use of their daughter for her life; and after her death to the use of her illegitimate children. The claimant argued that the settlement deed was to be construed as at the date of its delivery. The defendant argued that the correct date to be used was the date of death of the last surviving tenant.

The court held that the correct date to be used for the construction of the settlement deed was the date of delivery. Subsequent changes in the law changing the status of the children from illegitimate to legitimate or abolishing the disabilities associated with children born out of wedlock were immaterial. The settlor's intention must be gleaned from the words used in the settlement deed and the meanings attributable to them at the time of the delivery of the deed. Changes in the law which occurred subsequent to the settlement could not widen the class of intended beneficiaries.

Rights of the beneficiary

A beneficiary of a trust has two basic rights:

1. to receive the benefit of the trust property or income therefrom in accordance with the terms of the trust; and
2. to enforce the terms of the trust against the Trustees, particularly when they make questionable decisions in relation to trust property or to distribution to beneficiaries.

In order for a beneficiary to have a meaningful right to make the trustee account for the exercise of his discretion, the beneficiary must have sufficient information relating to trust matters; otherwise, a claim may be thrown out as an unjustified 'fishing expedition'. The courts have had to deal with competing considerations. On the one hand, there is the overriding need of keeping trustee decision-making confidential and enabling settlors to communicate relevant information to trustees for this purpose, while on the other hand, the requirement of which transparency enables beneficiaries to hold trustees to their fiduciary duties.

Since the leading cases of *Re Beloved Wilkes Charity*[21] and *Re Londonderry Settlement*,[22] the law has protected trustees from the need to give reasons at the request of beneficiaries, for their discretionary decisions. The policy as elegantly set out in *Londonderry* was:

> Nothing would be more likely to embitter family feelings and the relationship between trustees and members of the family were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might enure, added to the present not inconsiderable burdens.

20 CV 2009–01533 (unreported).
21 (1851) 3 Mac & G 440.
22 [1965] Ch 918.

In *Schmidt v Rosewood Trust Ltd*,[23] the Privy Council however recast the traditional approach to disclosure based on proprietary rights held by the beneficiaries, and replaced it with a broad discretion on the part of the court. Their Lordships found that:

(a) The more principled and correct approach when faced with beneficiary requests for information is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise and if necessary, intervene in the administration of trusts.

(b) A proprietary right on the part of the applicant is neither necessary nor sufficient to enable the court to exercise that jurisdiction.

(c) On an application for disclosure there are three areas in which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court.

(d) No beneficiary has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties.

After Schmidt, there was some question as to whether the *Londonderry* principle had been overruled. Gavin Lightman J suggested, extra judicially, that this was the case.[24] However, Briggs J, in *Breakspear and others v Ackland and another*,[25] affirmed the principle in a case which dealt with a beneficiary's entitlement to view a letter of wishes. The court in that case concluded that the exercise by trustees of their dispositive powers must be regarded 'from start to finish' as 'an essentially confidential process'. Nevertheless, in a nod to *Schmidt*, this confidentiality is subject to being overridden as a matter of discretion by the court.

The practical effect of the analysis of Briggs J may be summarised as follows:

1. Trustees should regard letters of wishes as confidential.
2. They have a discretion to abandon this confidentiality, if they judge it to be in the best interests of the beneficiaries and the due administration of the trust. The discretion arises

23 [2003] 3 All ER 76.

24 ACTAPS newsletter Issue 58:

> I would suggest that the principles stated in earlier cases (and in particular *Londonderry*) may no longer apply at least with the same stringency since the decision in Schmidt. The court now, after carrying out the appropriate balancing exercise, in proper cases requires disclosure both of confidential memoranda of wishes and of confidential documents . . . The reasoning of Kirby P . . . [the dissenting judge in *Hartigan*] is in my view compelling that disclosure to beneficiaries of confidential letters of wishes and trustees deliberation should not be regarded as immune from disclosure, when disclosure is necessary to enable beneficiaries to monitor performance of their duties by trustees and ensure that they are fully and properly informed. A balancing exercise is called for involving an examination of the best interest of the beneficiaries . . . But whether the confidence intended by the settlor (or desired by the trustees) should be broken must depend on the merits of the application. If a settlor in arranging his affairs has recourse to a settlement and a confidential letter or indeed a confidential oral communication of wishes, he runs the risk that the due administration of the settlement, the accountability of the trustees and the safeguarding of the interests of the beneficiaries may require the confidence to be overridden by those considerations. Trustees have no rights of confidence or privacy as such: it should only be claimed and respected when the need for it counter weighs countervailing considerations.

25 [2008] All ER 260.

regardless of a request for disclosure by a beneficiary. A beneficiary's request for disclosure merely triggers an occasion upon which the trustees need to exercise their discretion.

3. Having decided, the trustees are not obliged to give reasons.
4. In a difficult case, the trustees should seek directions from the court.

A recent and important case on the subject is *Fattal and others v Wallbrook Trustees*.[26] One of the issues which arose in this extensive litigation between the parties was the allegation that the trustee had failed to provide one of the beneficiaries, Mr Fattal, with certain documents which, in the words of Mr Fattal, he was 'entitled to see'. Lewison J applied *Schmidt* and held that 'a beneficiary has no legal right to see trust documents. . . '

These cases and related developments are of significance for Caribbean jurisdictions, since the increased intervention by the court and greater access for beneficiaries provide increased scope for high net worth individuals to seek alternative vehicles for sheltering assets. In particular, the new Foundation structure, which is discussed in Chapter 17, now presents estate planning opportunities which hitherto had not been seriously explored within a Caribbean context.

A note on the Commercial Division of the Eastern Caribbean Supreme Court

As the law of trusts, especially in offshore financial centres, evolves and becomes increasingly complex, so too will the related litigation as contentious issues arise. For as the Commonwealth Caribbean offshore centres have matured as jurisdictions, there has been a matching increase in the number of trust matters before the courts. In response to the increased volume and complexity of trust and private client matters, a decision was taken in 2009 to establish a commercial division of the Eastern Caribbean Supreme Court (ECSC) in the BVI. The aim of the commercial division is to 'bring a new and dynamic dimension to the specialist practice of cross-border litigation in the jurisdiction and . . . to enable [the ECSC] to maintain a competitive international profile and provide support to the international business sector'. Under rules of court, all claims or applications arising out of the transaction of trade and commerce including any claim relating to the law of trusts, where the claim or the subject matter to which it relates is at least US$500,000, will be assigned to the Commercial Division. The court retains a discretion to admit claims not meeting the monetary requirement. This introduction is a landmark development.

26 [2010] EWHC 2767 (Ch).

CHAPTER 17

ALTERNATIVES TO THE OFFSHORE TRUST: THE FOUNDATION

The twenty-first century has ushered in an ever increasing demand for structures which provide legal mechanisms for the protection of wealth. While in the past, the preferred vehicle for protection of wealth has been the asset protection trust, more recently, difficulties have been encountered in the use of offshore trusts. As evidenced in *Abdel Rahman*[1] and similar cases which raise issues of settlor control, the fundamental requirement that the trustee take full legal ownership and control of the assets is a difficult concession for most settlors. Business people who have built up assets by maintaining control over investment decisions are pained by the idea that, by setting up a trust, control of assets will be lost to a stranger in a remote jurisdiction where decisions are taken independent of the 'real owner'. Devices such as letters of wishes, trustees' file notes and special functions of the protector are increasingly attacked by the tax authorities of the G8 countries as being nothing more than an extension of settlor control. As a result of the increase in trust litigation, offshore trust providers have become increasingly sensitised to the potential risks, especially in jurisdictions where substantial insurance is required.

Hence, the establishing of an asset protection trust which minimises the risks associated with settlor control while remaining effective has become more difficult and increasingly expensive. Offshore Financial Centres (OFCs), including those in the Caribbean, have responded to this new reality with innovative vehicles which seek to be safer, more efficient and less costly to administer, such as segregated portfolio companies, various forms of insurance and foundations. Foundations in particular have become favoured as a method by which the settlor may maintain extensive control while still avoiding the possibility that the vehicle will be deemed to be a sham.

FOUNDATIONS

Origins

The legal entity known as a 'foundation' has been a well-established vehicle in the civil law countries of Europe since the Middle Ages. The concept of foundations emerged during the Roman Empire as a way for the Catholic Church to hold and administer its property. Congregation members frequently gave to the Church, one of the most powerful institutions of the era, in an effort to further its beneficial mission. The goal of the ecclesiastical foundations was to promote charitable, scientific and humanitarian objectives in accordance with the religious aims of the Church. The social conventions of the time were such that the Church should be concerned solely with matters of faith and not with those of asset management. As a result, legal theorists proposed that any asset given to the Church should have the ability to manage itself and should be classified as a legal person, separate and apart from the Church.

While the laws in some civil law European countries, such as France, Hungary and Sweden, continue to restrict the creation of foundations to those intended to support purposes which are cultural, scientific or charitable, other continental jurisdictions allow foundations to be used for non-charitable purposes. In 1926, foundations moved beyond their medieval limitations as

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1 See Chapter 16.

charitable structures when the Principality of Liechtenstein enacted the Personen- und Gesellschaftrecht (Persons and Companies Act, hereafter referred to as the PGR) which made the foundation suitable for use as a vehicle to manage the assets of wealthy families. The PGR meant that the foundation could henceforth be used to hold and manage private assets. As there is no concept of the trust in civil law countries, the foundation has developed in several civil law countries as a way for the owner of the assets (the founder) to transfer ownership to a separate legal entity while retaining significant control over how the assets are managed and distributed. Austria, Germany and Switzerland have followed Liechtenstein's lead in allowing the establishment of non-charitable or private foundations for the benefit of families, individuals or institutions.

In recent years, the use of non-charitable foundations has grown and they have been utilised for the following purposes:

- maintaining control of a family business;
- corporate stability;
- collection of royalties and payments;
- holding and managing personal and real property;
- providing security for a lender; and
- retention of control.

Maintaining control of a family business

The Garfield Weston Foundation (the 'GW Foundation') was established in 1958 by the late Willard Garfield Weston ('Willard Weston'), the founder of Associated British Foods ('ABF"). The Foundation was endowed with a donation of family-owned company shares and is today the ultimate controller of ABF. Willard Weston was succeeded as Chairman of both ABF and the GW Foundation by one of his sons, Garfield Howard Weston ('Garry Weston'), who helped the company grow and diversify its holdings. Garry Weston died in 2002 and was succeeded by George Weston as the Chief Executive of ABF, while Guy Weston became the Chairman of the Foundation. While the GW Foundation provides money to charitable causes, its true mission is arguably to allow the members of the Weston family to maintain control of ABF. All of the trustees of the Foundation are now, and have always been, lineal descendants of the founder.

Corporate stability

The INGKA Foundation owns the privately held Curaçao-registered company, INGKA Holding B.V., which is the parent company of the majority of the outlets of the Swedish multinational furniture store chain, IKEA. The Foundation's objects require it to 'obtain and manage' shares in the INGKA Holding group and to manage its shareholding in a way to ensure 'the continuity and growth' of the IKEA group. It has been speculated that the real purpose of the INGKA Foundation is to act as an anti-takeover device for INGKA Holding B.V., since its shares can only be sold to another foundation with the same objects and executive committee, and the Foundation can be dissolved only through insolvency.

Collection of royalties or payments

The Green Bay Packers Foundation (the 'Packers Foundation') was created in 1986 by the American National Football League (NFL) franchise, the Green Bay Packers (the 'Packers').

The Foundation distributes funds to civic and charitable groups throughout the State of Wisconsin. To fund its charity, the Packers Foundation collects royalty fees from the use of the Packers' oval G logo on officially licensed NFL merchandise and on Wisconsin licence plates. The Packers are the only community-owned franchise in major league North American team sports, and are the last remaining small-town team left in the NFL. The town of Green Bay, Wisconsin has approximately 100,000 residents, while most other franchises play in big cities, where the population numbers in the millions. To ensure that the team stays in Green Bay, the Packers' Articles of Incorporation provide that any profit from a sale of the franchise would go to the Packers Foundation.

Holding or managing real property

The Onassis Foundation contributes to philanthropic causes benefiting residents of Greece and promotes Hellenic culture. Besides these aims, the entity operates the 17 vessels owned by Olympic Shipping and Maritime, S.A. (the 'Olympic Shipping Group'), the successor-in-interest to the company established by the late Aristotle Onassis. In addition to the ships, the Foundation operates an investment portfolio and owns real properties in New York, London and Athens, which serve as offices for subsidiaries for the Olympic Shipping Group.

Providing security for a lender

A foundation may be used to hold orphan companies in off-balance sheet transactions. In such transactions, the structure can be used to provide security for the lender or to keep the asset and liability from appearing on the purchaser's balance sheet. For example, a purchaser may wish to buy an asset from a seller. To accomplish the purchase, the purchaser will establish a foundation which incorporates an underlying company. To finance the purchase, the underlying company in turn will borrow funds from a lender and give the lender a pledge of its shares as security. The underlying company leases the asset to the purchaser and utilises any rental income received to discharge its debt to the lender. When the debt is repaid, the lender releases its security and any surplus assets could either go to the purchaser or be held in the foundation until used up in full.

Avoiding controlled foreign corporation reporting requirements

As part of their tax planning strategy, many people use a company which is registered in a jurisdiction in which they do not reside. The United States, Canada and many Western European countries have strict tax regulations which require their citizens and residents to submit statements which declare any ownership or interest in such companies, which are better known as 'controlled foreign corporations' (CFCs). Instead of holding the shares in their own name, a person may establish a foundation to hold the shares, thus avoiding the CFC reporting rules. The advantage of using a foundation as a shareholder for a CFC is the removal of ownership from an identifiable person. The transfer of the CFC to a self-owned structure, with neither owners nor beneficiaries, confers anonymity and privacy on the subscriber.

Retention of control

The foundation is today essentially a response to settlor concerns over the loss of control inherent in the traditional trust structure. As a helpful alternative, it may allow a settlor to

maintain control over assets and restrict the rights of beneficiaries. It may also pursue a more aggressive investment strategy than might be the case with a professional trustee.[2]

KEY ASPECTS OF FOUNDATIONS

A private foundation may be described as a

> self-governing separate revocable or irrevocable legal entity, without shareholder or the equivalent, which is managed by a foundation council or similar body and set up following a declaration, registration or incorporation by, or on behalf of, a founder and designed to hold, administer and distribute the foundation's endowment for the benefit of beneficiaries, or for a purpose, where the entire ownership of the foundation assets rests with the foundation but which are managed according to the requirements of the charter and regulations (or articles) made under the charter.[3]

A foundation is regarded as self-owning. Endowments or transfers of assets by the founder or third parties to the foundation constitute its assets. Assets may be of any nature, although they will usually be tangible assets such as cash, securities and real estate. The transfer of assets made to the foundation may be disputed if such transfer is made with the intention of defrauding creditors. The assets, once transferred to the foundation, are separate from those of the founder. However, the foundation does not issue shares or any other document that represents participation in its ownership. While there are persons to whom distributions may be made from the assets of the foundation, these beneficiaries do not own or control or have any rights to the foundation assets in contrast to the beneficiaries of a trust who own the equitable interest in the trust property.

Ultimate control over a foundation rests in the hands of the foundation council which is responsible for carrying out the stated purpose(s) of the foundation. The control of the foundation by the council may be shared with the founder, depending on the extent of his retained powers, and may be influenced by a third party such as a guardian or protector. One of the most attractive features of the foundation as an alternative to the trust is that a founder may retain significant powers over the management of the assets of the foundation without running the risk that the foundation will be considered a sham, as could be the case with a traditional trust structure.

The core purpose of a foundation is to carry out the wishes of the founder as set out in its constitutive documents. The founder's wishes are either charitable or philanthropic in nature or, especially in respect of those foundations established in the OFCs, involve the management and distribution of family wealth. The founder's heirs have no right to revoke the creation of a foundation or which it has received. There can be no objection to a foundation on the grounds that the transfer of assets to the foundation is contrary to any forced heirship laws of the state where the founder resides or is a citizen.

Establishment or formation of a foundation

Each jurisdiction includes in its legislation governing foundations certain requirements for the establishment or formation of a foundation. Typically, the charter of the foundation must be

2 These examples of foundations provide interesting background information but, with the exception of the last point, are not strictly relevant to the foundation as an alternative to the trust.
3 Private Foundations Module; Society of Trust & Estate Planning UK 2010.

registered or deposited in some type of registry. Once the process of registration has been completed and the foundation entered on a register (or deposited as in Anguilla), there is no doubt that the foundation exists as a separate legal entity. The entry of the foundation in the register constitutes a form of publicity of the existence of the foundation as an entity in its own right and gives notice to third parties. Where the formation requirements do not necessarily involve registration, as in Anguilla, the separate legal existence of the foundation remains a private matter.

Management of the foundation

A foundation is managed in a manner which has great similarity to the way in which a company is managed by a board of directors. A protector or guardian may be appointed to supervise the council and safeguard the assets which are under the management and at the disposal of the foundation council. Often, the protector or guardian is a close friend of the founder, and will ensure that the founder's intention in establishing the foundation is followed as closely as is possible. In all the Caribbean jurisdictions which have enacted foundations legislation, the appointment of a protector or guardian is optional but in other jurisdictions, such as Jersey, there is a requirement that such a person must be appointed.

FOUNDATIONS IN THE CARIBBEAN

The concept of the foundation is unknown in English common law, the basis for the majority of legal systems in the English-speaking Caribbean. In the Caribbean, the Bahamas was the first jurisdiction in which foundations were introduced with the Foundations Act of 2004. Foundation legislation has since been enacted in St Kitts, Nevis, Anguilla and Belize; it has been tabled for discussion in Barbados. While there are important differences in the legislation, the Caribbean foundation legislation shares similar provisions with respect to requirements for registration of the foundation, exclusion of foreign law and forced heirship rules, possibility of continuance into and out of the jurisdiction and strict confidentiality with respect to foundation documents together with investigations into foundations.

Establishment and registration

The practice and procedure to establish a foundation differs from Caribbean jurisdiction to jurisdiction, but there is a common theme. All jurisdictions follow the corporate model of incorporation. Consequently, a founder must file with the registrar the proposed charter, which contains prescribed information, together with an application to register the foundation in a central register of foundations. In circumstances where a service provider registers the foundation, the service provider acts as an agent or 'nominee' of the founder and the nominee's client will contribute funds to the foundation post formation. In practice, the nominee contributes the minimum capital required in the jurisdiction for a foundation and the true owner subsequently endows assets upon the foundation. Clearly, this practice may have some undesirable consequences. For in cases where a third party who is not the founder transfers assets to a foundation, that party transferor does not become a founder for the purposes of the exercise of powers reserved by the founder. Hence, it is the nominee who has the founder's rights and not the true founder. In such circumstances the founder may give the nominee a letter of wishes. Alternatively, the charter may in its regulations or articles confer powers upon the real founder, as opposed to the nominee. As the regulations are not available for public inspection confidentiality is enhanced without depriving the client of the founder's rights.

Endowment of assets upon a foundation

In the Bahamas[4] and Anguilla,[5] a foundation must have assets of a minimum value of US$10,000 or its equivalent in any currency. There is no minimum value of assets required under the St Kitts and Nevis Foundations Act, the Nevis Multiform Foundations Ordinance or the Belize International Foundations Act.

The council and officers of a foundation

In all territories which have foundation legislation, with the exception of the Bahamas, a foundation council (or management board in Nevis) must be appointed.[6] In the Bahamas, a foundation council may be appointed where provision is made in the charter of the foundation but there is no requirement under the law. A registered agent must be appointed in Belize and Anguilla whereas a secretary is required in St Kitts and Nevis and the Bahamas. Foundations set up under the Nevis Multiform Foundation Ordinance (MFO) must have both a registered agent and a secretary. The secretary/registered agent must be a licensed provider in St Kitts and Nevis, the Bahamas and Anguilla. Every jurisdiction requires at least one member of the council[7] or the secretary or the registered agent to be a resident of the territory.

In the Bahamas, a foundation must have at least one appointed officer whose duties are primarily administrative, rather than fiduciary[8] in nature. The mandatory secretary must be appointed as an officer.

Protector or guardian

In none of the jurisdictions is the appointment of a protector,[9] guardian[10] or supervisory board[11] (hereinafter referred to as a 'guardian') necessary but the legislation does take into account the powers and responsibilities of a guardian if the provision for the appointment of one is made in the constating documents of the foundation. No protector may be a member of the foundation council. The role of the guardian is to ensure compliance with the provisions of the relevant foundation legislation and the constating documents of the foundation. The supervisory board of a Nevis multiform foundation may also generally supervise the management and conduct of the foundation's affairs by the management board.[12]

Termination and continuation

As with a company, a foundation can endure for ever until it is formally dissolved. The practice and procedure in relation to the winding-up and dissolution of a foundation is more or less the

4 The Bahamas Foundations Act, s 8.
5 Anguilla Foundation Act, s 3.
6 Belize International Foundations Act, s 36; Anguilla Foundation Act s 19; St Kitts and Nevis Foundations Act, 2003 s 12; Nevis Multiform Ordinance, 2004 s 17; The Bahamas Foundations Act, s 14.
7 Belize International Foundations Act s 40.
8 Bahamas Foundations Act, s 11.
9 Belize International Foundations Act, s 56.
10 St Kitts and Nevis Foundations Act, ss 20 and 21; Anguilla Foundation Act, s 31.
11 Nevis Multiform Foundations Ordinance, s 21.
12 Nevis Multiform Foundations Ordinance, s 22.

same as for a company.[13] A foundation may be compulsorily wound up by a court order if it is insolvent or under the just and equitable principle. While it cannot be wound up by members, as it has none, the charter of a foundation will normally provide for it to be expressly revocable by the founder. The charter may also set out express provisions which impose a term of years on the foundation or which provide that it will automatically dissolve on the occurrence of a specified event.

Most modern foundation legislation will contain provisions for continuance into another jurisdiction and the Caribbean Registration is no different. Each jurisdiction allows for foundations dual mobility by way of import or export.[14]

Beneficiary rights

Since there is no division in the ownership of foundation assets, beneficiaries under a foundation have no equitable ownership rights as would be the case with beneficiaries under a trust. Consequently they are less privileged than beneficiaries under a trust. With the exception of beneficiaries of a Belizean International Foundation,[15] beneficiaries are not specifically owed any statutory or implied duties by the foundation, or the council or indeed by others appointed by the constating documents, such as a guardian or protector. The duties of the council, officers, guardian and protector to comply with the foundation legislation and the constating documents are owed to the foundation and not the beneficiaries. The enacting legislation grants varying degrees of right to information including copies of the charter, regulations and any amendments, audit reports and other financial statements as well as minutes of the foundation council. Beneficiaries who challenge the very existence of the foundation may lose their entitlement to benefit from the assets of the foundation.[16] In all jurisdictions, yet again with the exception of Belize, and in contrast to trustees, members of the foundation council do not owe a fiduciary duty to the beneficiaries, but rather to the foundation. Accordingly, they must act in accordance with the charter of the foundation and any by-laws or regulations.

Legislation in the Bahamas stands alone in enshrining the right of a beneficiary to certain information upon request.[17] In the event of non-compliance, a beneficiary may apply to the Court for an order which compels provision of the requested information. While all jurisdictions allow beneficiaries to bring an action for breach of trust, without access to pertinent information, it may however be difficult for beneficiaries to know when a breach of trust has occurred.

Belize has no explicit provisions for beneficiaries to receive information. Section 62 of the Belize International Foundations Act provides that a beneficiary who believes his interest or right is prejudiced may apply to the Court for an order with respect to the proper administration of the foundation or disposition of the foundation endowment.

The Nevis Multiform Foundations Ordinance explicitly states that the management board shall not be required to provide any document which discloses its deliberations or reasons for

13 The Bahamas Foundations Act, s 50; St Kitts and Nevis Foundations Act, ss 46–51; Anguilla Foundation Act, ss 46–48; Nevis Multiform Foundations Ordinance, ss 78–81; Belize International Foundations Act, ss 25–32.

14 Anguilla Foundation Act, ss 38 and 42; St Kitts and Nevis Foundations Act, ss 39 and 43; The Bahamas Foundations Act, s 51; Nevis Multiform Foundations Ordinance ss 62 and 65; Belize International Foundations Act, ss 85 and 88.

15 Belize International Foundations Act s 38(1)(b).

16 St Kitts and Nevis Foundation Act, s 26; Nevis Multiform Foundations Ordinance, s 48; Anguilla Foundation Act, s 36.

17 The Bahamas Foundations Act, s 41.

any decision made by it with respect to any exercise or non-exercise of any power or discretion.[18]

Conflict of laws

The foundation legislation in the Caribbean jurisdictions contains conflict of laws provisions.[19]

The enactments all confirm that the relevant laws of the state of registration govern the foundation and the endowment of assets. Forced heirship avoidance and spousal claim avoidance provisions are also employed through some form of words to the effect that a foundation shall not be void, voidable, liable to be set aside or otherwise invalid by reason that:

i. the laws of a foreign jurisdiction prohibit or do not recognise foundations or prohibit the endowment;
ii. the foundation or endowment to it avoids or defeats spousal claims conferred by foreign law upon the spouse of the founder, assignee of the rights of the founder or person endowing assets upon the foundation; and
iii. the foundation or endowment to it avoids or defeats forced heirship rights conferred by foreign law upon the family of the founder, assignee of the rights of the founder or person endowing assets upon the foundation.

The relevant legislation also states that any foreign judgment shall not be recognised nor enforced whenever such judgment is based upon the matters i. to iii. above, or is otherwise inconsistent with the legislation.

A note about the Nevis Multiform Foundations Ordinance, 2004

Nevis, notwithstanding that it is a part of the independent state of St Christopher and Nevis, is able to enact its own legislation. Although the two-island state passed legislation governing the creation and administration of foundations, Nevis enacted its own legislation which provides for a unique form of foundation – the multiform foundation. In Nevis, one may establish a foundation which operates like a trust, a company or a partnership and uses the same terminology and structures of those vehicles.[20] The MFO terms entities registered under it as 'multiform foundations', which not only enables the establishment of new entities, but also allows already existing foreign and domestic business entities to continue, transfer, convert, consolidate or merge into a Nevis-registered multiform foundation. The MFO allows for flexibility in the by-laws, the regulations which govern a multiform foundation. The Ordinance which enables these entities to be established may be similar to a standard foundation, or may assume the form of more recognised business entities. The by-laws may be drafted to allow the entity, for administrative purposes, to take the form of a trust, a company, a limited liability company or a partnership. The stated form of a multiform foundation may be changed, from one form to another, and such change in form will not affect its existence, rights or obligations. The MFO also allows an entity the ability to choose a law, other than the Ordinance and the laws of Nevis, to govern either all or a portion of the multiform foundation.

18 Nevis Multiform Foundations Ordinance, s 27.
19 The Bahamas Foundations Act, s 68; Anguilla Foundation Act, ss 33 and 34; St Kitts and Nevis Foundations Act, ss 24 and 25; Nevis Multiform Foundations Ordinance, ss 46 and 47; Belize International Foundations Act, ss 80–82.
20 Nevis Multiform Foundations Ordinance, s 10.

The MFO provides an attractive statute of limitations provision for debtors. Under the Ordinance, any amounts contributed or 'subscribed' to the multiform foundation will not be fraudulent if the subscription occurred after one year from the date that the creditor's cause of action accrued or the subscription occurred before the creditor's cause of action accrued.[21] If the subscription occurred before the expiration of one year before the creditor's cause of action accrued and the creditor failed to bring an action before the expiration of six months since the subscription took place, the subscription will also not be considered fraudulent. Further, a creditor seeking to commence an action against a Nevis multiform foundation must deposit a bond of US$50,000 with the Minister responsible for Foundations from a financial institution in Nevis.

The legislation is the quintessence of flexibility.

TRUSTS VS FOUNDATIONS

The foundation may be used as a complex, asset holding and gift making vehicle. It is an alternative to the trust. Whether it is more useful than a trust will depend on the needs and concerns of the potential settlor/founder. In jurisdictions where both foundations and trusts are available, consideration may be given to the following comparisons.

- A significant difference relates to the nature of the two structures. A foundation has a separate legal personality, is the full and absolute owner of its property and can sue or be sued. A trust has no legal personality; it is the trustee who owns and manages the trust assets and who is the party to any litigation brought by or against the trust assets. Most foundation-enacting legislation in the Caribbean explicitly states that, upon certain formalities of registration, the foundation becomes a separate legal entity in its own right whose validity may not be challenged on the basis of any foreign law.[22] This 'certainty of existence' is an advantage over trusts as there is no need to grapple with the complexity of 'three certainties' which are needed to create an 'equitable obligation'. Further, a foundation, unlike a trust, can never be subsequently set aside as a sham; namely a trust where the settlor and the trustees intend from the outset to hold trust property to the order of the settlor and not for the beneficiaries as described in the trust instrument.[23] On the other hand, the requirement for registration does introduce an element of public knowledge. There is no public register for trusts and as such, a trust is a strictly confidential arrangement.
- With the exception of Belize,[24] foundations in the Caribbean allow for the founder to maintain significant control over the assets endowed upon the foundation. Even though the founder has transferred legal title of assets to the foundation by way of endowment, and the foundation has a council whose usual duty is to manage the foundation to achieve its stated objectives, the founder nevertheless may reserve rights to dictate or control the way in which the assets are managed or distributed and will frequently instruct the Foundation Council in important matters. The reservation of rights by the founder therefore does not cause the foundation to be a sham as it would under common law equitable principles.

21 Nevis Multiform Foundations Ordinance, s 108.
22 Belize International Foundations Act s 13; Anguilla Foundation Act s 15; The Bahamas Foundations Act ss 3 and 22(2); Nevis Multiform Foundations Ordinance s 3.
23 In *Re Esteem Settlement* [2003] JLR 188.
24 Belize International Foundations Act s 35(4).

- A private foundation is designed to comply with the wishes and intentions of the founder, rather than to serve the interests of the beneficiaries as is the case with a trust. By limiting the amount of information a beneficiary is entitled to receive and by punishing challenges to the foundation by a potential loss of entitlement, the control of foundations is kept firmly in the grip of the members of the foundation council, a body which may include the founder.

CHAPTER 18

CONFIDENTIALITY AND THE REGULATION OF TRUST ACTIVITY

INTRODUCTION

The prevalent view has been that confidentiality should be seen in a pure and ideal sense, such that zero tax jurisdictions were characterised as manifesting confidentiality, while no tax, or low tax jurisdictions were considered by their very nature as being unable to accommodate confidentiality. Secrecy as a concept therefore became linked with the notion of confidentiality. It is, however, obvious that confidentiality does not exist in a pure form, and indeed it may be more appropriate to explore the concept as one of examining procedures which limit disclosure in jurisdictions of both a low tax and zero tax nature. This more mature and current approach recognises the significance and the need for regulation of trust activity in all jurisdictions irrespective of size or tax regime. Such regulation is manifested at the micro level within the many jurisdictions whose residents use offshore trusts and indeed more recently such regulation is manifested in the offshore trust jurisdictions themselves. Hence, one increasingly recognises budgetary and policy initiatives in jurisdictions such as the United States, Canada, the United Kingdom, Switzerland and Italy, which discourage their residents from using offshore trusts. This approach at a micro level mirrors and is integrally related to the ongoing regulation at the macro level which has gained special prominence during the first decade of the twenty-first century, as represented by the reports of the Global Forum on Transparency and Exchange of Information for Tax Purposes established by the member countries of the Organization for Economic Cooperation and Development (OECD).

CONFIDENTIALITY IN A CARIBBEAN CONTEXT

The importance of banking confidentiality may be traced as far back as prior to Roman times, when temples acted as banks making financial confidentiality vital to an individual's privacy. Historically, the common law imposed a duty of confidentiality on banks regarding financial records of clients. In *Tournier v National Provincial Bank*,[1] an early English case, the court held that bankers had a contractual duty not to disclose a client's financial information. The *Tournier* principle was adopted by many nations, and expanded to cover areas other than banking. For example, the United Kingdom, as well as jurisdictions following UK jurisprudence, have expanded *Tournier* to cover commercial transactions. Common law courts recognise the importance of requiring a stringent standard of confidentiality. However, common law confidentiality is not absolute. Under *Tournier*, disclosure will be permitted in four instances: under compulsion of law; when disclosure is in the public interest; when disclosure is in the best interests of the banker; and with express or implied consent by the customer. Confidentiality of personal and corporate affairs is a key ingredient of trust and other financial planning and a major concern of settlors. Without stringent bank secrecy laws, it appears that under the common law standard of confidentiality, financial records can be compromised. Hence, in most offshore jurisdictions, the protection against disclosure is enhanced by statute. Some Caribbean jurisdictions have gone as far as to make confidentiality a matter of public policy.[2]

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1 [1924]1 KB 461.
2 The St Vincent Confidential Relationships Preservation (International Finance) Act 1996.

However, as stated by Lord Justice Millet in *In the Matter of BankAmerica Trust and Banking Corp (Cayman) Ltd. (1992–1993 CILR 574)*, 'there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.' Enforceability, in turn, places a duty upon the trustees to provide to the beneficiaries (not merely to the settlor or the protector) accounts with documentation and information as to the title to and whereabouts of, trust assets, so that the accounts may be properly checked. As a necessary and preliminary matter to all this, trustees are under a duty, so far as is practicable, to inform beneficiaries that they are beneficiaries.

Most of the Caribbean jurisdictions attempt, through legislation, to strike a balance between these two strands of accountability through transparency and confidentiality.

Section 83 of the Bahamas Trustee Act 1998 provides a very comprehensive formulation in the matter of trustee confidentiality. Trustees are under an obligation to take reasonable steps to inform each beneficiary who has, but may not be aware of having, a vested interest under a trust of the existence of the trust, and of the general nature of that interest. If the beneficiary is a minor or is mentally incapacitated, the trustees must give the information to the parents or legal guardians of the minor beneficiary, or (as the case may be) the receivers, conservators, curators, or other legal representatives of the mentally incapacitated beneficiary.

However, this obligation is subject always to the right of the trustees to withhold the information if they consider in their absolute discretion that it would not be in the best interest of the beneficiary to give the information. There is no obligation to inform beneficiaries who:

(a) have only a contingent interest;
(b) who are only objects of a discretion; and
(c) who have no vested interest.

This provision is clearly useful where there is a possibility that disclosure could defeat the settlor's intention of protecting the family.

The trustees are also under a legal obligation at the request and expense of any beneficiaries having vested interests under the trusts, to disclose certain documents to such beneficiaries:

(a) the trust instrument and all other documents in which the terms of the trust or any exercise of any trust, power or discretion are to be found;
(b) all financial statements of the trust; and
(c) all financial statements of companies wholly owned by the trustees of the trust.

There is, under the Act, an overriding requirement that when making disclosure of any documents or information to a beneficiary, the trustees shall, if other beneficiaries have requested confidentiality or if the trustees in their absolute discretion determine confidentiality to be in the best interest of such other beneficiaries, take all reasonable steps to secure the right to confidentiality of the other beneficiaries. The trustees must provide the beneficiary requesting information with only such documents or information as to enable that beneficiary to determine his own true entitlement or interest in the trust.

The trustees are not to be bound or compelled by any process of discovery or inspection or under any equitable rule or principle to disclose or produce to any beneficiary any of the following documents:

(a) any memorandum or letter of wishes issued by the settlor or any document recording any wishes of the settlor;

(b) any document disclosing any deliberations of the trustees as to manner in which the trustees should exercise any discretion;

(c) any other document relating to the exercise or proposed exercise of any discretion of the trustees (including legal advice obtained by them in connection with the exercise by them of any discretion).

In Barbados,[3] Grenada,[4] St Kitts,[5] St Vincent,[6] Turks and Caicos,[7] and St Lucia[8] statutes prohibit disclosure by the trustees of certain information concerning the trust to any person not legally entitled to that information. The protected information includes:

(a) the name of the settlor or any beneficiary;

(b) the trustees' deliberations as to the manner in which a power or discretion was exercised or a duty conferred by the terms of the trust or by law performed;

(c) the reason for the exercise of the power or discretion or the performance of the duty or any evidence upon which such reason might have been based;

(d) any information relating to or forming part of the accounts of an international trust;

(e) any other matter or thing respecting an international trust.

Notwithstanding this duty of confidentiality, the trustees are mandated to make disclosure of information relating to the accounts of the trust if such information is requested by a beneficiary. Another exception to the duty of confidentiality exists in relation to civil and criminal proceedings: the court may allow the disclosure of information or documents referred to above in such circumstances as the court thinks fit.

In St Kitts, the trustees' statutory duty of confidentiality is framed with more emphasis than in the other jurisdictions. A trustee shall so far as is reasonable and within a reasonable time of receiving a request in writing to that effect, provide full and accurate information as to the state and amount of trust property and the conduct of the trust administration to:

(a) the Court;

(b) the inspectors appointed under the Act; and

(c) subject to the terms of the trust –

  (i) the settlor;

  (ii) the protector of the trust (if any);

  (iii) any beneficiary of the trust who is not a minor or interdict; and

  (iv) any charity for the benefit of which the trust was established.

A similarly worded provision exists in Anguilla.[9]

Where there is no statutory duty of confidentiality, as in the British Virgin Islands, the common law position prevails. At common law, obligations of confidence may be derived from contract, tort, equity, property or bailment. A breach, or threatened breach, of confidence is actionable in the High Court, which will grant an injunction to restrain any threatened breach

3 Section 28 International Trusts Act 1995.
4 Section 47 International Trusts Act 1996.
5 Section 33 The Trusts Act 1996.
6 Section 64 International Trust Act 1996.
7 Section 28 Trust Ordinance 1990.
8 Saint Lucia International Trusts Act.
9 Section 28 The Trusts Ordinance 1994.

and will award damages for any actual breach. There is no criminal sanction for breach of a duty of confidence.

The extent of the common law duty of confidence depends upon the nature of the relationship between the relevant parties. A duty of confidence arises whenever confidential information comes to the knowledge of a person, in circumstances where that person has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.[10]

There is a public interest in preserving a duty of confidence which the court will enforce. There are, however, three general limiting principles on the duty of confidence, namely that:

(1) the information must be confidential;
(2) no duty of confidence applies to useless or trivial information; and
(3) the public interest in preserving a duty of confidence may be outweighed by a contrary public interest in favour of disclosing the information.

In several jurisdictions the duty of confidentiality, whether statutory or common law in nature, is supported by the existence of Confidential Relationships Laws. In the Cayman Islands the Monetary Authority Law (2008 Revision), the Banks and Trust Companies Law (2009 Revision), other legislation regulating the insurance, mutual fund and company management industries, and the Confidential Relationships (Preservation) Law (2009 Revision), all impose significant criminal penalties on government officials and professional persons who make unauthorised disclosure of information in the course of their duties or professional work.

The Turks and Caicos Confidential Relationships Ordinance 1979 states that its purpose is 'to give sanction to the duty of non-divulgence of information imparted under conditions of business or professional confidence, whether express or implied, and for purposes connected therewith'. Under this Act, any person who, being in possession of confidential information, however obtained:

(i) divulges it to any person not entitled to possession thereof; or
(ii) attempts, offers or threatens to divulge it to any person not entitled to possession thereof; or
(iii) obtains or attempts to obtain confidential information to which he is not entitled, shall be guilty of an offence.

Similar legislation exists in Nevis.[11]

As previously discussed, there are certain circumstances where, notwithstanding the duty of confidence, it may be necessary to provide information to third parties. In most jurisdictions the confidentiality provisions are balanced by provisions for disclosure of confidential information where there is *prima facie* evidence of criminal activity. The following are examples of such legislation:

British Virgin Islands

Banks and Trust Companies Act, Companies Management Act, and Insurance Act

These all contain virtually identical provisions about disclosure of information. The relevant sections provide that in usual circumstances any information, document, record or statement

10 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.
11 Confidential Relationships Act No 2 of 1985.

made or disclosed to the relevant authorities under the relevant Act is absolutely privileged and shall only be disclosed in certain circumstances. The restriction on disclosure does not apply when the disclosure is made, *inter alia*:

(1) on the order of a court of competent jurisdiction for the purposes of any criminal or civil proceedings;
(2) on request by a high ranking officer of a competent authority in an international organisation recognised by the Governor or a high ranking officer of the law enforcement authority in a country or jurisdiction approved by the Governor for the purpose of legal assistance in the investigation of any criminal activity; or
(3) for the purpose of enabling or assisting a regulatory authority in a country or jurisdiction approved by the Governor in discharging duties or exercising powers corresponding to those under the Acts and their regulations.

The Mutual Legal Assistance (USA) Act 1990

This Act puts into effect the terms of a treaty entered into between the United States and the United Kingdom in relation to the Cayman Islands and applies the provisions of this treaty to the British Virgin Islands. The purpose of the Act is to provide mutual procedures for law enforcement authorities in the US and the British Virgin Islands to obtain evidence and information. Generally the Act only applies to criminal investigations or proceedings although it will apply to fiscal matters insofar as any investigations by fiscal authorities are in connection with the unlawful proceeds of a crime.

A request under the provisions of this Act can be used to obtain documents or witness statements, to freeze assets, to locate persons, to serve documents and to assist with the transfer of persons in custody for testimony.

The Act specifically provides that any disclosure of evidence pursuant to the execution of a request shall not be a breach of any confidential relationship and no offence will have been committed and no civil claim or action could be brought in respect of such disclosure.

The Criminal Justice (International Co-operation) Act 1993

This Act provides mutual procedures for co-operation between the British Virgin Islands and countries, other than the US, in criminal proceedings and investigations. The Act extends to a fiscal offence where the request is made from a member of the Commonwealth or is made by a party pursuant to a treaty to which the UK is a party and which is applicable to the British Virgin Islands.

The Drug Trafficking Offences Act 1992

The Act is of interest insofar as disclosure to foreign authorities is concerned in that the court in the British Virgin Islands may register a confiscation order made in another country and the Governor may direct, with approval of the Legislative Council, that the provisions of the Act will apply to any external confiscation order.

Proceeds of Criminal Conduct Act 1997

This Act establishes a reporting Authority and a number of money-laundering offences, including:

(1) assisting another to retain the benefit of criminal conduct;
(2) the acquisition, possession or use of the proceeds of criminal conduct;
(3) concealing or transferring proceeds of criminal conduct.

If a person discloses to the Reporting Authority his suspicion or belief that the relevant funds which he is handling might be the proceeds of criminal conduct, that disclosure shall not give rise to any civil liability, even if it amounts to a breach of a duty of confidentiality.

Where information is disclosed to the Reporting Authority, no further disclosure to institutions or persons outside the territory by the Authority shall be made without consent of the Attorney General. Subject to this restriction, however, the Authority may disclose any information received in relation to criminal conduct:

(1) to any law enforcement agency in the territory; or
(2) to any law enforcement agency in any other country

in order to:

(a) report the possible commission of an offence;
(b) initiate a criminal investigation respecting the matter disclosed;
(c) assist with any investigation or criminal proceedings respecting the matter disclosed.

Cayman Islands

Under the Misuse of Drugs Law (2009 Revision), which imposes criminal offences for money laundering activities related to drug trafficking, disclosure of confidential information may be made to the Cayman Islands police where the person making the disclosure believes that any funds or investments are derived from or used in connection with drug trafficking.

The Proceeds of Criminal Conduct Law 1996 (2007 Revision) extends the principles of the Misuse of Drugs Law to all serious crimes and is in the same terms as the British Virgin Islands legislation.

From the point of view of a settlor, the offshore privacy and confidentiality features of the British dependent territories such as the British Virgin Islands, Anguilla, Bermuda, the Cayman Islands, and Turks and Caicos, have been circumscribed by the implementation of these previously mentioned 'mutual assistance', 'information exchange' provisions. Furthermore, the European Union Commission has indicated its intention to recommend a withholding tax on bank account interest, dividends and gains in all EU countries and dependent territories of such countries.

Some of the newer Caribbean offshore jurisdictions such as St Vincent and the Grenadines have passed stringent confidentiality laws to protect customers.

The St Vincent Confidential Relationships Preservation (International Finance) Act 1996 has been considered the most concrete expression of confidentiality in financial services and 'arguably the most restrictive confidentiality law in the world today'. The Act elevates the protection of professional confidential relationships and information to a matter of state 'public policy' (s 3), reaffirming the Government's policy that the right to privacy in financial affairs is a basic right of offshore companies and financial institutions, and that it will not assist other governments in collecting their taxes directly or under the guise of investigations or prosecutions for other purported offences. To make this clear, s 4(7) of the Act states that

> The Court hearing an application for directions under this section shall not allow the giving in evidence of confidential information in connection with the enforcement or prosecution of the civil or criminal revenue or tax laws of another state, territory or other political jurisdiction.

In Dominica, privacy is maintained due to the fact that although registration of the trust is required, the register in relation to the trust is not open to inspection without the written permission of the trustee; and there is exemption of trustees from requirements for the filing of annual returns or trust accounts and other typical reporting requirements relating to the trust.

Part XIII of the St Kitts Trust Act 1996 has implications related to the degree of confidentiality and asset protection which the jurisdiction can offer to settlors of offshore trusts. Under these provisions, if the Minister has *prima facie* evidence that a trust was created or is to be terminated for an unlawful or fraudulent purpose; or the transactions or affairs of the trust have been conducted unlawfully or with intent to defraud any person; or that it is in the public interest that an investigation of the trust be made, he may appoint inspectors to investigate the affairs of the trust. The appointment may be on his own initiative or on the application of any person who is a trustee, protector or beneficiary of the said trust, or a creditor of the settlor, provided that such applicant gives security of a maximum of $25,000 to defer the costs of the investigation.

Inspectors have the power to examine on oath; and to require a person to attend before them, to produce all records in that person's custody or power, and to give the inspectors all assistance in connection with the investigation. Any person who wilfully obstructs the conduct of the investigation or fails to co-operate with the inspectors is guilty of an offence. The Act clearly states that nothing in Part XIII is intended to abrogate the protection afforded by legal professional privilege and a banker's duty of confidentiality.

The ability of an offshore jurisdiction to assert its sovereignty without the interference of outside forces is a major deciding factor in choosing a place to invest and protect personal property. OFCs attract large amounts of business because they possess strict confidentiality rules which appeal to companies and individuals who wish to reduce their respective tax liabilities and withhold information from competitors, suppliers, creditors and customers for legitimate reasons. These jurisdictions are under no duty to aid onshore tax authorities in recovering taxes from funds which are legitimately deposited offshore. Nevertheless, the law related to confidentiality in several Caribbean jurisdictions has been tested and found to be not lacking in clarity and strength; and, cases in the late 1990s proved that their courts are anything but timorous in the application of these laws.[12]

However, at the macro level the Organisation for Economic Development (OECD) has attacked the viability of OFCs by claiming that the centres which provide favourable/non-existent taxes are engaging in unfair tax competition. The attacks have a two-fold purpose. By attacking confidentiality, developed nations not only attempt to gain access to financial records of supposed tax evaders, but also hope to make investments with OFCs unattractive by disassembling the confidentiality framework.

REGULATION AT THE MACRO LEVEL

In 2000, the OECD published a report which identified a number of jurisdictions as tax havens according to criteria it had established. In order to be removed from this list, 'blacklisted' nations needed to comply with nineteen separate items including signing tax treaties, exchanging information, and changing domestic policy. This requirement illustrates the hostile position the international community has taken towards Caribbean OFCs together with the stringent banking confidentiality policies. The Caribbean community responded negatively to the 2000

12 *Securities Exchange Commission v Banner Fund International and others* (1996) 54 WIR; *Attorney General v Bank of Nova Scotia, Nova Scotia Trust Company (Cayman) Limited* 1985 CILR 418.

OECD report, as it threatened the stability of the Caribbean community's financial reputation. The founding members of the OECD possess tremendous economic leverage. Conversely, small offshore jurisdictions, such as those in the Caribbean, lack the political or economic strength to withstand such a report-driven avalanche. Consequently, it is not a surprise that many offshore centres have either complied with the OECD regulations or at least opened channels of communication. Between the publication of the report in 2000 and April 2002, 31 jurisdictions (including all the Caribbean jurisdictions which had been 'black-listed') had made formal commitments to implement the OECD's standards of transparency and exchange of information.

Since the beginning of 2008, international tax evasion and the implementation of international standards of transparency and exchange of information have been high on the political agenda of the G8 countries. In the United States alone, its Internal Revenue System has estimated that the country loses $70 billion a year in revenue from investments and monies placed in OFCs. The global financial crisis placed a spotlight on OFCs as onshore jurisdictions strived to increase their rates of tax collection so as to offset large deficits. According to the OECD, 'since 2009, more progress toward full and effective exchange of information has been made than in the past decade'.[13] By the end of 2009, no jurisdiction remained on the list of uncooperative tax havens. It appears that confidentiality's greatest weakness is the coercive efforts by the global community to force offshore centres into compliance.

The Global Forum on Transparency and Exchange of Information for Tax Purposes

In charge of promoting tax co-operation and information exchange between countries, the Global Forum, first conceived in 2000, was dramatically restructured in September 2009. It was a response to the G20 call to strengthen exchange of information in the context of major progress made towards full transparency. As of September 2011, the Global Forum has 102 members, the most recent being Trinidad and Tobago. The Global Forum is mandated to establish an in-depth peer review system to enforce the commitments made by various jurisdictions; and also to respond in particular to the G20 call for rapid and effective implementation of the standards of transparency and exchange of information. All members of the Global Forum as well as jurisdictions identified as relevant will undergo reviews of the implementation of their systems for the exchange of information in tax matters. The peer review process is overseen by the 30 members of the Peer Review Group, which is currently chaired by France.

The peer review process works in two phases. The first phase is a review of each jurisdiction's legal and regulatory framework for transparency and the exchange of information of tax purposes. Phase 2 involves a survey of the practical implementation of the standards. Once a review is launched, all members of the Global Forum are asked to provide input regarding the assessed jurisdiction, particularly in Phase 2 reviews where all exchange of information partners are asked to complete a detailed questionnaire about their practical experience with the jurisdiction. Reviews are conducted by an assessment team which presents its report to the 30-member Peer Review Group and, once approved, becomes a report of the Peer Review Group. The report must be adopted by the members of the Global Forum on a consensus-minus-one basis, so that no one jurisdiction can block the adoption of a report.

13 A Background Information Brief of the Global Forum on Transparency and Exchange of Information for Tax Purposes, 18 February 2011.

There is no advantage to be gained by remaining outside of the process. If a jurisdiction chooses not to participate, the Global Forum will still conduct a review using publicly available information.

Jurisdictions are assessed against the standard of information exchange on request. The standard provides for the exchange of information on request where the information is 'foreseeably relevant' to assess the taxes of the requesting party, including bank and fiduciary information, regardless of a domestic tax interest. The standard has been broken down into ten essential elements.[14]

A. Availability of information – essential elements

A.1 Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

A.2 Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

A.3 Banking information should be available for all account holders.

B. Access to information

B.1 Competent authorities should have the power to obtain and provide information that is the subject of a request under an EOI agreement from any person within their territorial jurisdiction who is in possession or control of such information.

B.2 The rights and safeguards that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

C. Exchanging information

C.1 EOI mechanisms should provide for effective exchange of information.

C.2 The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

C.3 The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

C.4 The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

C.5 The jurisdiction should provide information under its network of agreements in a timely manner.

While neither the OECD nor the Global Forum has the power to impose sanctions on countries which do not implement the standards as formulated by the Global Forum, individual members will decide for themselves what measures they will take to ensure effective enforcement of their tax laws.

The recent emphasis on Tax Information Exchange Agreements (TIEAs) over Double Taxation Treaty Agreements has had a chastening effect on certain jurisdictions, such as Barbados, which had proceeded for years on the basis of concluding double taxation treaties.

14 The terms of reference are available at http://www.oecd.org/dataoecd/37/42/44824681.pdf

Such protocols require more negotiation, usually take longer to conclude and are themselves subject to extensive exchange of information protocols.

TREATY-BASED REGULATION

Possibly the most prominent element of treaty-based regulation is to be found in the Exchange of Information Article in the OECD Model Treaty Article 26 which allows the taxing authorities in the contracting state the opportunity to examine the fiscal activities of the taxpayer. It is a crucial mechanism with an aim which seeks to counter tax evasion both internationally and nationally. The effectiveness of the Article naturally depends on the quality of the information supplied (and traditionally much has been of poor quality).

It should be recognised that treaties providing for the exchange of tax information have existed for well over one hundred years. In 1843 and 1845, Belgium negotiated with France and the Netherlands tax conventions for the exchange of information relative to movable property owned in one of the contracting countries by a taxpayer of the other country. Around 1907 France and Britain entered into an agreement whereby the tax authorities of the two countries exchanged information for the purposes of dealing with evasion of death duties. It was, however, only with the advent of the League of Nations that the significance of exchange of information was given publicity. Hence, in 1925, the experts who were given the task of examining international double taxation took the view that the problem could not be successfully dealt with unless there was international co-operation among the various tax administrators. Accordingly, in 1928 the League of Nations adopted a model convention providing for, among other things, the exchange of fiscal information. These rules were further expanded and refined during later meetings of the League in Mexico in 1943 and London in 1946.

With the demise of the League of Nations there was a gradual diminution in the significance of the role of exchange of information provisions. This role has, however, been revived in recent years and has gained special prominence with the exchange procedures and rules which were adopted in the 1963 OECD Model Convention.

Article 26 is not limited in its application to resident persons. It expressly removes the qualifications which apply to other treaty provisions requiring satisfaction of the tests of 'persons' and of 'residence'. It extends to economic entities who are neither residents nor citizens of a contracting state and who may have only a minimal economic association in one of the contracting territories. The Article is mandatory; it imposes an obligation on one state to supply the other state with such information as is necessary for the purpose of carrying out the provision of the convention as well as the relevant municipal tax-laws of the treaty state. The test of what is necessary must be determined by the state of whom the request is made, and the municipal law of that territory determines the extent of the word 'necessary'. Precedent in the Commonwealth Caribbean accepts the word 'necessary' as a neutral word, whose particular meaning and application must be construed in the light of particular circumstances. In *Re Wreck Recovery and Salvage Co.*, Jessell MR in accord with previous judicial dicta stated that the word does not import an 'absolutely compelling force' but something which is highly expedient under all the circumstances. Constitutional cases are helpful, and arguably more relevant in view of the restrictions expressed in Article 26(2)(c). In *Sunday Times Newspaper v U.K.* the European Court of Human Rights expressed the view that the adjective 'necessary' is not synonymous with 'indispensable' neither has it the flexibility of such expressions as 'admissible' 'useful', 'tolerable' or 'desirable'; it imposes the existence of a pressing need. It cannot be regarded in absolute terms but requires the assessment of various factual data.

It is arguable that the ambit of the term 'necessary' is itself circumscribed by the restrictions expressed in Article 26(2). This is in accord with the opening words of that paragraph, which indicate that the first paragraph is to be construed in the light of the specific restrictions contained there. However, it appears that Article 26(2) is not intended to be definitive, but imposes general restrictions or exceptions to the general duty. Again, these specific restrictions are to be construed in accordance with the municipal law of a contracting state. In the Commonwealth Caribbean the term 'trade secret' embraces a wide range of confidential information, though it is essentially a question of fact whether such information is indeed secret. However, any transmission of information pursuant to the Article cannot give rise to a break of confidentiality. Further the safeguards construed in Article 26 are not as extensive as may appear in the light of existing rules of law in the Commonwealth Caribbean. The applicable rules of evidence do not bar the acceptance of irregularly obtained evidence, and any information obtained, albeit improperly, if relevant, remains admissible.

THE EXCHANGE PROCEDURES

Information exchange procedures may be classified, firstly, as information provided on a *routine or systematic basis*; secondly, as *spontaneous or discretionary exchanges without a request*; and, thirdly, as specific information being forwarded in *response to a request from the treaty partner*.

Routine transmittal will normally apply to areas where the income consists of dividends, interest, royalties and pensions and is subject to the deduction of tax at source. In particular, the information when collected and processed by the source country could include the names and addresses of persons in the recipient country receiving income from the source country. It could also include the payers, the type of income, the amount of income and the amount of tax which is withheld by the source country. The information can become significant and useful for the recipient country in that it is now in a position to correlate the names and addresses with its list of taxpayers and discover whether the taxpayer has declared the foreign income and its source.

Clearly, this kind of information is ideally suited for automatic transmittal and its effective exchange will depend on the degree of technological advancement of the respective tax administrations. Another form of information which is subsumed under this category of routine transmittal would be notices of changes in the relevant statutes, laws, administrative regulations and any leading relevant tax case decisions; for changes in the domestic law of the two states will call for amendments to particular treaty provisions.

Another area is that of *spontaneous exchanges* or *discretionary transmittals*. During a routine investigation the tax authorities may uncover information which would be particularly useful to the treaty partner and a decision will have to be taken as to whether this information will be sent without a request.

There is also the areas of *specific requests*. This relates to the cases in which a treaty partner may suspect a taxpayer of some type of fraudulent activity and requires more detailed and specific information to prove the particular case.

It is, however, necessary to refer to the limitations in the Article and the view is generally taken that information is construed to be in the normal course of administration if it is already in the files of the tax authorities or can be acquired through normal procedures. Information which is obtainable only if a special investigation is undertaken is generally considered as not obtainable in the normal course. This is an important element in interpreting the Article. Of equal importance in this Article is the implicit effect that the restriction on the availability of information ensures that the requesting state must first exhaust its investigative powers and

procedures before it can seek to obtain that information by making use of the treaty provision. It should be recognised that a thorough domestic investigation will also give to the requesting state a degree of respectability in its request, in that it cannot be said that the requesting state is merely on an expedition seeking whatever information it can obtain about a taxpayer.

However, in examining information obtained in the normal course of administration, one must take cognisance of the powers granted to the Commissioner of Inland Revenue in many Commonwealth jurisdictions under the Income Tax Act. '. . . the Commissioner may, for any purpose related to the administration or enforcement of this Act, by not less than seven days notice in writing require any person to attend before him and give evidence on oath and to produce on oath all books, letters, accounts, invoices, statements or other documents in his possession or control'. The section therefore widens the ambit of available information. Its admissibility in the courts or other quasi-judicial forum of the treaty partner is made secure by subsection (7), which states 'without restricting the generality of this section, this section applies to banks and solicitors, their employees and officers as it applies to any other business persons and premises'.

It therefore avoids the problems of admissibility which were exemplified in *X and Y Bank v the Swiss Federal Tax Administration*, a decision of the Swiss Supreme Court in 1975. In this particular case, the Swiss Federal Tax Administration complied with a request from the IRS for information from the records of Y Bank regarding dealings of the bank with X, an American citizen. The information was summarised in the official report and sent to the US and, not surprisingly, the IRS requested procurement of the original documents or certified copies included in the summarised report, as such documents were necessary as evidence in the legal proceedings against X. The Swiss Supreme Court ruled that the second request did not require compliance. The ratio of this case was to the effect that the Swiss/US Tax Convention provided for only the exchange of information, but that this did not include special measures for actual assistance. This case brings into sharp focus the significance of banking secrecy as it relates to the present exchange of information provisions.

'REGULATION' AT THE MICRO LEVEL

While there have been widespread efforts in regulation at the macro level involving international bodies and reports with an international dimension, nevertheless it is important to review some of the regulatory activity which is present at the micro level in the jurisdictions which have established Offshore Financial Centres. In this respect, the regulation is diffused in that it represents specific laws which have been introduced in those developed user jurisdictions and which are generally framed in the form of the controlled foreign company legislation. It is this type of legislation which has effectively been used under different names but for the main purpose of limiting the use of Offshore Financial Centres, either by way of establishing trusts or using the Double Tax Treaty mechanisms.

In the United States there has been an ongoing effort to exercise a level of control from that country over the functioning of trusts and other entities outside of the United States.

The Foreign Account Tax Compliance Act (FATCA) of 2009 is intended to improve tax compliance of offshore accounts held by US persons. It was signed into law in March 2011 as a way to raise revenue to pay for the Hiring Incentives to Restore Employment Act.

Under FATCA, Foreign Financial Institutions (FFIs) will be compelled to enter into agreements with the IRS to report, in certain details, on the US accounts which they handle or be subject to a 30 per cent withholding tax on any US source income and sales proceeds. FFIs will be required to identify US accounts, verify their ownership, report to the IRS and either withhold 30 per cent on recalcitrant accounts or obtain a waiver.

The Hiring Incentives to Restore Employment Act (the 'HIRE Act') of 2010 requires an entity classified as an FFI to either enter into an arrangement by which the FFI agrees to determine which of its account holders are US citizens, green card holders or tax residents (all 'US persons'), or suffer 30 per cent gross withholding on all amounts invested into the US. The withholding would apply to virtually all amounts invested by the FFI into the US, whether for its own account and for the account of its account holders, regardless of whether or not they were US persons. The FFI must agree with the IRS to:

1. obtain information regarding each holder of an account maintained by the institution to determine which accounts are US accounts;
2. comply with verification and due diligence procedures prescribed by the IRS to identify US accounts;
3. report annually for any US account, identifying information as to the specified account and any substantial owner of a US owned foreign entity.

FATCA will significantly increase the reporting burden for banks and other financial institutions around the world, essentially using them as extensions of the Internal Revenue Service. A number of offshore banks have already ceased to provide offshore banking services to US persons, and trust companies may have to make similar difficult decisions prior to the implementation of FATCA.

CONCLUDING REMARKS

The regulation of trust activity in the context of the offshore financial centres is clearly multi-dimensional. It includes self-regulation which varies in scope and kind according to the particular jurisdiction. While the principle of confidentiality in most cases remains respected and recognised, it is, however, buttressed in a rubric in which the prevailing global ethos does not admit secrecy or sham dealings.

CHAPTER 19

TRUSTS AND TAXATION

INTRODUCTION

Taxation may impact on trusts at various levels: namely at the settlor or beneficiary level; or conversely within the settlor's jurisdiction or in the offshore jurisdiction where the trust has been established. In respect of trusts established in the offshore financial centres, the majority of such jurisdictions do not impose a tax on trusts or indeed trust distributions provided that the beneficiary is not resident in the offshore jurisdiction. Notwithstanding this generous tax position, it is still necessary to examine how the trust may be used within a double taxation treaty perspective and also to explore the tax and regulatory forces within jurisdictions such as Britain, Canada and the United States which impact on the use of trusts as planning vehicles in the offshore financial centres with their liberally certified trust statutes.

THE TAXING STATUTES

The major taxes which affect trusts are income tax, capital gains tax, and inheritance tax. While other taxes such as stamp duty and value added tax may also affect trusts they are of comparatively subordinate importance. A survey of some Caribbean and mid-Atlantic offshore financial centres offers an excellent example of the tax exemptions available to offshore trusts.

Anguilla[1]

An 'exempt trust' does not pay any income tax, withholding tax, asset tax, gift tax, profits tax, capital gains tax, distributions tax, inheritance tax, estate duty, or other like taxes based upon or measured by assets or income originating outside of Anguilla or in connection with matters of administration which may occur in Anguilla, with the exception of registration fees of the trust.

A trust is an 'exempt trust' where the settlor is not resident in Anguilla, none of the beneficiaries are resident in Anguilla, and the trust property does not include any land situated in Anguilla or the shares of any company beneficially owning any such land.

British Virgin Islands[2]

The income of any trust in the hands of a trustee is exempt from income tax and any beneficiaries not resident in the British Virgin Islands are exempt from all British Virgin Islands taxes including income tax and stamp duty in respect of any distribution to them. Any trust that does not have beneficiaries resident in the British Virgin Islands is exempt from stamp duty in respect of the trust instrument and all other deeds and instruments are exempt from stamp duty. None of these exemptions apply to a trust which owns land or carries on a business or trades in the British Virgin Islands.

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1 Section 69 Trusts Ordinance 1994.
2 Section 90 Trustee Ordinance.

Bermuda

In respect of Bermudian property settled into a trust, stamp duty is payable by means of affixing stamps to the particular document to the value of the appropriate duty. Stamp duty is payable on the first BD$20,000 of the value of the settled property at zero rate, on the next BD$80,000 at 5% of the value of the property and thereafter at 10% of the value. There are no stamp duties payable in respect of trusts into which have been settled non-Bermudian property, regardless of whether or not the property is held in Bermuda. There are no stamp duties payable in respect of charitable trusts.

There is no income or capital gains tax payable in respect of profits or income accruing to a Bermuda trust and the distributions from the trust are also free from the incidence of Bermuda taxation.

Bahamas[3]

(Same regime as in the British Virgin Islands, above.)

Barbados[4]

An international trust is exempt from indirect tax, *ad valorem* stamp duty or other imposts on transactions undertaken or documents executed pursuant to its activities. However, it is liable to pay a fixed duty as specified in the Schedule to the Barbados Stamp Act (CAP. 91). Non-resident beneficiaries of an international trust are not subject to income tax on amounts allocated or distributed to them out of trust income. However, a beneficiary who is resident in Barbados is subject to tax on trust income in respect of any year during which he is resident in Barbados. Amounts allocated or distributed out of the capital of the trust to eligible beneficiaries are exempt from tax, whether or not the beneficiaries are resident in Barbados. Under the local Trustee Act however, income tax is payable.

Cayman Islands[5]

The Trusts Law provides for the registration of exempted trusts. The main advantage conferred on an exempted trust is a fifty-year undertaking from the Governor to the trustees that no law subsequently enacted, imposing any tax or duty to be levied on income or on capital assets gains or appreciation or any tax in the nature of estate duty or inheritance tax shall apply to any property comprised in or any income arising under such exempted trust or to the trustees or the beneficiaries thereof in respect of any such property or income.

Dominica

A trust registered under the International Exempt Trust Act 1997 is exempt from all income tax; stamp duty with respect to all instruments relating to the trust property or to transactions carried out by the trustee on behalf of the trust; and all exchange controls.

3 Section 93 Trustee Act 1998.
4 Section 29 International Trusts Act.
5 Section 81 Trusts Law 1967 (1998 Revision).

Grenada[6]

The income from an international trust that is received by a beneficiary who is not resident in Grenada is exempt from income tax. Those funds of the international trust which include or comprise foreign currency or foreign securities are exempt from any tax, duty or other impost in Grenada.

Nevis

A trust registered under the International Exempt Trust Ordinance 1994 is exempt from all income tax; all estate, inheritance, succession and gift tax payable with respect to the trust property by reason of any death; stamp duty with respect to all instruments relating to the trust property or to transactions carried out by the trustee on behalf of the trust; and all exchange controls.

DOUBLE TAX TREATIES AND TRUSTS

The Vienna Convention on the Law of Treaties governs the interpretation and legal effects of treaties, including tax treaties.

The Convention came into force on 27 January 1980 and is considered to be a codification of the pre-existing principles of customary international law to which all nations are subject. It applies to all treaties, including those treaties which involve countries, such as the United States, which have not signed the Convention. There are certain provisions of the Convention which deal with the interpretation of treaties. In particular, Article 31 as a general rule of interpretation states that a treaty is to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their particular context and in light of its object and manner. This article clearly establishes that the context for the purpose of the interpretation of the treaty comprises, in addition to the text which includes the preamble and any annexes, any agreement relating to the treaty which has been made between the parties in connection with the conclusion of the treaty. It also comprises any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and which was accepted by the other parties as an instrument related to the treaty. The Convention states in Article 32 that there are supplementary means of interpretation and allows recourse to be had to such means including preparatory work on the treaty and the circumstances surrounding its conclusion. This extension allows confirmation of the meaning resulting from the application of Article 31. It also allows for a better understanding when the meaning according to Article 31 is left ambiguous or obscure or leads to a result which is manifestly unreasonable or absurd.

The OECD Model Tax Convention on Income and on Capital (OECD Model Treaty) was first promulgated in 1963, revised in 1977 and subsequently in 1992. The Committee on Fiscal Affairs, which consists of senior tax officials from member countries, has responsibility for this treaty. It operates through the Permanent Secretariat and a variety of working parties. The OECD Model Treaty carries a detailed commentary organised on an article by article basis; and it provides an opportunity for member countries to indicate their observations and reservations on the Model Treaty and Commentary. The Commentary has become an important element in the interpretation and application of tax treaties. This Treaty is more partial towards

6 Section 49 International Trusts Act.

capital exporting countries than to capital importing countries. Very often, it eliminates or mitigates capital taxation by requiring that the source country give up some or all of its tax on certain categories of income earned by residents of the other treaty country. This aspect of the treaty is useful if the flow of trade and investment between the two countries is reasonably equal and if the resident's country taxes any income exempted by the source country.

The United Nations Model Treaty, on the other hand, was published in 1980 and follows a pattern established by the OECD Model Treaty and carries many identical positions. Accordingly, it is better to view the UN Model Treaty, not as a separate model treaty on its own, but rather as one which makes important but limited modifications to the OECD Model Treaty. These modifications reflect the interest of the developing countries. A major difference is that the UN Model Treaty imposes fewer restrictions on the tax jurisdiction of the source country. Hence, it does not contain specific limitations under withholding tax rates on dividends, interest and royalties imposed by the source country. Instead, the withholding rate levels are left to bilateral negotiations of the two contracting states. This UN Model Treaty also allocates greater responsibility to the source country in the taxing of the business income of nonentities.

In addition to the OECD Model and the UN Model there is yet another Model Treaty, namely that of the United States (the US Model). This Model was adopted in the decades of the seventies and eighties and contains some clearly identifiable differences from the OECD Model. In the case of residents, the US Model views the residence of the corporation as the place of incorporation whereas the OECD Model clearly defines corporate residence as the place of management. Equally, the US Model avoids double tax by way of granting of credits, whereas in the OECD Model such double tax is generally avoided by exemption. There are also differences with respect to the treatment of interest, for in the OECD Model it is taxed at the location of the peer, while in the US Model taxation occurs where the recipient lives. Similarly, the US Model makes no reference to state or local taxes, which are however included in the OECD Model. Finally, the US Model construes the residence of a Trust according to the type of Trust, namely be it a Grantor, Simple or Complex Trust. On the other hand, the residence of a Trust under the OECD Model is the locus of effective management of that Trust.

Residence under treaty

The concept of residence is critical to all treaties since treaty benefits will generally only apply to those persons who qualify as a resident under the terms of the particular treaty. In cases where there is an absence of treaty definition of residence, then recourse must be had to the domestic laws of the particular country.

The US Model Treaty at Article 3–4 gives a clear and succinct definition of residence. Under this treaty, residence is defined in terms of the concept of person which, used in a treaty, includes an individual, an estate, a trust, a partnership, a company and any other body of persons. The United States Internal Revenue Service (IRS) issued final regulations under Section 6114 of its Internal Revenue Code in October of 1997 which provided reporting requirements which would determine residence under treaties. It is necessary to report if the residence of an individual is decided under a treaty rather than under the United States Internal Revenue Code and its regulations. With respect to the OECD Model, residence is dealt with at Article 1 which also has provisions related to persons who are residents of one or both contracting states and a person is given its wide meaning to include an individual or company and any other body of persons. The Article clearly indicates that the definition is not exclusive and has wide usage although the definition does not give specific mention of the word Trust. The concept of residence is expanded in Article 4 of the OECD Model and highlights three

circumstances where it assumes special significance. In the first place it is important in deciding a Convention's personal scope of application; secondly, it also assumes relevance in resolving cases where other taxation has arisen as a result of double residence; and thirdly, it is critical in resolving cases where double taxation has arisen as a result of taxation in the state of residence and in the state of the particular situs or source.

The methods by which income from a trust are treated for tax purposes under the US Model Treaty will vary to the degree that it is necessary to first understand the residence for tax purposes of the persons who are subject to the taxable income. Under the US Model such persons may be the Trust itself; secondly, the persons creating the Trust, namely the Grantor; and thirdly, the beneficiaries of the Trust who may indeed be both the beneficiary and the grantor in accordance with the particular terms of the particular Trust. In the content of the United States, the residence of a Trust can vary significantly. In the first example, special rules will apply to a Grantor Trust, an entity which has rules unique to the United States and which will tax the Grantor as the owner of the trust assets and the resulting income. Furthermore the United States tax rules will also consider a foreign Trust to be a Grantor Trust if it has United States beneficiaries. Nevertheless, in the cases where the Grantor is a foreign taxpayer the United States is not able to tax such persons under the Grantor Trust rules.

The United States Internal Revenue Code will classify all other trusts either as Simple Trusts or Complex Trusts. In the case of a Simple Trust all income must be distributed to the beneficiaries who will be taxed on the distribution. However, in the case of a Complex Trust, which allows for accumulations, the Trust will be taxed upon the accumulated income. In the case of a Simple Trust the residence of the beneficiaries is the critical issue. With such a trust it may characterise the nature of the income which is taxable to the beneficiaries. Hence, if a trust establishes a permanent establishment in a particular country for treaty purposes then in such a case the beneficiaries of the trust are deemed to also have a permanent establishment. There are also circumstances where income resulting from United States profits and accruing to a foreign beneficiary of a foreign trust is exempt from tax under treaty with the United States. The beneficiary of the Trust is however always in a position to be subject to United States taxation if that foreign trust is deemed to have a permanent establishment in the US by virtue of participating as a limited partner in a US partnership. In the case of a Complex Trust there are a variety of factors which will decide the residence of the Trust.

With a Simple Trust it is possible for the trust to characterise the nature of the income for which the beneficiaries are taxable. As an example if a trust establishes a permanent establishment in a particular country for treaty purposes then in such a case the beneficiaries of the trust will be deemed to have a permanent establishment as well. Indeed, should there be income resulting from the United States profits and accruing to a foreign beneficiary of a foreign trust and exempt from tax under treaty with the United States, then the beneficiary of the trust may also be subject to United States taxation if the trust itself is said to have a permanent establishment in the United States as a result of participating as a limited partner in a US partnership. This principle is clearly established in a United States Revenue Ruling 85–60, 1985 ic.d187.

In the case of a Complex Trust, residence is established by virtue of a variety of factors since the Trust itself becomes subject to taxation; and the treaty rates for the Trust's country of residence will apply. To determine the proper residence of the Trust a variety of factors are taken into consideration in the case of a Complex Trust, such as the residence of the Trustees, the situs of Trust activities and assets, as well as the residence of the beneficiaries. In the leading case of *Maximov v US* 299F.2d 565 (2d cir. 1962) affirmed at 373 US 49 (1963), a United Kingdom citizen and resident established a Trust under English Law for the benefit of United Kingdom residents and citizens but all of the trust assets were situated in the United States and administered from the United States. The trusts were deemed to be resident in the United

States. In the other very important decision of *B.W. Jones Trust v Commissioner* 132 Fff914 (4th cir. 1943), a case with United Kingdom grantor and beneficiaries and with United States activity, the Trust realised Capital Gains which would not have been subject to United States tax to the beneficiaries under the United States/United Kingdom Double Tax Treaty. The case, however, affirmed that the trusts were resident in the United States for tax purposes. In a significant Revenue Ruling 60–181, 1960-icb257 (1960) a foreign trust which was settled by a foreigner to the United States with foreign beneficiaries was considered a United States resident since all of the trust assets, comprising securities which were traded on exchanges, were situated in the United States and were also administered by a United States trustee.

In the case of the OECD Model Treaty, the place of effective management is considered to be the place of residence, and will accordingly apply to a trust by way of the place where administration of the trust takes place. To clearly establish residence the factors which would be taken into consideration would be the activities of all the trustees and of any enforcer or protector.

Residence as an expanded tax issue

The concept of residence very often takes on an expanded significance, since to benefit from the tax advantages of being a non-resident trust it is crucial to establish that the trust is not resident in a particular jurisdiction. A trust resident in Canada, for example, would be subject to Canadian income tax on its worldwide income. Hence it often becomes critical to determine where in fact the trust is resident. Canada subscribes to the OECD Model Double Taxation Treaty but it also deals with the issue of residence under its Income Tax Act (ITA). That Act does not specifically define how the residence of a Trust is to be decided. Nevertheless, at subsections 1 of 4(1) 4(2) one may take the view that the residence of a Trust is in fact the residence of the Trustee or Trustees who have ownership or control of the Trust property. The ITA is, however, not useful in establishing residence in a case where there are multiple trustees residing in different jurisdictions and also in the case where it is unclear as to who controls the trust property.

Before 2009, the established common law principle for determining the residence of trusts was that a trust is resident in the jurisdiction where its trustees reside and operate. This principle was set out in the leading Canadian case of *Thibodeau Family Trust v the Queen* 78DTC 6376 (FCTD) which considered the issue of a trust with multiple trustees residing in different jurisdictions. In this case the Trust was administered by three trustees, two of whom were Bermudan residents and the other being a resident of Canada. The Trust document, however, required a majority decision on all matters requiring trustees' discretion, and all of the meetings of the trustees were held in Bermuda where the important decisions related to management and administration of assets were made. Bermuda was also the situs of the trust assets. The Canadian resident trustee, however, took an active role in the management of the trust and in its investment strategy and that trustee also had the power to appoint other trustees but had no power to remove existing trustees. In those circumstances the Court held that the Trust was resident in Bermuda since all matters of trustees' discretion were exercisable by a majority decision and secondly, the majority of the trustees were resident in Bermuda. This landmark case had established that in circumstances where there are multiple trustees residing in different jurisdictions the trust would be resident in the jurisdiction where the majority of the trustees reside.

The Tax Court of Canada's decision in *Garron Family Trust v Her Majesty The Queen*, 2009 TCC 450 [*Garron*], released 10 September 2009, abandons this established approach in favour of the 'central management and control' test used to determine the residence of corporations

(*De Beers Consolidated Mines, Limited v Howe* (1906) AC 455). *Garron* holds that the residence of a trust is determined by the jurisdiction where the central management and control of the trust resides regardless of the residence of the trustee.

Garron concerned the residence of two trusts formed in Barbados. The settlor for the trusts was a resident of St Vincent, the trustee was a holding company resident in Barbados, and the trust beneficiaries were Canadian residents.

The beneficiaries initially owned a Canadian Controlled Private Corporation, PMPL Holdings Inc. In 1998, a corporate reorganisation similar to an estate freeze was carried out on the capital of PMPL Holdings Inc. As a result of the sale of new common shares which were issued upon this reorganisation, the two trusts realised capital gains of $450 million on which Canadian tax was paid due to a withholding mechanism. The trusts subsequently claimed tax refunds on these capital gains based on Article XIV(4) of the Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital. Under Article XIV(4), capital gains may only be taxed in the jurisdiction where the taxpayer is resident. The issue therefore before the Tax Court of Canada was the residence of the two Barbados trusts.

Neither the appellant taxpayers nor the Minister of National Revenue disputed the fact that the trustee for both trusts was a resident of Barbados and not resident in Canada. Relying on *Thibodeau*, the appellants argued that the residence of the trust is determined by the residence of the trustee. However, the Minister argued for the use of the central management and control test in determining residence of the trusts. The Minister submitted that throughout the period in question, the beneficiaries were in control of the trust; and that the offshore trustee had played merely a subordinate role.

Madam Justice Woods agreed with the Minister, holding that the central management and control test was the appropriate test for determining trust residence. Justice Woods found that *Thibodeau*'s reliance on the residence of trustee alone could be restricted to the unique facts of that case. She further held that *Thibodeau*'s rejection of the central management and control test was erroneous: 'in my view the *Thibodeau* decision does not form a solid foundation for rejecting the Minister's position that residence should be determined by a central management and control test'.

According to Justice Woods, *Thibodeau* relied on the assumption that trustees will always comply with their fiduciary obligations. Since the trustee has a fiduciary obligation to manage the trust for the benefit of the beneficiaries, the residence of the trustee is sufficient to determine the residence of the trust. In her view, this assumption was erroneous and key to the rejection of the central management and control test in *Thibodeau*.

The *Garron* judgment falls short in providing a convincing rationale for moving away from the *Thibodeau* approach to trust residency. Madam Justice Woods approached the decision as developing a test for trust residence rather than following or moving away from established jurisprudence. The rationale provided by Justice Woods is that 'adopting a similar test of residence for trusts and corporations promotes the important principles of consistency, predictability and fairness in the application of tax law'. The judgment lacks a discussion of the legal and structural differences between corporations and trusts and indeed why a central management and control test may be necessary for determining corporate residence but not necessary for determining trust residence.

It is suggested that a better approach may have been to have carved out an exception from *Thibodeau* to deal with the facts of this case: namely, situations where there is evidence that the trustee is not fulfilling its fiduciary duties and legal obligations towards the trust and the beneficiaries of the trust. In such cases, residence could be found in jurisdictions other than the jurisdiction where the trustee is resident because of the limited or subordinated role of the trustee.

Applying the new approach to the facts of the case, Justice Woods held that there was a lack of evidence to show that the trustee actually played a role in the management of the trust assets and investment portfolio. The trustee was selected by the beneficiaries to deal with the administrative aspects of the trusts and had no effective decision-making authority beyond this.

Another factor which weighed against the appellants in *Garron* was the provision in the trust indentures for the appointment of a protector who could replace the trustee. On its own, this provision would not pose a problem (like the trustee, the protector in this case was also not a Canadian resident). However, the trust indentures further provided that a majority of the beneficiaries could replace the trustee and retain control of the trusts. For Justice Wood, the subordination of the trustee was apparent and 'effectively enforceable' through this mechanism.

Despite the drastic shift in law resulting from *Garron*, the management and control test may not be as arduous to meet as it would seem on first glance. The UK case *Wood v Holden* [2006] EWCA Civ 26 [*Wood*], discussed in the *Garron* judgment, is indicative of this feature.

Wood was also concerned with the determining of an offshore entity's residence for purposes of calculating capital gains tax. A London financial services firm had set up a holding company in the Netherlands. The arrangement produced favourable tax consequences for Mr and Mrs Woods, who were residents of the UK and who were disposing of their family business. However, the sole managing director of the holding company was another corporation in the Netherlands.

The Court of Appeal held that the Netherlands holding company was not a resident in the UK despite the involvement of UK residents in its set-up and its affairs. The court found that:

(i) the London firm 'did not dictate any decisions' that the director was to make, and the directors of Eulalia 'were not by-passed nor did they stand aside'; and

(ii) the managing director exercised its duty as managing director by signing and executing relevant documents.

The court also noted that '[t]he documents [adduced as evidence] showed guidance and influence coming from [the London firm], but no more than that'.

In *Garron*, Justice Woods relied on the lack of evidence adduced by the appellants to distinguish the application of the management and control test from *Wood*: '[i]n contrast [to *Wood*], the appellants led very little evidence as to the formation and operation of the Trusts. In these circumstances, there is no basis for concluding that St Michael [the trustee] did not agree to assume a limited role in the management of the Trusts).

Arguably, the management and control test in the offshore trust context could be satisfied when the trustee exercises independent authority over the trust, such as effecting changes in the trust's investment portfolio and management of the trust's property. The trustee may act in this manner even with guidance and influence of a Canadian resident beneficiary or an investment advisor, as long as the trustee's authority is not bypassed or undermined. Avoiding a structure in which the trustee may be ousted at any time by a Canadian resident protector or beneficiary would further bolster the argument for having vested central management and control in the offshore trustee.

Nonetheless, even if the hurdle is not too difficult to overcome, it is a higher standard than the *Thibodeau* approach of determining residence based on the residence of the trustee.

These principles of interpretation of residence are given full weight and acceptability in the Commonwealth Caribbean jurisdictions, particularly where there is a domestic trust statute being used in harmony with a double tax treaty.

INTERNATIONAL PLANNING: THE AMERICAN EQUATION

An understanding of the tax usage of offshore domiciled trusts requires an examination of the ongoing taxation policies within the jurisdictions in which the prime users reside. On an ongoing basis, legislation in countries such as Canada, Britain and the United States of America is being formulated so as to protect revenue within their own national economies which *ipso facto* represents efforts to minimise the tax benefits of an offshore trust structure. Any examination in this area is therefore, by its very nature, always a work in transition.

The American legislative tax arm is a dynamic process fuelled by a complex plural and federal society founded upon principles related to the dual notions of taxation and representation. Just as Shakespeare's nature abhors a vacuum, so too America's global world functions rest on a set of keenly formulated taxing principles.

As previously stated, it is the practice to classify trusts in the United States as grantor, simple or complex trusts. While simple trusts are recognised as those which make annual income distributions, complex trusts will accumulate income and make later distributions. Grantor trusts are, however, viewed as a virtual extension of the grantor. Hence grantor trusts in the United States will sometimes assimilate and aggregate all the items of both long-term and short-term gains and losses and report a single item to the taxpayer, which will in turn become part of the taxpayer's return. It can represent a useful vehicle where there are significant stock losses contrived with large gains from the disposition of a valuable equity position. The grantor trust will, therefore, act as a screening agent.

Simple trusts are treated in a tax neutral sense in that the trust may distribute its income and gains and obtain the appropriate deduction for the distribution. The distributed items, namely royalties, interest, dividends or capital gains, do not lose their intrinsic features. It is possible to place the trust between the non-United States users and the United States investments without giving rise to the attribution of United States trade or business status and the possible accompanying negative tax consequences. Hence, a United States trust with Barbados beneficiaries who receive all income directly from the trust will be able to use the Barbados United States of America Double Taxation Convention. For the trustee as withholding agent will stand in the place of the Barbados beneficiaries as direct holder of the investments in the trust and so benefit from treaty withholding tax rates. The Barbados beneficiaries will therefore be able to legally obtain the benefit of an American-based investment and manager on a non-taxed basis. Naturally, the transaction would be subject to the Barbadian interest, first obtaining from the relevant Barbadian authorities the necessary Barbados-based exchange control approvals for the foreign investment.

On the other hand, complex trusts which accumulate income are taxed at the rates of United States resident individuals. Consequently, when later distributions are made out of accumulated income they are treated as if distributed in earlier years, and the beneficiaries receive credit for taxes which have been paid by the trust. This feature gives the trust the ability to obtain a deduction for the funds distributed which itself becomes part of the gross income of the beneficiaries. Hence, a party who is not resident in the United States and is using a complex trust will not obtain as generous an advantage as with the simple trust.

There are also transnational advantages connected with the use by United States residents of what is characterised as a Rabbi Trust. Although not trusts in the pure sense of the original concept, they contain many of the characteristics and functions of a trust. As deferred compensation plans they provide much of the insulation associated with a trust and they also function for the protection of beneficiaries through the assistance of trustees. The United States Internal Revenue Service has sanctioned the use of the trust and has provided a model trust agreement (see Appendix ?). Essentially an employer will place money into a Rabbi Trust but will not get

a tax deduction. The income generated as part of the trust is taxed to the employer's account; and inasmuch as it is a grantor trust, the employer is considered as the direct owner of the trust assets. The trust assets, however, are still subject to any claims of employer's creditors, in the event that the employer did become insolvent. The employer is able to enjoy a tax deduction upon the disbursement to the employees. The device of the Rabbi Trust has presented opportunities for United States residents with foreign-sourced income. For the foreign employer may establish an onshore or offshore Rabbi Trust to receive the income and the trust may in turn purchase stocks and bonds thereby allowing them to generate income during the deferral period. Depending on the particular jurisdiction of the employer, he or she may not be taxed on the funds within the trust. However, the trust is able to save substantial tax on the income which has been compounded and only becomes taxable when ultimately distributed to the United States resident employee or consultant. The Rabbi Trust was specifically excluded when in 1997 the United States introduced tighter regulatory controls on grantor trusts, and so remained an accepted planning device.

The landscape for tax planning from and within the United States taking advantage of offshore trusts is a dynamic one as regulations may dramatically change accepted planning vehicles and so will continually call for newly evolved structures.

A CANADIAN PERSPECTIVE: TREATY-BASED PLANNING

Canada has, for many years, provided an opportunity to persons seeking to reside in Canada to use an Immigration Trust with significant tax minimisation and deferral benefits. Similarly, Canadians who are leaving their own jurisdiction to take up residence elsewhere have also been able to creatively use such an Immigration Trust. Of great significance has been the ability for Canadians to place their assets in a Barbados Trust by way of an Estate Freeze, a facility which has been made possible as a result of the Double Taxation Treaty which Barbados has with Canada. It has not been possible for other Caribbean jurisdictions, such as the Cayman Islands and the British Virgin Islands, to use this facility as a result of their zero-tax status which precludes the ability to have a Double Tax Treaty. The ability to use the Double Tax Treaty can be very effective as a tax minimisation scheme.

We may use as an example a resident and citizen of the Bahamas, who is a citizen but not a resident of Canada, and who has agreed, either solely or by way of a company which he controls, to purchase a large interest of a Canadian company which for example may be engaged in the development, distribution and sale of software. We may assume that the return on the investment in the company's shares will be realised on their sale which at the time of the sale will become taxable Canadian property. The primary objective will therefore be to minimise Canadian and foreign tax on the capital gain realised on the disposal of the shares. In such circumstances, an intermediary which could achieve that objective may be a Barbados Trust which is *prima facie* liable to as comprehensive a tax liability as is imposed under the laws of Barbados. The individual would in such circumstances settle the Barbados Trust with a gift of the shares which he has purchased, and would then seek to have as the trustee of the Barbados Trust a Barbados resident financial institution other than a body corporate that holds an existing licence under the International Financial Services Act of Barbados to carry on international banking business from within Barbados. The beneficiaries in such circumstances under the Barbados Trust would be X and those persons who are the residual beneficiaries under his last Will and Testament in the proportions in which these persons benefit under his Will ('the contingent beneficiaries'). In such circumstances the distribution would be under the terms of the Trust and not under the terms of the Will. The distribution date under the Barbados Trust

could be twelve months after the date on which the Trust no longer owned any shares of the company, or such earlier date as the Trustee in its absolute discretion deemed appropriate. On the distribution date the trust property would be payable to X, if he were then alive, or the contingent beneficiaries. A provision would also be made for capital encroachments whereby the Trustee would be directed to add to trust capital at the end of a fiscal year any undistributed trust income. Prior to the distribution date, cash realised by the trustee whether it be in the form of dividends or proceeds of sale of some but not all of the company's shares would be payable to X if he were then alive or to the contingent beneficiaries twelve months after the date of realisation.

This scenario carries very favourable Canadian tax considerations. First, since the decision in *Garron*[7] the residence of the Barbados Trust would be determined on the corporate law test of the residence of the mind and management of the trust, regardless of whether the Trustee is a corporation or a natural person. Hence, if the central management and control of the trust is in Barbados then the Trust is regarded as Barbados resident for Barbados tax purposes. In considering the gift of the company's shares to the Barbados Trust one would naturally first look at X's potential liability. The gift of the shares would clearly be a disposition within the meaning of Canada's amended definition of that term at which the applicable transactions and events occur after 23 December 1998 under Canadian legislation. For where a taxpayer has disposed of anything to any person by way of a gift *inter vivos*, the taxpayer is deemed to have received proceeds of disposal equal to the fair market value. The price negotiated between parties dealing at arm's length is generally considered the best evidence of fair market value. Since the cost to X of the shares would also be five million Canadian dollars there should be no gain realised by him on the disposal of the shares to the Trustee of the Barbados Trust. In such a situation it would be prudent to have a Share Purchase Agreement between X and the company which evidences this share transfer price. For in circumstances where a taxpayer acquires a property by way of a gift, the taxpayer is deemed to acquire the property as fair market value as stated in paragraph 69 subsection (1c) of the Canadian Income Tax Act. The Barbados Trust would itself be a 'taxpayer' since it is *prima facie* liable for Canadian tax under disposal of the company's shares; and the Trust would be deemed to have acquired the company's shares at a fair market value of five million Canadian dollars.

The matter is further facilitated in the area of dividends, and at the Trust level the Canadian Income Tax Act imposes a withholding tax at the rate of 25% of the gross amount of dividends paid by a company resident in Canada to a non-resident, namely, the Barbados Trust. Furthermore, a Barbados Trust that is not a body corporate that holds a subsisting licence under the International Financial Services of Barbados to carry on international banking business from within Barbados is considered to be subject to as comprehensive a tax liability as is imposed under Barbados law. It should be recognised that a Trust which is established by a Settlor who is not a resident of Barbados in favour of another person who is not a resident of Barbados is exempt from any tax, duty or impost in Barbados if the funds of the Trust consist solely of foreign currency or foreign securities and the Trust is under the management of a Licensee (this provision is by virtue of the International Financial Services Act). A Licensee is defined to mean a body corporate that holds a subsisting licence under the International Financial Services Act of Barbados to carry on international banking business from within Barbados. The Trust would accordingly be a 'resident of Barbados' for purposes of Article 4 subsection IV(1) of the Canada Barbados Income Tax Convention (*Crown Forest Industries Limited v the Queen*) 1955 2ctc64,95 dpc 5389, 125 dlr (485, 1995) (2scr802). Hence, as a resident of

7 See above.

Barbados for Treaty purposes the Barbados Trust would be entitled to Treaty benefits, particularly since there is no provision in the Canada Barbados Income Tax Convention which excludes the Barbados Trust from Treaty benefits. The statutory rate is also reduced to 15% where the resident of Barbados is the 'beneficial owner' of the dividends (Article X(2)). There has been discussion as to whether a Trust can be the beneficial owner of dividends, particularly since there is no discussion directly on this point in the Commentary on Article 10 of the OECD Model Treaty. However, in the case of *Wood Preservation Limited v Prior* 54 Tax Cases 112, (133) (CA), Harmon J observed that beneficial ownership is 'an ownership which is not merely a legal ownership by the mere fact of being on a Register, but the right at least to some extent to deal with the property as your own'. Hence, it can be safely concluded that a Trust cannot be the beneficial owner of a dividend. However, the technical explanation to Article IV, namely, Residence of the Canada US Income Tax Convention, prepared by the US Treasury Department and endorsed by the Canadian Department of Finance, states 'to the extent that an estate or trust is considered a resident of a Contracting State under this provision it can be a 'beneficial owner' of items of income specified in other Articles of the condition, e.g. paragraph 2 of Article 10X (Dividends)'. From this technical explanation it can be safely concluded that if the income received by the estate or trust that is resident in a contracted state is subject to estate or trust level taxation in that contracted state then the estate or trust is clearly considered to be the beneficial owner for Treaty purposes. In this regard, and from a compliance view point, the company as payer of the dividend would likely withhold at the 25% statutory rate and leave it to the Barbados Trust to persuade the Canadian tax authorities that it is only liable for the Treaty-reduced 15%.

Taken into account the terms of the Barbados Trust and again assuming that the parties conduct themselves in accordance with these terms, there would be no potential for a beneficiary level Canadian taxation on taxable capital gain either on the basis of agency or on the basis of attribution or indeed under Section 104(13) of the Income Tax Act. As regards the trust distributions in satisfaction of capital interest, there would be no exposure to Canadian taxation since distributions would be in the form of cash which is not taxable Canadian property. As far as the beneficiary level taxation is concerned, the receipt of trust property in satisfaction of a capital interest in a trust gives rise to a disposition of the trust capital interest and there would be no Canadian tax implications to the disposition by a beneficiary of a capital interest in the Barbados Trust since this interest would not be 'taxable Canadian property'.

The Canadian Income Tax Act contains a special general anti-avoidance rule (GAAR) which was introduced generally to transactions entered into on or after 13 September 1988. Under GAAR, where a transaction is an 'avoidance transaction' the 'tax consequences' to a person are determined, as is reasonable in the circumstances, to deny the related tax benefit (see subsection 245(2)). A tax benefit is defined as a reduction, avoidance or deferral of tax or other amount payable or an increase in a refund of tax or other amount under the Income Tax Act (subsection 245(1)). According to the section, the tax consequences to a person refer to the amount of income, taxable income, or taxable income earned in Canada, tax or other amount payable by, or refundable to, the person under the Income Tax Act or any other amount that is relevant for the purposes for computing that amount (subsection 245(1)). The question of whether subsection 245(2) applies may be considered within the context of three questions, namely, whether there is a tax benefit, secondly, whether there is an avoidance transaction and thirdly, whether there is a misuse or abuse. The third question is basically derived from subsection 245(4), which exempts from the scope of subsection 245(2) a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse or abuse of the provisions of the Income Tax Act. The GAAR is an all-encompassing provision which needs to be very carefully analysed in the formulation of any tax planning strategy. In the

present scenario it is safe to say that it should not apply to the acquisition or the holding by a Barbados Trust of the shares of the company. Nevertheless, in all planning matters within a Canadian context or within a whole or partial Canadian context a careful and special analysis must always be made as to the applicability of the GAAR.

Inasmuch as the scenario contemplates a dual structure where use is being made of a Double Tax Treaty it is important to also consider the Barbados tax considerations. With respect to the dividends paid on the company's shares the amount of those dividends received by a Barbados resident trust would be included in the income of the Trust and subject to Barbados income tax at the rate of 35% with a credit for up to 25% Canadian withholding tax. Hence, Barbados income tax on a $200.00 dividend net of credit for a Canadian withholding tax would be $20.00. There is clearly no tax advantage under Barbados law in distributing Trust income net of Canadian withholding tax since such distributions would attract Barbados withholding tax of 15%. With respect to the capital gain on the disposition of the company's shares it must be stated that capital gains are not subject to tax under the Income Tax Act of Barbados. Hence, the capital gain which is realised by the Trust under disposition of the company's shares would not be subject to either Canadian or Barbados tax. Furthermore, the distribution of the proceeds of the disposition (which is a capital receipt under trust law) by a Barbados resident trust to a non-resident beneficiary is not subject to Barbados withholding tax.

A VIEW FROM THE UNITED KINGDOM

The recent UK Supreme Court case of *R (on the application of Gaines-Cooper) v The Commissioners for HMRC*[8] (the 'Gaines-Cooper' case) raises serious concerns about the determination of residence for wealthy United Kingdom (UK) citizens living abroad, for whom retention of ties to the UK could jeopardise residence status.

The case concerned Robert Gaines-Cooper, a British-born Seychelles businessman who had moved away from the UK over 30 years previously. Mr Gaines-Cooper maintained ties to the UK in that he kept a residence near Oxford, where his wife and son resided for certain periods. His will was drawn up under English law and he regularly visited the jurisdiction. However, Mr Gaines-Cooper had planned his affairs in reliance on the Inland Revenue Booklet IR20 'Residents and Non-Residents – Liability to Tax in the UK' which offered general guidance upon the meaning of the word 'residence' and of the phrase 'ordinary residence' in the context of an individual's liability for UK income tax and capital gains tax. He argued that the guidance contained in the booklet had given rise to a legitimate expectation that an individual would be treated as non-resident in the UK if he:

(a) left the UK to take up full-time employment abroad (paragraph 2.2 of the booklet); or
(b) left the UK permanently or for at least three years (paragraph 2.8); or
(c) went abroad for a settled purpose and remained abroad for at least a whole tax year (paragraph 2.9);

provided, in each case, that his visits to the UK during the years following departure totalled less than six months in any tax year and averaged less than 91 days in each such year. It was clear that Mr Gaines-Cooper had satisfied, in the relevant tax years, the conditions that his visits to the UK should in a no tax year total 83 days, and average less than 91 days per year. Lord Mance, in his dissenting judgment, agreed with Mr Gaines-Cooper, finding that the

8 [2001] UKSC 47.

'natural meaning to a potential taxpayer of all relevant paragraphs of the guidance is, as [he saw] it, that as long as he confined his presence within the UK to less than 183 days in any one tax year and less than 91 days average per tax year, and satisfies the other requirements relating to intention and/or years spent abroad, he will qualify as not ordinarily resident'.

Four of the five justices dismissed the appeal on the grounds that the paragraphs in the booklet, though 'very poorly drafted', must be read in conjunction with the general guidelines which indicated that the booklet served only as a guide. Residence must be determined by taking a balanced view of a range of factors and, on the evidence, the appellant had not demonstrated an intent to leave the UK permanently. Mr Gaines-Cooper failed to make a 'distinct break' from the UK and, as a result, he was liable to pay back-dated UK tax.

The case is of immediate relevance only to taxpayers who are in dispute with HMRC for periods up to 2009 (when the booklet was withdrawn). For others, it provides no clarity, except to confirm that residence must be determined by taking a balanced view of a range of factors. In practice, this may mean that under the current rules, obtaining certainty on residence status may prove to be very difficult in all but the most straightforward cases. It is a particularly troubling decision, as nowhere in the IR20 is the concept of 'distinct break' mentioned or explained. Although HMRC6 (replacing the IR20) refers now to a distinct break, it is still left very open to interpretation. The decision will call into question all similar cases, and individuals who leave the UK to set up residence elsewhere would be well advised to reassess whether they have made a 'distinct break' from the UK and at what point in time was the break accomplished. It is hoped that the consultation paper issued by the UK Government in June 2011 will pave the way for a clear statutory definition of 'non-residence'.

CONCLUDING REMARKS

The trust can sometimes prove to be as taxable a benefit as a corporate vehicle. It may be used effectively with double tax treaties and yet avoid the accounting and auditing requirements of its corporate counterpart. Furthermore, it will sometimes be available for use in circumstances where the preferentially taxed company is prohibited, as in the Canada Barbados Double Taxation Treaty. Its flexibility, particularly in areas such as Purpose Trusts, further enhances its tax utility and attractiveness. In the Caribbean context, its tax effectiveness often rests in its tax exempt status.

APPENDIX 1

THE CHARITIES ACT—BARBADOS

ARRANGEMENT OF SECTIONS

PART I
Preliminary

PART II
Registration of Charities

PART III
Incorporation of Institutions

PART IV
Schemes in Respect of Charitable Trusts

PART V
Supervision of Charitable Trusts and Miscellaneous Matters

CHARITIES ACT BARBADOS

An Act to make provision respecting charities and for related matters.

1979–2.
1979–44
1982–54
1986–6

[1st January, 1980] Commencement.
1979/189.

PART I
Preliminary

1 This Act may be cited as the Charities Act.

2 For the purposes of this Act

'Board' means any charity trustees incorporated as a board under this Act.

'charity' means any institution, corporate or not, which is established for charitable objects or purposes, is intended to and does operate for the public benefit, and is subject to the control of the court in the exercise of its jurisdiction with respect to charities;

'charitable objects' has the same meaning as 'charitable purposes' as defined by section 3, and vice versa;

'charity trustees' means the persons having general control and management of the administration of a charity;

'court' means the High Court;

'exempt charity' means a charity included in the First Schedule;

'institution' includes any society trust or undertaking;

'local newspaper' means a newspaper printed and published in Barbados;

'permanent endowment' means property held for the purposes of a charity the capital of which cannot be expended for those purposes;

'property' means property of every kind and includes money;

'public benefit' has the meaning assigned to it by section 4;

'register' means the register of charities under section 5;

'Registrar' means the Registrar of Corporate Affairs and Intellectual Property;

'trusts', in relation to a charity, means the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not, and in relation to other institutions has a corresponding meaning.

3 Meaning of 'charitable purposes'.

For the purposes of this Act, the expression 'charitable purposes' includes the following purposes, namely

(a) the relief and prevention of poverty, howsoever caused;
(b) the relief and prevention of sickness and disability, both physical and mental, including
  (i) the provision and staffing of hospitals, nursing and convalescent homes and clinics,
  (ii) the promotion of medical research,

(iii) the provision of advice, treatment or comfort, and

(iv) the establishment of homes, workshops or other centres for the disabled or the mentally or physically handicapped or any other disadvantaged or needy persons;

(c) the relief of the suffering and distress or disability caused by old age, including the provision of homes for the care and maintenance of the old, and of housing for old people adapted to their special needs;

(d) the relief of distress caused by natural disasters or sudden catastrophes;

(e) the advancement of education, including

(i) the improvement of knowledge and its public dissemination in a way not constituting propaganda,

(ii) the provision of schools, colleges, universities and other like institutions,

(iii) the establishment in such institutions of professorships, fellowships, lectureships and other teaching and research posts,

(iv) the provision in such institutions of scholarships, bursaries, prizes and other awards,

(v) the provision both within and without such institutions of physical training and sport for young persons, and

(vi) the education of the public generally, including those not engaged in full-time study at such institutions;

(f) the promotion and publication of research with a view to increasing the common stock of knowledge;

(g) the advancement of science and all recognised branches of learning and the establishment and maintenance of institutions therefor, including the support and maintenance of learned societies;

(h) the cultivation of public taste in aesthetic matters, including art, music, literature and fine craftsmanship, and the establishment and development of facilities for their practice;

(i) the provision and maintenance of museums and art galleries;

(j) the advancement of religion and the encouragement of belief in, and reverence for, a divine power, and of the practice of worship of that power, including

(i) the organisation and carrying out of religious instruction and pastoral and missionary work in Barbados and overseas,

(ii) the provision and maintenance of buildings for worship and other religious uses,

(iii) the payment of stipends to and the provision of houses for ministers of religion, their widows and dependent children, and

(iv) other purposes tending to promote the moral or spiritual welfare of the community;

(k) the advancement of ethical and moral teachings and studies;

(l) the provision of social welfare services for those in need of them;

(m) the provision of housing for those in special need;

(n) the promotion and improvement of the national heritage, whether physical, environmental, artistic, cultural or otherwise;

(o) without prejudice to the operation of paragraph (e)(v), the promotion of sport and recreation, including the provision of facilities for recreation or other leisure-time occupations with the object of improving the conditions of life for those who have need of such facilities;

(p) the welfare of children, including prevention of cruelty to them;

(q) the promotion of the social welfare of the family, including the provision of facilities for family planning;

(r) the welfare of animals, including prevention of cruelty to them;
(s) the rehabilitation and resettlement of persons who have need of such services;
(t) the establishment in life of young people;
(u) the promotion and encouragement of projects for community development;
(v) the establishment of organisations to assist members of the community with special needs such as one-parent families, single persons with dependants, battered spouses, specially gifted children and minority groups;
(w) the provision of public work for the benefit of the community and the protection of the lives and property of the community;
(x) the advancement and improvement of the standards of efficiency of industry, commerce and agriculture;
(y) the maintenance and improvement of the efficiency of the armed forces and the Police Force and their welfare; and
(z) any purpose within the spirit of, and analogous to, the foregoing.

4 Meaning of 'public benefit' 1979–44.

'Public benefit' includes benefit of a kind comprised within the scope of charitable purposes which is available to members of the public at large or to a section of the public ascertained by reference to some specified geographical area, but does not include such a benefit if the persons for whom it is intended to be available are to be ascertained by reference to their relationship with some body or other person, whether that relationship is one of blood, status, contract or otherwise.

PART II
Registration of Charities

5 Registration of charities.

(1) There shall be a register of charities which shall be established and maintained by the Registrar and in which there shall be entered such particulars as the Registrar may from time to time determine of any charity there registered.
(2) There shall be entered in the register every charity not excepted by subsection (4), and a charity so excepted may be entered in the register at the request of the charity, but (whether or not it was excepted at the time of registration) may at any time, and shall at the request of the charity, be removed from the register.
(3) Any institution which no longer appears to the Registrar to be a charity shall be removed from the register, with effect, where the removal is due to any change in its purposes of trusts, from the date of that change; and there shall also be removed from the register any charity which ceases to exist or does not operate.
(4) The following charities are not required to be registered

(a) any exempt charity;
(b) any charity which is excepted by order made by the Attorney-General;
(c) any charity having neither any permanent endowment, nor any income from property amounting to more than $100 a year or such other sum as the Attorney-General may specify by order from time to time.

(5) On submission of any application for a charity to be registered, there shall be supplied to the Registrar copies of its trusts (or, if they are not set out in any extant document, particulars

of them), and such other documents or information as may be prescribed or as the Registrar may require for the purpose of the application.
(6) It shall be the duty of

(a) the charity trustees of any charity which is not registered nor excepted from registration to apply for it to be registered, and to supply the documents and information required by subsection (5); and
(b) the charity trustees (or last charity trustees) of any institution which is for the time being registered to notify the Registrar if it ceases to exist, or if there is any change in its trusts, or in the particulars of it entered in the register, and to supply to the Registrar particulars of any such change and copies of any new trusts or alterations of the trusts, and any person who makes default in carrying out any of the duties imposed by this subsection may be required by order of the Registrar to make good that default.

(7) The register (including the entries cancelled when institutions are removed from the register) shall be open to public inspection at all reasonable times; and copies (or particulars) of the trusts of any registered charity as supplied to the Registrar under this section shall, so long as it remains on the register, be kept by him and be open to public inspection at all reasonable times on payment of the prescribed fee.
(8) This section shall not apply to charities taking effect before 1st January, 1980, until such date as the Attorney-General may appoint by order made by statutory instrument; and different dates may be appointed for different cases or classes of cases.

6 Effect of failure to register charity.

Where charity trustees of any charity fail to register that charity in accordance with section 5, the charity trustees shall not be entitled to claim any tax exemptions under any charity, enactment in respect of that charity for the income year during which it remains unregistered.

7 Effect of and claims and objections to registration.

(1) An institution shall for all purposes other than rectification of the register be conclusively presumed to be or to have been a charity at any time when it is or was on the register of charities.
(2) Any person who is affected by the registration of an institution as a charity may, on the ground that it is not a charity, object to its being entered by the Registrar in the register, or apply to him for it to be removed from the register; and provision may be made by regulations as to the manner in which any such objection or application is to be made, prosecuted, or dealt with.
(3) An appeal against any decision of the Registrar to enter or not to enter an institution in the register of charities, or to remove or not to remove an institution from the register, may be brought in the court by the Attorney-General, or by the persons who are or claim to be the charity trustees of the institution, or by any person whose objection or application under subsection (2) is disallowed by the decision.
(4) If there is an appeal to the court against any decision of the Registrar to enter an institution in the register, or not to remove an institution from the register, then, until the Registrar is satisfied whether his decision is or is not to stand, the entry in the register shall be maintained, but shall be in suspense and marked to indicate that it is in suspense; and for the purposes of subsection (1) an institution shall be deemed not to be on the register during any period when the entry relating to it is in suspense under this subsection.
(5) Any question affecting the registration or removal from the register of an institution may, notwithstanding that it has been determined by a decision on appeal under subsection (3), be

considered afresh by the Registrar and shall not be concluded by that decision, if it appears to the Registrar that there has been a change of circumstances or that the decision is inconsistent with a later judicial decision, whether given on such an appeal or not.

8 Registrar and Commissioner of Inland Revenue may exchange information.

(1) The Registrar may furnish the Commissioner of Inland Revenue and other Government departments and statutory boards, and the Income Tax Commissioner and other Government departments and statutory boards may furnish the Registrar, with the names and addresses of institutions which have for any purpose been treated by the person furnishing the information as established for charitable purposes, or, in order to give or obtain assistance in determining whether an institution ought to be treated as so established, with information as to the purposes of the institution and the trusts under which it is established or regulated.
(2) The Registrar shall supply any person, on payment of the prescribed fee, with copies of, or extracts from, any document in his possession which is for the time being open to public inspection in accordance with this Act.

PART III
Incorporation of Institutions

9 Charity trustees may apply for incorporation.

(1) Trustees of a charity registered under section 5 may apply to the Registrar for their incorporation as a Board under this Part, unless they are already incorporated under another Act or otherwise.
(2) No application shall be made on behalf of a society unless it is authorised by the society.

Second Schedule.

(3) Every application shall be in the form prescribed in the Second Schedule or to the like effect and shall be signed by the majority of the trustees.

10 Manner in which society may authorise application.

For the purposes of section 9 an application shall be deemed to be authorised by a society if

(a) it is authorised by a majority of the members of that society; or
(b) a resolution authorising the making of the application is passed by a majority of those present at a meeting of that application society, and the Registrar is satisfied that such notice of intention to hold that meeting and of its purpose was given as may be reasonable in the circumstances; or
(c) the application is authorised by the rules of the society or by any other means provided in those rules.

11 Registration of Boards.

(1) The Registrar, on being satisfied that the procedural requirements of this Part have been observed, shall

(a) enter the name of the Board in the register kept by him under this Part, together with particulars as to the composition of the Board, the place of its registered office, and such other particulars as he thinks fit;

(b) issue under his seal a certificate that the Board has been incorporated under this Part on the date mentioned in the certificate.

(2) From the date of incorporation mentioned in the certificate of incorporation the Board shall be a body corporate, and shall consist of the persons who are for the time being the charity trustees.

Cap. 1.

(3) Section 21 of the Interpretation Act shall apply to every Board incorporated under this Part.

12 Evidence of incorporation.

Every certificate of incorporation issued under the seal of the Registrar shall be sufficient evidence, in the absence of proof to the contrary, that the Board named was incorporated on the date specified in the certificate, and that the procedural requirements of this Part have been observed.

13 Vesting of property.

(1) All property held by the charity trustees shall immediately upon their incorporation as a Board vest without transfer, conveyance, or assignment in the Board for the same purposes, with the same powers, and upon and subject to the same trusts, contracts, and equities as then affect the same.

Cap. 229.

(2) Where any land, lease or charge under the Land Registration Act, is vested in a Board by virtue of this section, the Registrar of Titles shall, on receiving a written application under the common seal of the Board, register the Board as proprietor of that land, lease or charge.

14 Name of Board.

(1) No charity trustees shall be incorporated under a name which is identical with that of any other Board, or of any company carrying on business in Barbados (whether registered in Barbados or not) or of any other body corporate established or registered in Barbados under any Act or of any name registered under the Registration of Business Names Act, Cap. 317, or which so nearly resembles that name as to be calculated to deceive, except where the other Board, company, body corporate, or business as the case may be, signifies its consent in such manner as the Registrar requires, and the Registrar is satisfied that registration of the Board by that name will not be contrary to the public interest.

(2) The name of a Board need not include

(a) the words 'Trust Board'; or

(b) any of the following words, namely, 'Trust', 'Board', 'Society', and 'Incorporated'.

15 Change of name.

(1) Any Board incorporated under this Part may, in accordance with a resolution passed at a meeting of the Board, apply to the Registrar to change the name under which it is registered.

(2) Where a Board applies to the Registrar under this section to change the name under which it is registered and the Registrar approves of the change, he shall enter the new name in the register in place of the former name, and shall alter the certificate of incorporation to meet the circumstances of the case.

(3) A change of name by a Board under this section shall not affect any rights or obligations of the Board, or render defective any legal proceedings by or against the Board, and any legal proceedings that may have been continued or commenced by or against it in its new name.

16 Service of notice on a Board. Cap. 1.

Any notice, document or legal process shall be deemed to be served upon a Board if it is served in accordance with section 25 of the Interpretation Act.

17 Acts of Board members presumed valid.

Acts done or proceedings taken by any person acting in good faith as a member of a Board incorporated under this Part are presumed valid and shall not be questioned on the ground of

(a) the existence of any vacancy in the membership of the Board; or
(b) any omission, defect or irregularity not affecting the merits of the case.

18 Powers in respect of property.

(1) Without restricting its powers exercisable by or under any enactment or otherwise, any Board may

(a) notwithstanding any trusts that may affect its property, with the consent of the court, dedicate all or any part of its property for any public purpose;
(b) notwithstanding any trusts that may affect its property, sell or exchange any part of its property for any purpose upon such terms as it deems expedient; but no property subject to any trust shall be sold or exchanged in exercise of the power conferred by this paragraph without the consent of the court in any case where it is of the essence of the trust that the particular property should be used for the purpose of the trust;
(c) subject to the rules or other documents providing for the constitution of the Board, purchase any property situated in Barbados, and apply any money for the time being held by the Board for or towards any such purpose; and any property so purchased shall be held upon the same trusts as affected the money applied in payment for the property.

(2) Any money or other property received in consequence of any such dedication or sale or exchange shall be held upon the same trusts as affected the property so dealt with, and any such money may be invested in any investments for the time being authorised by the Trustee Act, Cap. 250, for the investment of trust funds.

19 Variation of trusts and change of registered office.

(1) If any variation is made by the court under Part IV in the trusts on which any Board holds any property, or if any additional property becomes vested in any Board on trusts not completely shown in the documents or other information lodged with the Registrar at the time of the incorporation of the Board under this Part, then, within 1 month from the date of the variation or vesting, there shall be lodged with the Registrar

(a) a copy of the documents showing the trusts as varied and the trusts on which the additional property is vested in the Board; or
(b) a statutory declaration by a member of the Board setting forth the variation of the trusts or the trusts on which the additional property is held so far as they are not shown in any such document

(2) If any Board desires to alter the address of its registered office, notice of the alteration or desired alteration shall be given to the Registrar within 1 month from the date thereof.
(3) Where any Board gives notice under subsection (2) of its desire to alter the address of its registered office and specifies a new address for its registered office with sufficient particularity

to enable documents to be served by hand and served by post, the Registrar shall alter the registered address accordingly.
(4) If in any case the requirements of this section are not complied with within any such period of 1 month, each member of the Board, and each officer of the Board is guilty of an offence and liable on summary conviction to a fine of $250 and an additional fine of $25 for every day during which the default continues after a conviction is first obtained.

20 Voluntary winding-up of Board Cap. 308. 1982–54.

Subject to this Act, the voluntary winding-up of a Board shall mutatis mutandis be governed by the same rules as the voluntary winding-up of a company under the Companies Act.

21 Winding-up of a Board by the court.

(1) A Board may be wound up by the court if the court is satisfied that it is just and equitable that the Board should be wound up.
(2) Any application to the court for the winding-up of a Board may be presented by any of the following

(a) the Attorney-General;
(b) the Board;
(c) a member of the Board;
(d) a creditor of the Board;
(e) the Registrar; or
(f) any other person who adduces proof of circumstances which in the opinion of the court make it proper that he should make the application.

(3) All costs incurred by the Attorney-General or the Registrar in making application for the winding-up of a Board shall, unless the court otherwise orders, be a first charge on the assets of the Board.
(4) Subject to this Act, every application to the court for the winding-up of a Board, and every winding-up of a Board by the court, shall be governed by the same rules as in the case of the winding-up of a company by the court under the Companies Act. Cap. 308. 1982–54.

22 Dissolution by Registrar.

(1) Subject to subsection (6), if at any time the Registrar is satisfied that a Board is no longer carrying on its operations or has been registered by reason of a mistake of fact or law, he may make under his seal a declaration that the Board is dissolved as from the date of the declaration, and shall thereupon publish the declaration in the Official Gazette, and make in the register an entry of the dissolution of the Board.
(2) On the making of that entry the incorporation of the Board shall cease as from the date of the declaration.
(3) If any time thereafter the Registrar is satisfied that the declaration was made in error and ought to be revoked, he may, subject to subsection (6), revoke the same by a declaration in the Official Gazette, and shall thereupon make an entry of that revocation in the register, and the Board shall thereupon be revived from the date of the dissolution thereof as if no such dissolution had taken place.
(4) The Registrar may at any time send to any Board, by registered letter addressed to it at its registered office, an inquiry as to whether or not the Board is still carrying on its operations, and if no reply is received to that letter within 6 months after the date of the posting thereof, or if

the letter is not delivered and is returned to the Registrar, that shall be sufficient to satisfy the Registrar that the Board is no longer carrying on its operations.
(5) Notwithstanding subsection (4), the Registrar may satisfy himself as to whether or not a Board is still carrying on its operations in any other manner he deems fit.
(6) Where the Registrar proposes to make a declaration in accordance with subsection (1) or subsection (3), he shall first give notice of the proposed declaration to the Attorney-General.

23 Distribution of surplus assets on winding-up or dissolution.

On the winding-up of a Board or on its dissolution by the Registrar, all surplus assets after the payment of all costs, debts, and liabilities shall be disposed of as the court directs.

PART IV
Schemes in Respect of Charitable Trusts

24 Application of property cy-près.

(1) Subject to subsection (3), where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and

(a) it is impossible, impracticable or inexpedient to carry out that purpose; or
(b) the amount available is inadequate to carry out that purpose; or
(c) that purpose has been effected already; or
(d) that purpose has ceased, as being useless or harmful to the community or for other reasons, to be in law charitable, or
(e) that purpose has ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift or trust, then, whether or not there is any general charitable intention, the property and income, or any part or residue thereof, or the proceeds of sale thereof, shall be disposed of for some other charitable purpose, or a combination of such purposes, in the manner directed, and subject to the provisions contained in this Part.

(2) Subject to subsection (3), where any property or income is given or held upon trust, or is to be applied for any charitable purpose, and the property or income that accrues is more than necessary for the purpose, then, whether or not there is any general charitable intention, any excess property or income or proceeds of sale may be disposed of for some other charitable purpose, or a combination of such purposes, in the manner directed, and subject to the provisions contained in this Part.
(3) Without prejudice to section 25, this section shall not operate to cause any property or income to be disposed of as provided in subsection (1) or (2) if in accordance with any rule of law, the intended gift thereof would otherwise lapse or fail and the property or income would not be applicable for any other charitable purpose.
(4) This section applies to cases where the charitable purpose affecting any property or income is defined by a scheme approved by the court under this Part or otherwise, and in any such case the original purpose may be restored, with or without modification.
(5) The provisions of this section apply with respect to trusts created, and to schemes approved, before or after 1st January, 1980.

25 Application cy-près of gifts of donors unknown or disclaiming.

(1) Property given for charitable purposes which fail shall be applicable cy-près where it was given

(a) by a donor who, after advertisements and reasonable inquiries have been made, cannot be identified or cannot be found; or

(b) by a donor who has executed a written disclaimer of his right to have the property returned.

(2) For the purposes of this section, property shall be conclusively presumed (without any advertisement or inquiry) to have been given by donors who cannot be identified, in so far as it consists of

(a) the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another; or

(b) the proceeds of any lottery, competition, entertainment, or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.

(3) The court may by order direct that property not falling within subsection (2) shall for the purposes of this section be treated (without any advertisement or inquiry) as having been given by donors who cannot be identified, where it appears to the court either

(a) that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or

(b) that it would be unreasonable, having regard to the nature, circumstances and amount of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned.

(4) Where property is applied cy-près by virtue of this section, the donor shall be deemed to have parted with all interest at the time when the gift was made; but where property is so applied as belonging to donors who cannot be identified or cannot be found, and is not so applied by virtue of subsection (2) or (3)

(a) the scheme shall specify the total amount of that property; and

(b) the donor of any part of that amount shall be entitled, if he makes a claim not later than 12 months after the date on which the scheme is made, to recover from the charity from which the property is applied a sum equal to that part, less any expenses properly incurred by the charity trustees after that date in connection with claims relating to his gift; and

(c) the scheme may include directions as to the provision to be made for meeting any such claim.

(5) For the purposes of this section, charitable purposes shall be deemed to 'fail' where any difficulty in applying property to those purposes makes that property or the part not applicable cy-près available to be returned.

(6) In this section, except in so far as the context otherwise requires, references to a donor include persons claiming through or under the original donor, and references to property given include the property for the time being representing the property originally given or property derived from it.

(7) This section shall apply to property given for charitable purposes, notwithstanding that it was so given before 1st January, 1980.

26 Extension of powers or varying mode of administering trust.

(1) Where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and the administration of the property or income or the carrying out of the

trust, could be facilitated by extending or varying the powers of the trustees, or by prescribing or varying the mode of administering the trust, the powers of the trustees may be extended or varied, and the mode of administering the trust may be prescribed or varied, in the manner directed, and subject to the provisions contained in this Part.
(2) Nothing in this section restricts the powers that are conferred on the court or the trustees under any other enactment.

27 Trustees may prepare scheme.

Where the trustees of any property or income, to which the provisions of this Part applies, wish it to be dealt with subject to this Part, they may prepare or cause to be prepared, in accordance therewith, a scheme for the disposition of the property or income, and for extending or varying the mode of administering the trust.

28 Scheme to be laid before Attorney-General.

(1) Trustees shall submit to the Attorney-General every scheme prepared under this Part I together with full information as to all the facts upon which it is proposed to make the disposition set out in the scheme, and with copies of any instruments necessary to explain the scheme so prepared; and in respect of every such scheme, the Attorney-General

(a) may remit the proposed scheme to the trustees for consideration of any amendments he may suggest; and
(b) shall report on the scheme as finally submitted by the trustees after they have considered such amendments (if any) as are suggested by the Attorney-General, and shall deliver the report to the trustees.

(2) At any time after delivery to them of the report of the Attorney-General, the trustees may apply to the court for approval of the scheme, and on making that application shall file therewith the scheme and the report of the Attorney-General thereon.
(3) The application, scheme, and report mentioned in subsection (2) shall be open for public inspection.

29 Scheme to be advertised.

(1) Before any application mentioned in section 30 is considered by the court, notice of that application shall be given once in the Official Gazette, and once in each of the local newspapers, and those notices shall be given not more than 3 months, and not less than 1 month, before the date proposed for the consideration of the scheme by the court.
(2) Every notice given under subsection (1) shall

(a) give a brief summary of the scheme;
(b) state the date proposed for the hearing of the application by the court; and
(c) require any person desiring to oppose the scheme to give written notice of his intention to do so to the Registrar (1979–44), the trustees, and the Attorney-General not less than 7 clear days before the date proposed for the hearing.

30 Opposition to scheme.

Any person wishing to oppose a scheme prepared under this Part shall, not less than 7 clear days before the date proposed for the hearing of the application by the court, give written notice of his intention to oppose the scheme to the Registrar, the trustees and the Attorney-General.

31 Administration of scheme.

Without limiting the power to make any other provision for carrying out the purposes of a scheme prepared under this Part or for administering any property, income or money to which any such scheme relates, a scheme approved in accordance with this Part may provide that the purposes of the scheme may, in whole or in part, be carried out, and that any property, income or money to which the scheme relates may be administered, by

(a) the trustees of any existing trust for any charitable purpose; or
(b) the Public Trustee.

32 Expenses of scheme.

Any scheme prepared and approved under this Part may provide that all reasonable expenses of or incidental to preparing, perusing, and advertising the scheme, and of and incidental to applying to the court for approval of the scheme, shall be paid out of, and be a charge upon, the property or income or money affected.

33 Court's jurisdiction in respect of scheme.

Where application for approval of a scheme is made to the court under this Part, the court

(a) may decide what persons shall be heard before it in support of or in opposition to, the scheme;
(b) has jurisdiction and authority to hear and determine all matters relating to the scheme;
(c) may make an order approving the scheme with or without modification, as it thinks fit; and
(d) may, on the application of the trustees, from time to time, vary or modify the scheme.

34 Court's decision in respect of scheme to be Gazetted.

Notice of the approval of a scheme under this Part, or the refusal of the court to approve any such scheme, shall be published by the Registrar in the Official Gazette as soon as practicable after the date of that approval or refusal.

35 Court may make order in respect of scheme.

The court may, if it thinks fit, make an order under this Part notwithstanding any non-compliance with the procedural requirements thereof in relation to the scheme.

36 Restrictions on approval of scheme.

(1) A scheme shall not be approved by the court under this Part, unless the court is satisfied that

(a) the scheme is a proper one, that should carry out the desired purpose or proposal, and that is not contrary to law or public policy or good morals;
(b) the scheme can be approved under this Part;
(c) every proposed purpose is charitable and can be carried out; and
(d) subject to section 37, the requirements of this Part have been complied with in respect of the scheme.

(2) Notwithstanding the refusal of the court to approve a scheme under this Part, the trustees may seek approval of any other scheme in respect of the same property, income or money.

37 Holder of property to transfer in accordance with scheme.

Where any scheme approved by the court under this Part designates any institution, body or person to hold or receive any property, money or income under the scheme, the trustees in whom that property, money or income is vested shall convey, transfer or pay that property, money or income, with all profits or interest which may have accrued thereon to that institution, body or person; and, upon so doing, the trustees shall no longer be liable in respect of any express or implied trust upon which they held the property, money or income, except for wilful default or misappropriation thereof.

PART V
Supervision of Charitable Trusts and Miscellaneous Matters

38 Inquiries into condition and management of charities.

(1) The Attorney-General may examine and inquire into any trusts for charitable purposes in Barbados, and may examine and inquire into the nature and objects, administration, management and results thereof, and the value, condition, management, and application of the property and income belonging thereto.
(2) The Attorney-General may appoint an officer of the Public Service or any person to make the examination or inquiry in any specified case for the purposes of subsection (1).
(3) Every trustee and every person acting or having any concern in the management and administration of a trust for a charitable purpose, or of the property or income thereof, into which an examination or inquiry is being made under this section, shall, on request, produce to the Attorney-General or to the officer or person making the examination or inquiry all books, papers, writings and documents in relation to the trust or the property or income thereof, or to the administration, management, value, condition, and application of that property and income, and shall answer all questions and give all assistance in connection with the examination or inquiry that he is reasonably able to answer or give.
(4) Any person who fails to comply, in any respect, with subsection (3) is guilty of an offence and liable on summary conviction to a fine of $500 or imprisonment for 3 months and an additional fine of $50 for every day on which the offence continues after a conviction is first obtained.

39 Attorney-General may call for documents and search records.

(1) The Attorney-General may require any person who possesses or controls any books, records, deeds, or papers relating to a charity to furnish him with copies of, or extracts from, any of those documents, or, unless the document forms part of the records or other documents of a court or of a public authority, require that person to transmit the document itself to him for inspection.
(2) The Attorney-General shall be entitled, without payment to inspect and take copies of or extracts from the records or other documents of any court, public registry, public authority or office of records for any purpose connected with the discharge of the functions of the Attorney-General with respect to charities.
(3) No person claiming to hold any property adversely to a charity, or freed or discharged from any charitable trust or charge shall be required under subsection (1) to transmit to the Attorney-General any document relating to that property or any trust or charge alleged to affect it, or to furnish any copy of or extract from any such document.

40 Proceedings to enforce or vary charitable trusts or to require new scheme.

(1) Subject to subsection (2), the Attorney-General, a public officer, or any other person, may apply to the court in respect of any property, money or income subject to a trust for a charitable purpose, whether or not a scheme in respect of that property, money or income has been approved by the court under Part IV or otherwise, for an order

(a) requiring the trustees to carry out the trusts on which the property, money or income is held, and to comply with the provisions of the scheme (if any);

(b) requiring any trustee to meet his liability for any breach of trust affecting the property, money or income, as the court may direct;

(c) removing any trustee who has been responsible for, or privy to, any misconduct or mismanagement in the administration of a charity, or has by his conduct contributed to it or facilitated it;

(d) excluding any purpose from the purposes for which the property, money or income may be used, applied or disposed of;

(e) giving directions in respect of the administration of the trust, or in respect of any examination or inquiry under section 38, or in respect of any question to be answered or assistance to be given by any person in connection with that examination or inquiry; or

(f) directing that on and after the date of the order or any subsequent date specified in the order, the property, money or income subject to the trust shall not be used or applied or disposed of otherwise than in accordance with a scheme that, after the date of the order, is approved by the court under Part IV, and the court may make such order in respect of that application as it thinks fit.

(2) Where any person other than the Attorney-General or a public officer makes an application under this section, he shall give 1 month's notice thereof to the Attorney-General.
(3) Where any person other than the Attorney-General makes an application under this section, copies of the application shall be served on the trustees of the property, money or income to which the application relates, and on the Attorney-General where such service is appropriate.
(4) On an application under this section, the court may decide what persons in addition to the Attorney-General shall be heard before it in support of, or in opposition to, the application.

41 Charity trustees to keep accounts.

(1) Charity trustees shall keep proper books of account with respect to the affairs of the charity, and charity trustees not required by or under the authority of any other Act to prepare periodical statements of account shall prepare consecutive statements of account consisting on each occasion of an income and expenditure account relating to a period of not more than 15 months, and a balance sheet relating to the end of that period.
(2) The books of account and statements of account relating to any charity shall be preserved for a period of 7 years at least, unless the charity ceases to exist and the Registrar permits them to be destroyed or otherwise disposed of.

42 Furnishing and audit of accounts.

(1) Statements of account giving the information with respect to the affairs of a charity required under section 41, shall be transmitted to the Registrar by the charity trustees within 1 month after the period specified in section 41 for the preparation of statements of account.

(2) Any statement of account transmitted to the Registrar under subsection (1) shall be open to public inspection at all reasonable times.
(3) The Registrar may by order require that the condition and accounts of a charity for such period as he thinks fit shall be investigated and audited by an auditor appointed by him, being a member of the Institute of Chartered Accountants of Barbados.
(4) An auditor appointed in accordance with subsection (3)

(a) shall have a right of access to all books, accounts and documents relating to the charity which are in the possession or control of the charity trustees or to which the charity trustees have access;
(b) shall be entitled to require from any charity trustee, past or present officer or servant of the charity such information and explanation as he 'thinks necessary for the performance of his duties;
(c) shall at the conclusion or during the progress of the audit make such reports to the Registrar about the audit or about the accounts or affairs of the charity as he thinks the case requires, and shall send a copy of any such report to the charity trustees.

(5) The expenses of any audit under subsection (3), including the remuneration of the auditor, shall be paid by the charity.
(6) Any person who

(a) fails to transmit to the Registrar any statement of account required by subsection (I); or
(b) fails to afford an auditor any facility to which he is entitled under subsection (4),

is guilty of an offence and liable on summary conviction to a fine of $1 000 or imprisonment for 6 months, and an additional fine of $100 for every day during which the offence continues after a conviction is first obtained.
(7) This section shall not apply to an exempt charity.

43 Manner of executing instruments.

(1) Charity trustees may, subject to the trusts of the charity, confer on any of their body (not being less than two in number a general authority, or an authority limited in such number as the trustees think fit, to execute in the names and on behalf of the trustees assurances or other deeds or instruments for giving effect to transactions to which the trustees are a party; and any deed or instrument executed in accordance with an authority so given shall be of the same effect as if executed, by the whole body.
(2) An authority under subsection (1)

(a) shall suffice for any deed or instrument if it is given in writing or by resolution of a meeting of the trustees, notwithstanding the want of any formality that would be required in giving authority apart from that subsection;
(b) may be given so as to make the powers conferred exercisable by any of the trustees, or may be restricted to named persons or in any other way;
(c) shall, subject to any restriction, and until it is revoked, and, notwithstanding any change in the charity trustees, have effect as a continuing authority given by and to the persons who from time to time are of their body.

(3) Where a deed or instrument purports to be executed in accordance with this section, then, in favour of a person who in good faith acquires for money or money's worth an interest in or charge on property or the benefit of any covenant or agreement expressed to be entered into by the charity trustees, it shall be conclusively presumed to have been duly executed by virtue of this section.

(4) The powers conferred by this section shall be in addition to and not in derogation of any other powers.

44 Transfer and evidence of title to property vested in trustees.

(1) Where, under the trusts of a charity, trustees of property held for the purposes of the charity may be appointed or discharged by resolution of a meeting of the charity trustee members or other persons, a memorandum declaring a trustee to have been so appointed or discharged shall be sufficient evidence of that fact, if the memorandum is signed either at the meeting by the person presiding or in some manner directed by the meting, and is attested by two persons present at the meeting.
(2) A memorandum evidencing the appointment or discharge of a trustee under subsection (1) if executed as a deed, shall have the like operation under section 42 of the Trustee Act, Cap. 250 (which relates to a vesting declaration as respects trust property in deeds appointing or discharging trustees), as if the appointment or discharge were effected by the deed.
(3) For the purposes of this section, where a document purports to have been signed and attested as mentioned in subsection (1), then proof (whether by evidence or as a matter of presumption) of the signature the document shall be presumed to have been so signed and attested, unless the contrary is shown.
(4) This section applies to a memorandum made at any time, except that subsection (2) applies only to those made after 1st January, 1980.

45 Enforcement of orders of the Attorney-General or Registrar.

A person guilty of disobedience

(a) to an order of the Attorney-General under section 39 or 40 of this Act; or
(b) to an order of the Registrar requiring that a default under this Act be made good,

may on the application of the Attorney-General or the Registrar to the court be dealt with as for disobedience to an order of the court.

46 Right of appeal to the court.

(1) Any person dissatisfied with a decision of the Registrar under Part II may appeal to the court against that decision.
(2) Where an appeal is made in accordance with subsection (1), section 7 applies.
(3) Where an appeal is made, the Attorney-General and such other persons as the court may direct shall be entitled to appear and be heard.

47 Expenses.

(1) There shall be defrayed out of moneys provided by Parliament

(a) the remuneration and allowances payable under this Act to the Registrar and other public officers; and
(b) any administrative expenses incurred for the purposes of this Act by the Attorney-General and the Registrar.

(2) Any fees received by the Registrar under this Act shall be paid into the Consolidated Fund.

48 Regulations.

(1) The Attorney-General may make regulations generally in respect of all matters which are required or authorised to be prescribed, or which are necessary or convenient for carrying out and giving effect to the purposes of this Act.
(2) Regulations made under this Act shall be subject to negative resolution.

49 UK Statutes. Third Schedule.

The enactments of the United Kingdom Parliament specified in the Third Schedule, to the extent of their application in Barbados are repealed.

FIRST SCHEDULE

(Section 2)
The following institutions, in so far as they are charitable, are exempt charities within the meaning of this Act, that is to say

(a) the Barbados Community College;
(b) the National Sports Council;
(c) the National Assistance Board;
(d) the Queen Elizabeth Hospital Board;
(e) the Child Care Board;
(f) the Sanitation Service Authority;
(g) schools administered under the Education Act, Cap. 41;
(h) public and private hospitals; and
(i) churches within the meaning of that expression in section 2 of the Anglican Church Act, Cap. 375 and any church whose Superintendent or Minister receives any sum by way of grant-in-aid under the Grant-in-Aid (Churches) Act, Cap. 376.

SECOND SCHEDULE

(Section 9)

FORMS OF APPLICATION FOR INCORPORATION AS A BOARD

Form I

Application for Incorporation of Trustees as a Board

1 We, being trustees for, hereby apply to be incorporated as a Board under the provisions of the Charities Act. Cap. 243.
2 We desire the name of the Board to be
3 The registered office of the Board is to be at (State an address with sufficient particularity for service by hand and service by post of documents thereat).

4 This application is made with the authority of (State name of society for which the trustees act and mode of authorisation by the society. If there is no such society this should be stated).
5 The said society is registered as a charity but not itself incorporated.
6 The particulars of registration are
Dated this day of 20.....

THIRD SCHEDULE

(Section 49)
The Statutes of Mortmain of 1279, 1290, 1391 and 1531.
The Charitable Uses Act, 1601.

APPENDIX 2

KNOW YOUR CUSTOMER GUIDELINES

CENTRAL BANK OF BARBADOS

KNOW YOUR CUSTOMER GUIDELINES FOR LICENSED FINANCIAL INSTITUTIONS

Issued in Conjunction with the Anti-Money Laundering Authority Pursuant to its Powers under the Money Laundering (Prevention & Control) Act.

FOREWORD

The Central Bank of Barbados first issued guidelines on this subject to financial institutions licensed under the Offshore Banking Act and the Financial Intermediaries Regulatory Act (now Financial Institutions Act) in April 1991 following the issuance of the Forty Recommendations by the Financial Action Task Force[1] (FATF) a year earlier. In association with regional Central Banks, the Central Bank of Barbados revised and reissued new guidelines in March 1995. These notes provided guidance to financial institutions on the requirements for effective systems and controls in the fight against money laundering.

Barbados has actively participated in the work of the Caribbean Financial Action Task Force[2] (CFATF), the regional chapter of the FATF. The Government of Barbados has enacted comprehensive legislation to address the issue of money laundering. More recently, the Money Laundering (Prevention And Control) Act, 1998–38 ('the Act') was proclaimed and an Anti-Money Laundering Authority[3] ('the Authority') and Financial Intelligence Unit were established. In light of the enactment of new legislation in April 2000 and ongoing international developments to improve regulatory standards, the Central Bank of Barbados is now revising its anti-money laundering guidelines.

Financial institutions should ensure that the guidelines are also applied to their branches and subsidiaries abroad, especially in countries which do not or insufficiently apply similar recommendations, to the extent that local applicable laws and regulations permit. Financial institutions should inform the Central Bank of Barbados ('Central Bank') and the Authority when the local applicable laws and regulations prohibit the implementation of these guidelines.

The guidelines will be used by the Central Bank in the assessment of the adequacy of anti-money laundering systems in place at licensed financial institutions.

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1 The FATF develops and promotes policies to combat money laundering. Refer to section 1.02 of the guidelines.

2 The CFATF presents a regional perspective to the money laundering issue. Refer to section 1.02 of the guidelines.

3 The Authority was established in August 2000 and its responsibilities are shown in section 2.0 of the guidelines.

SECTION 1 INTRODUCTION

1.01 Purpose of Guidelines

In order to preserve the viability and reputation of Barbados' financial sector, financial institutions must be vigilant to guard against money laundering. Financial institutions may be attractive to money launderers in light of the variety of their services and instruments that can be used to conceal the source of money. The placement and transfer of cash in the financial system are stages at which money laundering is most easily detected. These guidelines represent good industry practice and compliance will assist institutions in identifying attempts to launder criminal proceeds through the financial system. Financial institutions that have adequate prevention systems in place are best able to recognise and detect efforts to launder money.

One of the most effective methods to combat money laundering is a sound knowledge of a customer's business and pattern of financial transactions and commitments. The adoption of 'know-your-customer' rules does not only make good business sense but is an essential tool to avoid legitimising the proceeds of criminal activity. The main concepts of 'know-your-customer' are:

(a) Identification procedures and monitoring;
(b) Suspicious transaction reporting (allied to adequate record keeping); and
(c) Controls and communication (allied to training and awareness).

In recent times, the concept of know-your-customer has been extended to ensure that institutions know those with whom they are doing business, including employees, correspondent banks and regulators. The overriding goal remains unchanged, that is, the financial institution's ability to review their customers' activities for unusual activity.

Persons and entities other than financial institutions are also vulnerable to money launderers. To this end, those engaged in any of the following activities should be aware of the guidelines and are encouraged to use this document to safeguard their operations: –

(1) Financial service providers and consultants;
(2) Money exchange houses such as bureaux de change, cheque encashment;
(3) Money transmission services including wire transfers;
(4) Bookmaking/gaming services;
(5) Dealers in motor vehicles, jewellery, art and antiques;
(6) Professional accountants and other persons engaged in accounting and bookkeeping services;
(7) Management services including investment management;
(8) Services relating to company registration and incorporation, the provision of company secretary services and registered offices for companies;
(9) Trustee services including the provision of trust investment advice; and
(10) Advice, administration and other services provided in the course of business relating to real estate.

Notwithstanding the definition of a financial institution in section 2 of the Act, entities such as domestic trusts, partnerships, attorneys-at-law, management companies, and post offices should consider the issues embodied in these guidelines. This would serve to protect them from the possibility of committing an offence of money laundering.

1.02 International Background

Regulators worldwide share a common goal in the fight against money laundering. Guidance notes and principles have been issued by several regulatory agencies in an effort to harmonise supervisory standards and more effectively combat criminal activity. The know-your-customer principle is a fundamental requirement for an effective anti-money laundering programme and its importance is emphasised in all regulatory guidelines.

The Financial Action Task Force (FATF) is an inter-governmental body which develops and promotes policies to combat money laundering. The FATF was established by the G-7 Summit in Paris in 1989 and currently has 29 member countries and two regional organisations. In 1990, the FATF issued 40 Recommendations to be implemented to fight money laundering and these were subsequently revised in 1996. The 40 Recommendations have become the internationally accepted anti-money laundering standard.

The Caribbean Financial Action Task Force (CFATF) is an organisation of states and territories of the Caribbean basin which has agreed to implement common counter-measures against money laundering. The CFATF originated in early 1990 and holds observer status with the FATF. Barbados is a member of this body whose membership currently stands at 26. In June 1990, the CFATF issued 19 Recommendations to complement the FATF's 40 Recommendations by presenting a regional perspective to the issue.

In order to assess the status of the anti-money laundering framework of their member countries, both the FATF and the CFATF undertake detailed reviews referred to as mutual evaluations. A CFATF mutual evaluation of Barbados was completed in September 1997.

In September 1997, the Basel Committee on Banking Supervision issued a paper entitled the 'Core Principles For Effective Banking Supervision' which includes a requirement (principle 15) that supervisors 'determine that banks have adequate policies, practices and procedures in place, including strict know-your-customer rules, that promote high ethical and professional standards in the financial sector and prevent the bank being used, intentionally or unintentionally, by criminal elements.' The Committee also issued a Statement of Principles in December 1988 entitled Prevention of Criminal Use Of The Banking System For The Purpose Of Money Laundering.

Recently, there has been increased pressure from such bodies as the FATF, the Organisation for Economic Cooperation and Development (OECD) and the U.S. Treasury for countries to strengthen their anti-money laundering framework. Barbados remains committed to implementing adequate measures to combat money laundering.

1.03 Definition of Money Laundering

Money laundering is the process by which criminals attempt to conceal the true origin and ownership of the proceeds of criminal activities. If undertaken successfully, the money can lose its criminal identity and appear to be legitimately derived.

In simple terms, the money launderer's goal is to: –

(1) Place the money in the financial system, without arousing suspicion;

(2) Move the money around, within or across multiple jurisdictions, and often in a series of complex transactions, so that it becomes difficult to identify its original source;

(3) Then move the money back into the financial and business system, so that it appears as legitimate funds or assets.

There is no one method of laundering money. Initially, however, in the case of drug trafficking and other serious crimes, the proceeds usually take the form of cash which needs to enter the financial system by some means. The laundering process involves three sometimes overlapping stages: –

(1) Placement: Physically disposing cash proceeds derived from illegal activities;
(2) Layering: Separating the proceeds from criminal activity from their origins through layers of complex financial transactions;
(3) Integration: Providing an apparent legitimate explanation for the illicit proceeds.

The three basic steps occur as separate and distinct stages but may occur simultaneously or, more commonly, they may overlap. The available laundering mechanisms and requirements of the criminal organization shape how these stages are employed.

SECTION 2 LEGISLATIVE AND REGULATORY FRAMEWORK

2.01 Legislation

Between 1990 and 2000, the Government of Barbados enacted several pieces of legislation aimed at preventing and detecting drug trafficking, money laundering and other serious crimes. These are the: –

(a) Drug Abuse (Prevention and Control) Act, 1990;
(b) Proceeds of Crime Act, 1990–13;
(c) Mutual Assistance in Criminal Matters Act, 1992; and
(d) Money Laundering (Prevention and Control) Act, 1998–38 ('the Act').

The Money Laundering (Prevention and Control) Act, 1998–38 confers responsibility for the supervision of financial institutions to the Anti-Money Laundering Authority ('the Authority') which was officially established in August 2000. A Financial Intelligence Unit has been established to carry out the Authority's Anti-Money Laundering supervisory function over financial institutions including the functions of collecting, analyzing and disseminating suspect transaction reports. Where the Authority believes on reasonable grounds that a transaction involves proceeds of crime the Authority sends the report to the Commissioner of Police. A Financial Investigations Unit has been established within the Royal Barbados Police Force to investigate reports referred to it by the Authority.

The Act establishes a mandatory threshold of BDS$10,000 (or its equivalent in foreign currency) for the retention of business transaction records. This requirement will facilitate a system to help identify money launderers.

This framework is supported by the Central Bank of Barbados which is responsible for financial institutions licensed under the Financial Institutions Act, 1996 and the Offshore Banking Act, 1979. The Bank Supervision Department has included know-your-customer verification within the scope of onsite examinations since 1997.

2.02 Offences

Section 3(1) of the Money Laundering (Prevention and Control) Act states that a person engages in money laundering where:

(1) The person engages, directly or indirectly, in a transaction that involves money or other property, that is proceeds of crime; or
(2) The person receives, possesses, conceals, disposes of, or brings into or sends out of Barbados, any money or other property that is proceeds of crime.

It is not necessary for the original offence from which the proceeds stem to be committed in Barbados, so long as it would have been an offence had it taken place within Barbados. See sub-section 3(4).

The offences and their associated penalties appear in Sections 12, 20, 21 and 22 of the Act and are summarized as follows:

- A person who has been convicted of an indictable offence is not permitted to be licensed to carry on the business of a financial institution; and where the person is a financial institution the licence will be revoked. See Section 12(1).
- Engaging in the act of money laundering is punishable on conviction to a maximum of 25 years imprisonment, a fine of $2.0 million or both. See Subsection 20(3).
- Aiding, abetting, counselling or conspiring to engage in a transaction involving money or property that is or is suspected to be the proceeds of crime is punishable on conviction to a maximum of 15 years imprisonment, a fine of $1.5 million or both. See Sub-section 20(4).
- Where an offence is committed under Section 20 by a body of persons, whether corporate or unincorporated, every person acting in an official capacity for or on behalf of such a body at the time of the commission of the offence, is guilty of that offence and will be tried and punished accordingly. See Section 21.
- (a) Tipping off the target or third party about an investigation or pending investigation into money laundering or freezing order; disposing, destroying or falsifying material evidence all of which may result in the investigation being prejudiced. See Sub-section 22(1); or

  (b) Falsifying, concealing, destroying or otherwise disposing of, or causing or permitting the falsification, concealment, destruction or disposal of any document or thing that is likely to be material to the execution of a freezing order. See Sub-section 22(2); or
  (c) Disclosing the existence of a freezing order (on the property of, or in the possession or under the control of a person suspected of money laundering) to an unauthorised person as defined in the Act. See Subsection 22(3);
  (d) Is punishable on conviction to a maximum of 2 years imprisonment a fine of $50,000 or both.

2.03 Scope of Guidelines

Although the Money Laundering (Prevention And Control) Act applies to all persons and businesses, additional administrative requirements are placed on financial institutions which are defined as:

(1) Any persons carrying on business under the Financial Institutions Act; and
(2) Includes
    - A deposit taking institution
    - A credit union within the meaning of the Co-operatives Societies Act
    - A building within the Building Societies Act

- A friendly society within the meaning of the Friendly Societies Act
- An insurance business within the meaning of the Insurance Act
- An offshore bank within the meaning of the Offshore Banking Act
- An exempt insurance company within the meaning of the Exempt Insurance Act
- An international business company within the meaning of the International Business Companies Act
- A society with restricted liability within the meaning of the Societies with Restricted Liability Act, 1995
- A foreign sales corporation within the meaning of the Barbados Foreign Sales Corporation Act
- A mutual fund, mutual funds administrator and a mutual fund manager
- International trusts within the meaning of the International trusts Act, 1995.

SECTION 3 IDENTIFICATION PROCEDURES

Financial institutions are required to document and implement effective procedures to prevent money laundering. Employees should be aware of these procedures and apply them in order to verify and adequately document the identity of the customer or account holder.

Financial institutions should reassess their requirements pertaining to identification records to ensure that all customer records conform to the new requirements. In addition, customer identification records should be verified periodically to ensure that identification information remains current. Any change in the name and address of any customer from that given when the business relationship was first established should be recorded.

A customer or account holder refers to any nominee, agent, beneficiary or principal engaged in a business transaction as defined in Section 2 of the Act.

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names. It is a requirement to identify, on the basis of an official or other reliable identifying document, and record the identity of clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe-deposit boxes, the use of safe custody facilities, performing of business transactions in excess of the $10,000 threshold).

Financial institutions should exercise extreme caution in their business relations and transactions with persons, including companies and financial institutions from other countries. Where possible, contact should be made with appropriate persons in these countries as part of know-your-customer procedures.

At a minimum, there should be adherence to the following guidelines: –

3.01 Direct Applications: Personal Client

1. Institutions are required to obtain relevant identification records of a customer as indicated in Section 2 of the Act. The following information should be ascertained:
   (1) Full name(s) and aliases;
   (2) Permanent address*;
   (3) Date and place of birth;

(4) Nationality;
(5) Reason for opening the account;
(6) Nature and place of business/occupation;
(7) Expected account turnover and source of funds; and
(8) Any other information deemed appropriate by the institution.

2. At a minimum, valid photo-bearing identification should be obtained, e.g.
(1) Passport; or
(2) National identification card; or
(3) Driver's licence; and Where the applicant is non-resident,
(4) Social security number

In instances where original documents are not available, copies should only be acceptable if certified by a notary public (e.g. justice of the peace). Identification documents which do not bear a photograph or signature and which are easily obtainable (e.g. birth certificate) should not be accepted as the sole means of identification. The financial institution is ultimately responsible for verifying the name and address of the applicant.

*Any address referred to in the guidelines relates to a permanent address. Temporary addresses, post office boxes and in-care-of addresses are not acceptable under know-your-customer rules.

The Act does not recognise introduction or referrals in whole or in part, as an alternative to proper identification procedures. The onus remains on the institution to separately verify the identity of the customer. Where references are used as one of the means of verification, the information should be documented to form part of the identification record. An account holder's identify should not be established solely on the basis of a referral.

References should be considered from:

- A financial institution as defined in Section 2(1) of the Act; or
- A reputable financial institution which the bank has satisfied itself by way of reasonable measures.

Financial institutions undertaking business transactions with persons from these approved countries are required to exercise the appropriate due diligence that is consistent with good banking practice.

3.02 Direct Applications: Body Corporate

The relevant requirements in 3.01 are also applicable to a body corporate. Financial institutions should verify the identity of the directors, shareholders, officers, account signatories and beneficial owners. In the latter instance, an affidavit should be obtained confirming the beneficial ownership.

In addition to the requirements for a certificate of incorporation, certificate of continuance and certificate of registration (see Section 2 of the Act), certified copies of the following should also be obtained at a minimum:

(1) Partnership agreement;
(2) Memorandum and articles of association;
(3) Certificate of good standing; and
(4) By-laws.

3.03 Indirect Applications

All prospective applicants are subject to the same proof of identification and verification as outlined in 3.01 and 3.02 regardless of the manner in which the application is submitted to a financial institution.

An account should not be opened by any means other than by establishing in person the identity of a customer through the account holder's own identity documents. Where due diligence on a prospective customer has been completed by a branch or banking subsidiary/affiliate of the financial institution and that process meets the criteria of the Barbados guidelines, then copies of the relevant documentation must be obtained before the account is opened. In the case of an international bank engaged in intra group treasury operations, written confirmation of the source of funds must be obtained from the parent company.

3.04 Exceptions to Identification Requirements

Section 7(5) of the Act permits the exception of the production of any evidence of identification only where the applicant is itself a financial institution subject to Part 11 of the Act or where a series of transactions occur in a business relationship for which the applicant has already produced satisfactory evidence of identity. A definition of a financial institution appears in sub-section 2(1) of the Act is reproduced in Section 2.03 of the guidelines.

The institution is expected to document those instances where this section of the Act is applied.

3.05 Trust, nominee and fiduciary customers

Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction is conducted if there are any doubts as to whether these clients or customers are not acting on their own behalf, in particular, in the case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc. that do not conduct any commercial or manufacturing business or any form of commercial operation in the country where their registered office is located).

At a minimum, the financial institutions should obtain and verify the following information: –

(1) Evidence of the appointment of trustees (e.g. extracts from Deed of Trust);
(2) Nature and purpose of the trust;
(3) Verification of the identity of the trustee, settlor, protector; person providing the funds; controller or similar person holding power to appoint or remove the trustee; and
(4) Source of funds.

SECTION 4 INTERNAL CONTROLS AND PROCEDURES

Financial institutions should develop and document an anti-money laundering program to ensure compliance with the Act. It is required that institutions:

(i) Develop and apply internal policies, procedures and controls to combat money laundering. Sub-section 8(1)(e)(i).

(ii) Develop audit functions to evaluate such policies, procedures and controls. Sub-section 8(1)(e)(ii); and

(iii) Develop a procedure to audit compliance with section 8 of the Act. Sub-section 8(1)(g).

Programs should be implemented which are applicable for the size and nature of the institution's operations and include, as a minimum:

(a) Adequate internal policies, procedures and controls which include –
- Opening of accounts and documentation requirements;
- Designating a local compliance officer(s) at the management level to coordinate and monitor the compliance program, receive internal reports and issue external reports to the Authority (see Section 9 of the Act);
- Establishing management information/reporting systems to facilitate the timely detection and reporting of suspicious activity within the institution and to the Authority;
- Screening procedures to ensure high standards not only when hiring employees but on an ongoing basis.

(b) An ongoing employee training program (see Section 10 of the Act). Refer to section 7 of the guidelines.

(c) An effective risk-based audit function to test and evaluate the compliance program. This should include assessments of compliance with internal reporting, record keeping and reporting to the Authority. See sub-section 8(1)(e) and (g).

Section 8 of the Act establishes a threshold level of BDS$10,000 or its equivalent in foreign currency for document retention. Financial institutions are expected to be vigilant in their monitoring to ensure that linked transactions, which are individually below the BDS$10,000 limit but with an aggregate value exceeding the threshold, are monitored and appropriately recorded.

4.01 Complex Transactions/Wire Transfers

All institutions should review and properly document the background and purpose of all complex, unusual, large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.

Institutions should exercise caution in accepting funds from non-account holders and non-correspondent banks for wire transfers to unknown third parties. The name and address of the ordering and beneficiary customers should be included on all domestic and international transfers. Each institution that participates in a business transaction via wire transfer should relay this 'identifying' information about the transfer to any other financial institution participating in the transmittal.

Procedures should be identified to detect suspicious activity in all types of business transactions undertaken by the institution including cash, wire transfers, cheques, credit and debit cards, automatic teller machine transactions and on-line banking.

SECTION 5 RECORD KEEPING

Financial institutions should maintain for a minimum of five years, all business transaction records (both domestic and international) of all transactions exceeding $10,000 to enable them to comply swiftly with information requests from the Authority. It may be necessary for

institutions to retain business transaction records for a period exceeding the date of termination of the last business transaction where certain circumstances predate this event, for example:

(a) Date of closure of an account;
(b) Date of termination of the business relationship; or
(c) Date of insolvency.

Where there has been a report of a suspicious transaction or there is an on-going investigation relating to a transaction or client, the institution should retain the documentation until such time as advised by the Authority or High Court.

Financial institutions should ensure that their document retention policy conforms with the stipulations of the Act.

Business transaction records must be kept in sufficient form to permit reconstruction of individual transactions (including the amounts and types of currency involved, if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour. See Sections 8(1)(a) and (3) of the Act. These documents should be available to domestic law enforcement authorities in the context of relevant criminal prosecutions and investigations.

Documentation refers inter alia to any part of a document, reproduction, copies, micro-fiche, computerised or electronic form. See sub-section 2(2).

Institutions should retain customer identification records, account files and business correspondence since it may be necessary to establish a financial profile of any suspected account as part of an investigation. To satisfy this requirement, additional information such as the following may be sought:

- Volume of funds flowing through the account;
- Origin of the funds;
- Form in which the funds were offered or withdrawn e.g. cash, cheque;
- Identity of the person undertaking the transaction;
- Form of instruction and authority; and
- Name and address of the counterparty.

Financial institutions should document a formal anti-money laundering policy including evidence of compliance with provisions of section 8 of the Act relating to audit and training. At a minimum, records should be maintained on the following:

(a) Details and contents of the training programme;
(b) Names of staff receiving training;
(c) Dates of training sessions; and
(d) Assessment of training.

It is important for institutions to ensure that the retrieval of relevant documentation is achieved within a reasonable time in order to comply with instructions issued by the Authority, High Court or regulator.

SECTION 6 REPORTING

Financial institutions are required to submit reports to the Authority in compliance with any instructions issued by that body. See sub-sections 6(a) and 8(1)(c) of the Act. Appropriate reports must therefore be devised under the direction of the Authority.

As part of its internal control system, financial institutions should, at minimum, introduce management reports which, depending on the nature of each institution's operations, cover the following:

(a) Cash volumes by branch;
(b) Wire transfers by country;
(c) Transactions secured by cash;
(d) Large transaction reports (i.e. for transactions exceeding BDS$10,000 or its foreign currency equivalent);
(e) Suspicious transaction reports.

Appropriate information systems must therefore be in place to facilitate such reporting.

6.01 Large Transaction Reporting

Financial institutions must establish and maintain reporting procedures to ensure compliance with Sections 9(1)(a) and 9(2) of the Act. As mentioned in section 4.0 of the guidelines, appropriate procedures should be developed to ensure the timely and effective delivery of internal reports.

Although not a requirement under the Act, the Central Bank recommends that financial institutions continue the practice of using large transaction reports to record and give special attention to transactions over the BDS$10,000 threshold. However, institutions must be cognizant that such information can only be reported to the Authority under sub-section 8(1)(b) of the Act which deals with suspicious transactions and sub-section 8(1)(c). Where such a report is being made, the Act does not allow an institution to notify the customer as this may constitute an offence under sub-section 22(1) of the Act. To this extent, the internal procedures and forms adopted by institutions to record large transactions must comply with the Act and should not for example require the customer's written consent to disclose information to the Authority.

Where a financial institution has developed a business relationship with a customer and determines that the nature of the business generates legitimate transactions in excess of the BDS$10,000 threshold, then completion of a declaration form will not always be necessary. Institutions should clearly document their policy for the granting of such internal reporting waivers including the qualifying criteria for exemption, officers responsible for preparing and authorizing exemptions, basis for establishing threshold limits, review cycle of exempt customers and procedures for processing transactions. Each institution is required to maintain authorized lists of exempt customers showing threshold limits established in each case.

6.02 Suspicious Transaction Reporting

If a financial institution suspects that any transaction by a customer may involve proceeds of crime or is of an unusual nature, they must report their suspicions to the Authority forthwith. (See Sub-section 8(1)(b) of the Act). Consequently, appropriate internal reporting to the compliance officer must therefore be in place.

A suspicious activity is often one which is inconsistent in amount and origin with a customer's known, legitimate business or personal activities. The first step to recognition is knowing enough of the customer's business to recognise that a transaction, or series of transactions, is unusual.

A record should be kept of all internal reports to management and reports made by the financial institution to the Authority. In the event that a financial institution declines to establish a

business relationship with a prospective customer or to undertake a business transaction because of inadequate identification or documentation, a report should be sent to the Authority.

Reports should be in the format determined by the Authority.

Financial institutions, their directors and employees, should not warn their customers when information on suspicious activities relating to them is being reported to the law enforcement authorities. This may constitute an offence under sub-section 22(1) of the Act.

Financial institutions that report their suspicions, should follow the instructions from and otherwise cooperate fully with the Authority and law enforcement authorities in accordance with sub-sections 6(d) and 8(1)(c) of the Act.

SECTION 7 TRAINING AND AWARENESS

An appropriate training programme should be developed in accordance with the institution's size, resources and type of operation. This should formally documented and form part of the anti-money laundering policy document.

Sub-section 6(c) of the Act states that the Authority will 'establish training requirements and provide such training for any financial institution in respect of the business transaction record keeping and reporting obligations . . .' It is a legal requirement for financial institutions to comply with these requirements – sub-section 8(1)(f) and for financial institutions to provide their employees with appropriate training in the recognition and handling of money laundering transactions – sub-section 10(b).

All directors and employees should be aware of the Act and anti-money laundering guidelines. There may be a tendency to concentrate training efforts on front line staff but financial institutions should be cognizant of the fact that criminal activity may impact on various products and services throughout their operations.

Training programs should be tailored for various audiences including:

(a) Front-line staff (e.g. tellers, customer service representatives, branch management);
(b) Wire transfer employees;
(c) Loans officers;
(d) Accounting staff;
(e) Internal audit;
(f) Compliance officer(s);
(g) Senior management and directors; and
(h) New employees.

Training topics should generally cover:

- Laws and guidelines;
- Policies and procedures;
- Know-your-customer requirements;
- Know-your-business relationships;
- The identification of possible types of suspicious activities in all departments;
- Case studies of traditional schemes and new money laundering 'typologies';

- Reporting procedures; and
- Personal obligation and liability under the Act.

Financial institutions should ensure that the compliance officer(s) receive indepth training on all aspects of the legislation and regulatory framework. Specific training should include:

- Policies and procedures to prevent money laundering;
- Customer identification, record keeping and other procedures;
- Recognition and handling of suspicious transactions; and
- New trends in criminal activity.

All training should be undertaken on a regular basis to ensure that there is a clear understanding of and adherence to internal policies and procedures as well as laws and guidelines.

CONCLUSION

The exact size of money laundering worldwide is unknown – in 1996, a range of US$590 billion to US$1.5 trillion was suggested. Despite the inability to accurately measure its size, money laundering is recognized as a threat of international proportions. Such unwanted criminal activity can have severe economic repercussions. It is therefore critical that jurisdictions enforce strict measures to combat money laundering.

While the Authority is the body charged with the responsibility of coordinating this fight, the battle must be supported by all of the major players in our financial sector. Financial institutions are likely to remain the focus of anti-money laundering attention, however the enormity of this threat reinforces the need for a broad-based defense for the sake of national interest.

FATF MEMBER COUNTRIES

Argentina
Australia
Austria
Brazil
Belgium
Canada
Denmark
European Commission
Finland
France
Germany
Greece
Gulf Co-operation Council
Hong Kong, China
Iceland
Ireland
Italy
Japan
Luxembourg
Mexico
Kingdom of the Netherlands
New Zealand
Norway
Portugal
Singapore
Spain
Sweden
Switzerland
Turkey
United Kingdom
United States

OBSERVER BODIES AND ORGANISATIONS

Asia/Pacific Group on Money Laundering
Caribbean Financial Action Task Force
Council of Europe PC-R-EV Committee
Eastern and Southern Africa Anti-Money Laundering Group
Intergovernmental Task Force against Money Laundering in Africa

THE FORTY RECOMMENDATIONS

Introduction

The Financial Action Task Force on Money Laundering (FATF) is an intergovernmental body whose purpose is the development and promotion of policies to combat money laundering – the processing of criminal proceeds in order to disguise their illegal origin. These policies aim to prevent such proceeds from being utilised in future criminal activities and from affecting legitimate economic activities.

The FATF currently consists of 29 countries[1] and two international organisations.[2] Its membership includes the major financial centre countries of Europe, North and South America, and Asia. It is a multi-disciplinary body – as is essential in dealing with money laundering – bringing together the policy-making power of legal, financial and law enforcement experts.

This need to cover all relevant aspects of the fight against money laundering is reflected in the scope of the Forty FATF Recommendations – the measures which the Task Force have agreed to implement and which all countries are encouraged to adopt. The Recommendations were originally drawn up in 1990. In 1996 the forty Recommendations were revised to take into account the experience gained over the last six years and to reflect the changes which have occurred in the money laundering problem.[3]

These Forty Recommendations set out the basic framework for anti-money laundering efforts and they are designed to be of universal application. They cover the criminal justice system and law enforcement; the financial system and its regulation, and international co-operation.

It was recognised from the outset of the FATF that countries have diverse legal and financial systems and so all cannot take identical measures. The Recommendations are therefore the principles for action in this field, for countries to implement according to their particular circumstances and constitutional frameworks allowing countries a measure of flexibility rather than prescribing every detail. The measures are not particularly complex or difficult, provided there is the political will to act. Nor do they compromise the freedom to engage in legitimate transactions or threaten economic development.

1 Reference in this document to 'countries' should be taken to apply equally to 'territories' or 'jurisdictions'. The 29 FATF member countries and governments are: Argentina; Australia; Austria; Belgium; Brazil, Canada; Denmark; Finland; France; Germany; Greece; Hong Kong; China; Iceland; Ireland; Italy; Japan; Luxembourg; Mexico; the Kingdom of the Netherlands; New Zealand; Norway; Portugal; Singapore; Spain; Sweden; Switzerland; Turkey; the United Kingdom and the United States.
2 The two international organisations are: the European Commission and the Gulf Cooperation Council.
3 During the period 1990 to 1995, the FATF also elaborated various Interpretative Notes which are designed to clarify the application of specific Recommendations. The FATF adopted a new Interpretative Note relating to Recommendation 15 on 2 July 1999.

FATF countries are clearly committed to accept the discipline of being subjected to multilateral surveillance and peer review. All member countries have their implementation of the Forty Recommendations monitored through a two-pronged approach: an annual self-assessment exercise and the more detailed mutual evaluation process under which each member country is subject to an on-site examination. In addition, the FATF carries out cross-country reviews of measures taken to implement particular Recommendations.

These measures are essential for the creation of an effective anti-money laundering framework.

GENERAL FRAMEWORK OF THE RECOMMENDATIONS

Recommendation 1

Each country should take immediate steps to ratify and to implement fully the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention).

Recommendation 2

Financial institution secrecy laws should be conceived so as not to inhibit implementation of these recommendations.

Recommendation 3

An effective money laundering enforcement program should include increased multilateral co-operation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible.

ROLE OF NATIONAL LEGAL SYSTEMS IN COMBATING MONEY LAUNDERING

Scope of the Criminal Offence of Money Laundering

Recommendation 4

Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.

Recommendation 5

As provided in the Vienna Convention, the offence of money laundering should apply at least to knowing money laundering activity including the concept that knowledge may be inferred from objective factual circumstances.

Recommendation 6

Where possible, corporations themselves – not only their employees – should be subject to criminal liability.

PROVISIONAL MEASURES AND CONFISCATION

Recommendation 7

Countries should adopt measures similar to those set forth in the Vienna Convention, as may be necessary, including legislative ones, to enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (1) identify, trace and evaluate property which is subject to confiscation; (2) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and (3) take any appropriate investigative measures.

In addition to confiscation and criminal sanctions, countries also should consider monetary and civil penalties, and/or proceedings including civil proceedings, to void contracts entered into by parties, where parties knew or should have known that as a result of the contract, the State would be prejudiced in its ability to recover financial claims, e.g. through confiscation or collection of fines and penalties.

ROLE OF THE FINANCIAL SYSTEM IN COMBATING MONEY LAUNDERING

Recommendation 8

Recommendations 10 to 29 should apply not only to banks, but also to non-bank financial institutions. Even for those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries, for example bureaux de change, governments should ensure that these institutions are subject to the same anti-money laundering laws or regulations as all other financial institutions and that these laws or regulations are implemented effectively.

Recommendation 9

The appropriate national authorities should consider applying Recommendations 10 to 21 and 23 to the conduct of financial activities as a commercial undertaking by businesses or professions which are not financial institutions, where such conduct is allowed or not prohibited. Financial activities include, but are not limited to, those listed in the attached annex. It is left to each country to decide whether special situations should be defined where the application of anti-money laundering measures is not necessary, for example, when a financial activity is carried out on an occasional or limited basis.

Customer Identification and Record Keeping Rules

Recommendation 10

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).

In order to fulfil identification requirements concerning legal entities, financial institutions should, when necessary, take measures:

(i) to verify the legal existence and structure of the customer by obtaining either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity.

(ii) to verify that any person purporting to act on behalf of the customer is so authorised and identify that person.

Recommendation 11

Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction conducted if there are any doubts as to whether these clients or customers are acting on their own behalf, for example, in the case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc. that do not conduct any commercial or manufacturing business or any other form of commercial operation in the country where their registered office is located).

Recommendation 12

Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour.

Financial institutions should keep records on customer identification (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the account is closed. These documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations.

Recommendation 13

Countries should pay special attention to money laundering threats inherent in new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes.

Increased Diligence of Financial Institutions

Recommendation 14

Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 15

If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

Recommendation 16

Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

Recommendation 17

Financial institutions, their directors, officers and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities.

Recommendation 18

Financial institutions reporting their suspicions should comply with instructions from the competent authorities.

Recommendation 19

Financial institutions should develop programs against money laundering. These programs should include, as a minimum:

(i) the development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees;

(ii) an ongoing employee training programme;

(iii) an audit function to test the system.

Measures to Cope with the Problem of Countries with No or Insufficient Anti-Money Laundering Measures

Recommendation 20

Financial institutions should ensure that the principles mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply these Recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the mother institution should be informed by the financial institutions that they cannot apply these Recommendations.

Recommendation 21

Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Other Measures to Avoid Money Laundering

Recommendation 22

Countries should consider implementing feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

Recommendation 23

Countries should consider the feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerised data base, available to competent authorities for use in money laundering cases, subject to strict safeguards to ensure proper use of the information.

Recommendation 24

Countries should further encourage in general the development of modern and secure techniques of money management, including increased use of checks, payment cards, direct deposit of salary checks, and book entry recording of securities, as a means to encourage the replacement of cash transfers.

Recommendation 25

Countries should take notice of the potential for abuse of shell corporations by money launderers and should consider whether additional measures are required to prevent unlawful use of such entities.

Implementation and Role of Regulatory and Other Administrative Authorities

Recommendation 26

The competent authorities supervising banks or other financial institutions or intermediaries, or other competent authorities, should ensure that the supervised institutions have adequate programs to guard against money laundering. These authorities should co-operate and lend expertise spontaneously or on request with other domestic judicial or law enforcement authorities in money laundering investigations and prosecutions.

Recommendation 27

Competent authorities should be designated to ensure an effective implementation of all these Recommendations, through administrative supervision and regulation, in other professions dealing with cash as defined by each country.

Recommendation 28

The competent authorities should establish guidelines which will assist financial institutions in detecting suspicious patterns of behaviour by their customers. It is understood that such guidelines must develop over time, and will never be exhaustive. It is further understood that such guidelines will primarily serve as an educational tool for financial institutions' personnel.

Recommendation 29

The competent authorities regulating or supervising financial institutions should take the necessary legal or regulatory measures to guard against control or acquisition of a significant participation in financial institutions by criminals or their confederates.

STRENGTHENING OF INTERNATIONAL CO-OPERATION

Administrative Co-operation

Exchange of General Information

Recommendation 30

National administrations should consider recording, at least in the aggregate, international flows of cash in whatever currency, so that estimates can be made of cash flows and reflows

from various sources abroad, when this is combined with central bank information. Such information should be made available to the International Monetary Fund and the Bank for International Settlements to facilitate international studies.

Recommendation 31

International competent authorities, perhaps Interpol and the World Customs Organisation, should be given responsibility for gathering and disseminating information to competent authorities about the latest developments in money laundering and money laundering techniques. Central banks and bank regulators could do the same on their network. National authorities in various spheres, in consultation with trade associations, could then disseminate this to financial institutions in individual countries.

Exchange of Information Relating to Suspicious Transactions

Recommendation 32

Each country should make efforts to improve a spontaneous or 'upon request' international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.

Other Forms of Co-operation

Basis and Means for Co-operation in Confiscation, Mutual Assistance and Extradition

Recommendation 33

Countries should try to ensure, on a bilateral or multilateral basis, that different knowledge standards in national definitions – i.e. different standards concerning the intentional element of the infraction – do not affect the ability or willingness of countries to provide each other with mutual legal assistance.

Recommendation 34

International co-operation should be supported by a network of bilateral and multilateral agreements and arrangements based on generally shared legal concepts with the aim of providing practical measures to affect the widest possible range of mutual assistance.

Recommendation 35

Countries should be encouraged to ratify and implement relevant international conventions on money laundering such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Focus of Improved Mutual Assistance on Money Laundering Issues

Recommendation 36

Co-operative investigations among countries' appropriate competent authorities should be encouraged. One valid and effective investigative technique in this respect is controlled delivery related to assets known or suspected to be the proceeds of crime. Countries are encouraged to support this technique, where possible.

Recommendation 37

There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions.

Recommendation 38

There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate proceeds or other property of corresponding value to such proceeds, based on money laundering or the crimes underlying the laundering activity. There should also be arrangements for co-ordinating seizure and confiscation proceedings which may include the sharing of confiscated assets.

Recommendation 39

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country. Similarly, there should be arrangements for co-ordinating seizure and confiscation proceedings which may include the sharing of confiscated assets.

Recommendation 40

Countries should have procedures in place to extradite, where possible, individuals charged with a money laundering offence or related offences. With respect to its national legal system, each country should recognise money laundering as an extraditable offence. Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgements, extraditing their nationals, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

Annex to Recommendation 9: List of Financial Activities undertaken by business or professions which are not financial institutions

1. Acceptance of deposits and other repayable funds from the public.
2. Lending.[1]
3. Financial leasing.
4. Money transmission services.
5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques and bankers' drafts.)
6. Financial guarantees and commitments.
7. Trading for account of customers (spot, forward, swaps, futures, options) in:
   (a) Money market instruments (cheques, bills, CDs, etc);
   (b) Foreign exchange;
   (c) Exchange, interest rate and index instruments;
   (d) Transferable securities;
   (e) Commodity futures trading.
8. Participation in securities issues and the provision of financial services related to such issues.
9. Individual and collective portfolio management.
10. Safekeeping and administration of cash or liquid securities on behalf of clients.
11. Life insurance and other investment related insurance.
12. Money changing.

CFATF MEMBER COUNTRIES

Anguilla
Antigua & Barbuda
Aruba
Bahamas
Barbados
Belize
Bermuda
British Virgin Islands
Cayman Islands
Costa Rica
Dominican Republic
Grenada
Guatemala
Guyana
Jamaica
Montserrat
Netherlands Antilles
Nicaragua
Panama
St Kitts & Nevis
St Lucia
St Vincent & the Grenadines
Suriname
Trinidad & Tobago
Turks & Caicos Islands
Venezuela

1 Including *inter alia:* consumer credit; mortgage credit; factoring, with or without recourse and finance of commercial transactions (including forfaiting).

CO-OPERATING AND SUPPORTING NATIONS

Canada
France
Netherlands
Spain
United Kingdom
United States of America

OBSERVERS

Asia/Pacific Group Secretariat
Caribbean Customs and Law Enforcement Council
Caribbean Development Bank
CARICOM
CARIFORUM
Commonwealth Secretariat
European Commission
FATF Secretariat
UN Global Programme on Money Laundering
Inter-American Development Bank
Interpol
Offshore Group of Banking Supervisors
Organization of American States/ Inter-American Drug Abuse Control Commission
United Nations Office for Drug Control and Crime Prevention

THE NINETEEN RECOMMENDATIONS

Anti-Money Laundering Authority

1. Adequate resources need to be dedicated to fighting money laundering. In countries where experience in combating money laundering is limited, there need to be competent authorities that specialize in money laundering investigations and prosecutions and related forfeiture actions, advise financial institutions and regulatory authorities on anti-money laundering measures, and receive and evaluate suspicious transaction information from financial institutions and regulators and currency reports which are filed by individuals or institutions.

Crime of Money Laundering

2. Consistent with recommendation 5 of the Financial Action Task Force and recognizing that the objectives of combating money laundering are shared by CFATF members, each country in determining for itself what crimes ought to constitute predicate offences, should be fully aware of the practical evidentiary complications that may arise if money laundering is made an offence only with respect to certain very specific predicate offences.
3. In accordance with the Vienna Convention each country should, subject to its constitutional principles and the basic concepts of its legal system, criminalize conspiracy or association to engage in, and aiding and abetting drug trafficking, money laundering and other serious offences and subject such activities to stringent criminal sanctions.

4. When criminalizing money laundering, the national legislature should consider:
   a. extend money laundering predicate offences beyond narcotics trafficking to include all serious crimes;
   b. whether money laundering should only qualify as an offence in cases where the offender actually knew that he was dealing with funds derived from crime or whether it should also qualify as an offence in cases where the offender ought to have known that this was the case;
   c. whether it should be relevant that the predicate offence may have been committed outside the territorial jurisdiction of the country where the laundering occurred;
   d. whether it is sufficient to criminalize the laundering of illegally obtained funds, or whether other property that may serve as a means of payment should also be covered.
5. Where it is not otherwise a crime, countries should consider enacting statutes that criminalize the knowing payment, receipt or transfer, or attempted payment, receipt or transfer of property known to represent the proceeds of drug trafficking, serious crimes or money laundering where the recipient of the property is a public official, political candidate, or political party. In countries where it is already a crime, countries should consider the imposition of enhanced punishment or other sanctions, such as forfeiture of office.

Privilege

6. The fact that a person acting as a financial advisor or nominee is an attorney, accountant, stockbroker or other professional, should not in and of itself be sufficient reason for such person to invoke an attorney-client privilege, or any other confidentiality clauses.

Confiscation

7. Confiscation measures should provide for the authority to seize, freeze, and confiscate, at the request of a foreign state, property in the jurisdiction in which such property is located regardless of whether the owner of the property or any persons who committed the offence making the property subject to confiscation are present or have ever been present within the jurisdiction.
8. Countries should provide for the possibility of confiscating any property that represents assets that have been directly or indirectly derived from drug offences or related money laundering offences (property confiscation), and may also provide for a system of pecuniary sanctions based on an assessment of the value of assets that have been directly or indirectly derived from such offences. In the latter case, the pecuniary sanctions concerned might be recoverable from any asset of the convicted person that may be available (value confiscation).
9. Confiscation measures may provide that all or part of any property confiscated be transferred directly for use by competent authorities, or be sold and the proceeds of such sales deposited into a fund dedicated to the use by competent authorities in anti-narcotics and anti-money laundering efforts.
10. Confiscation measures should also apply to narcotic drugs and psychotropic substances, precursor and essential chemicals, equipment and materials used or destined for the illicit manufacture, preparation, distribution and use of narcotic drugs and psychotropic substances.

Administrative Authorities

11. In order to implement effectively the recommendations of the Financial Action Task Force, each country should have a system that provides for bank and other financial institution supervision, including:
    1) licensing of all banks, including offices, branches, and agencies of foreign banks whether or not they take deposits or otherwise do business in the country (so-called offshore shell banks), and
    2) the periodic examination of institutions by authorities to ensure that the institutions have adequate anti-money laundering programs in place and are following the implementation of other recommendations of the Financial Action Task Force.

    Similarly, in order to implement the recommendation of the Financial Action Task Force, there needs to be effective regulation, including licensing and examination, of institutions and businesses such as services that make them vulnerable to money laundering.
12. Countries need to ensure that there are adequate border procedures for inspecting merchandise and carriers, including private aircraft, to detect illegal drug and currency shipments.

Record-keeping

13. In order to ensure implementation of the recommendations of the Financial Action Task Force, countries should apply appropriate administrative, civil, or criminal sanctions to financial institutions and also businesses or professions which are not financial institutions that fail to maintain records for the required retention period. Financial institution supervisory authorities as well as supervisory authorities for businesses and professions which are not financial institutions must take special care to ensure that adequate records are maintained.

Currency Reporting

14. Countries should consider the feasibility and utility of a system that requires the reporting of large amounts of currency over a certain specified amount received by businesses other than financial institutions either in one transaction or in a series of related financial transactions. These reports would be analyzed routinely by competent authorities in the same manner as any currency report filed by financial institutions. Large cash purchases of property and services such as real estate and aircraft are frequently made by drug traffickers and money launderers and, consequently, as of similar interest to law enforcement. Civil and criminal sanctions would apply to businesses and persons who fail to file or falsely file reports or structure transactions with the intent to evade the reporting requirements.

Administrative Co-operation

15. In furtherance of recommendation 30 of the Financial Action Task Force, information acquired about international currency flows should be shared internationally and disseminated, if possible through the services of appropriate international or regional organizations, or on existing international networks. Special agreements may also be concluded for this purpose.

16. Member States of the OAS should consider signing the OAS Convention on Extradition, concluded at Caracas on February 25, 1981.
17. Each country should endeavour to ensure that its laws and other measures regarding drug trafficking and money laundering, and bank regulation as it pertains to money laundering, are to the greatest extent possible as effective as the laws and other measures of all other countries in the region.

Training and Assistance

18. As a follow-up, there should be regular meetings among competent judicial, law enforcement, and supervisory authorities of the countries of the Caribbean and Central American region in order to discuss experience in the fight against money laundering and emerging trends and techniques.
19. In order to enable countries with small economies and limited resources to develop appropriate money laundering prevention programs, other countries should consider widening the scope of their international technical assistance programs, and to pay particular attention to the need of training and otherwise strengthening the quality and preserving the integrity of judicial, legal and law enforcement systems.

BASEL STATEMENT OF PRINCIPLES

I. Purpose

Banks and other financial institutions may unwittingly be used as intermediaries for the transfer or deposit of money derived from criminal activity. The intention behind such transactions is often to hide the beneficial ownership of funds. The use of the financial system in this way is of direct concern to police and other law enforcement agencies; it is also a matter of concern to banking supervisors and banks' managements, since public confidence in banks may be undermined through their association with criminals.

This Statement of Principles is intended to outline some basic policies and procedures that banks' managements should ensure are in place within their institutions with a view to assisting in the suppression of money-laundering through the banking system, national and international. The Statement thus sets out to reinforce existing best practices among banks and, specifically, to encourage vigilance against criminal use of the payments system, implementation by banks of effective preventive safeguards, and cooperation with law enforcement agencies.

II. Customer Identification

With a view to ensuring that the financial system is not used as a channel for criminal funds, banks should make reasonable efforts to determine the true identity of all customers requesting the institution's services. Particular care should be taken to identify the ownership of all accounts and those using safe-custody facilities. All banks should institute effective procedures for obtaining identification from new customers. It should be an explicit policy that significant business transactions will not be conducted with customers who fail to provide evidence of their identity.

III. Compliance with Laws

Banks' management should ensure that business is conducted in conformity with high ethical standards and that laws and regulations pertaining to financial transactions are adhered to. As regards transactions executed on behalf of customers, it is accepted that banks may have no means of knowing whether the transaction stems from or forms part of criminal activity. Similarly, in an international context it may be difficult to ensure that cross-border transactions on behalf of customers are in compliance with the regulations of another country. Nevertheless, banks should not set out to offer services or provide active assistance in transactions which they have good reason to suppose are associated with money-laundering activities.

IV. Cooperation with Law Enforcement Authorities

Banks should cooperate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality. Care should be taken to avoid providing support or assistance to customers seeking to deceive law enforcement agencies through the provision of altered, incomplete or misleading information. Where banks become aware of facts which lead to the reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose, appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with the customer and close or freeze accounts.

V. Adherence to the Statement

All banks should formally adopt policies consistent with the principles set out in this Statement and should ensure that all members of their staff concerned, wherever located, are informed of the bank's policy in this regard. Attention should be given to staff training in matters covered by the Statement. To promote adherence to these principles, banks should implement specific procedures for customer identification and for retaining internal records of transactions. Arrangements for internal audit may need to be extended in order to establish an effective means of testing for general compliance with the Statement.

CUSTOMER REFERENCE REQUEST FORM (SPECIMEN)

In accordance with the Anti-Money Laundering Guidelines for Licensed Financial Institutions, we hereby request your confirmation of the identity of our prospective customer.

Full Name of Customer: .....

Known Aliases: .....

Title (Mr/Mrs/Miss/Ms): .....

Permanent Address: .....
(as given by customer)

Date of Birth: ..... Account Number: .....

Specimen Customer Signature: .....

Please respond by returning the lower portion of this form.

To: (Sender) From: (Referee)

Request for reference regarding: .....

With reference to your enquiry dated ..... we:

1. Confirm that the above customer is/is not known to us.
2. Confirm/cannot confirm the address shown in your enquiry.
3. Confirm/cannot confirm that the signature reproduced in your enquiry appears to be that of the above customer.

The above information is given in strict confidence, for your private use only, and without any guarantee or responsibility on the part of this financial institution or its officials.

IDENTIFICATION EXCEPTION (SPECIMEN)

DATE OF TRANSACTION:

1. EXEMPT CUSTOMER NAME (last, first, middle) OR BUSINESS
2. TRADING NAME
3. PERSON COMPLETING TRANSACTION (last, first, middle)
4. PERMANENT ADDRESS
5. BASIS FOR EXEMPTION ☐ **FINANCIAL INSTITUTION** (specify) ☐ LINKED TRANSACTION **DATE OF ORIGINAL TRANSACTION:** **EFFECTIVE DATE:** **REFERENCE #:**
6. EFFECTIVE DATE OF EXEMPTION
7. AMOUNT OF TRANSACTION

DESCRIPTION/NATURE OF BUSINESS TRANSACTION:

☐ Deposit ☐ Draft/Money Order Purchase ☐ Currency Exchange
☐ Wire Transfer ☐ Credit/Debit Card ☐ Travellers Cheques Purchase
☐ ATM ☐ Other (Specify)

.....	.....	.....
TRANSACTION TAKEN BY (Signature & Title)	AUTHORISING OFFICER (Signature & Title)	COMPLIANCE OFFICE (Signature & Title)

LARGE TRANSACTION REPORT (SPECIMEN)

[NAME & ADDRESS OF FINANCIAL INSTITUTION]

DATE OF TRANSACTION:

1. CUSTOMER NAME (last first, middle) BUSINESS	**7. NAME OF PERSON CONDUCTING** OR **TRANSACTION, if different from previous**
2. PERMANENT ADDRESS	8. PERMANENT ADDRESS
3. DATE AND PLACE OF BIRTH	**9. DATE AND PLACE OF BIRTH**
4. NATIONALITY	**10. NATIONALITY**
5. OCCUPATION	**11. OCCUPATION**
6. HOME TELEPHONE NUMBER WORK TELEPHONE NUMBER	**12. HOME TELEPHONE NUMBER WORK TELEPHONE NUMBER**
13. A/C NUMBER	
14. AMOUNT OF TRANSACTION & CURRENCY:	

FORM OF VERIFICATION	**ISSUER & DATE**	**NUMBER**
15. NATIONAL I.D.		
16. PASSPORT		
17. DRIVER'S LICENCE		
18. SOCIAL SECURITY		
19. OTHER (Specify)		

DESCRIPTION/NATURE OF BUSINESS TRANSACTION:

☐ Deposit ☐ Draft/Money Order Purchase ☐ Currency Exchange
☐ Wire Transfer ☐ Credit/Debit Card ☐ Travellers Cheques Purchase
☐ ATM ☐ Other (Specify)

Source of Funds: .....

Transaction Approved? Yes No

If No, state reason: .....

OFFICER COMPLETING TRANSACTION AUTHORISING/COMPLIANCE OFFICER

(Signature & Title) (Signature & Title)

EXAMPLES OF SUSPICIOUS TRANSACTIONS

Money laundering is a global and dynamic phenomenon. The Financial Action Task Force meets annually to discuss money laundering trends and methods (referred to as 'typologies'). These examples of suspicious transactions are not exhaustive and financial institutions are advised to keep abreast of any developments that would assist in their fight against money laundering.

(a) Customers whose transactions are in size, type or nature not in accordance with their apparent source of wealth.

(b) Unusual large cash deposits made by an individual or company whose ostensible business activities would normally be generated by cheques and other instruments.

(c) Customers seeking to exchange large quantities of cash of low denomination notes for those of higher denomination.

(d) Frequent exchange of cash into other currencies.

(e) Customers transferring large sums of money to or from overseas locations with instructions for payment in cash.

(f) Large cash deposits using night safe facilities, thereby avoiding direct contact with staff of licensed financial institutions.

(g) Customers whose explanation of the source of funds is unclear and who decline to provide a satisfactory explanation.

(h) Matching of payments out with credits paid in cash on the same or previous day.

(i) Large cash withdrawals from a previously dormant or inactive account.

(j) Greater use of safety deposit facilities. The use of sealed deposit and withdraw packets.

(k) Substantial increase in deposits of cash or negotiable instruments by a professional firm or company, using client accounts or in-house company or trust accounts, especially if the deposits are promptly transferred between other client, company or trust accounts.

(l) Large number of individuals making payments into the same account without adequate explanation.

(m) Buying and selling of a security with no discernible purpose or in circumstances which appear unusual.

(n) Building up of large balances, not consistent with the known turnover of the customer's business, and subsequent transfer to overseas account(s).

(o) Frequent requests for travellers cheques, foreign currency drafts or other negotiable instruments.

(p) Request to borrow against an asset held by a financial institution or a third party, where the origin of the assets is not known or the assets are inconsistent with the customer's standing.

(q) Customers introduced by an overseas branch, affiliate or other bank based in countries where production of drugs or drug trafficking may be prevalent.

(r) Use of letters of credit and other methods of trade finance to move money between countries where such trade is not consistent with the customer's usual business.

(s) Unexplained electronic fund transfers by customers, foreign currency drafts or other negotiable instruments to be issued.

(t) Frequent paying in of travellers cheques or foreign currency drafts particularly if originating from overseas.

SUSPECT TRANSACTION REPORT

SUSPECT TRANSACTION REPORT

PLEASE WRITE IN BLOCK LETTERS

PART A Identity of customers involved in transaction

CUSTOMER 1

1.:.....
(Date of birth)

2.:.....

.....
(Address)

3.:.....
(Nationality – if not Barbadian)

4.:.....
(Occupation)

5.:.....
(Date of birth)

6.: Type and number of affected accounts

.....

.....

7.: Particulars of ID, e.g. National ID no., bank account no.

.....

PART B Name of account holder

(To be completed only if transaction was conducted on behalf of another person other than those mentioned in part A)
(Given names and surname)

8.:.....
(Given names and surname)

9......

.....
(Address)

10.:.....
(Nationality – if not Barbadian)

11.:.....
(Occupation)

12.:.....
(Date of birth)

13.: Type and number of affected accounts

.....

.....

14.: Particulars of ID, e.g. National ID no., bank account no.

.....

CUSTOMER 2 (if more than one customer at counter)

1.:.....
(Given names and surname)

2.:.....

.....
(Address)

3.:.....
(Nationality – if not Barbadian)

4.:.....
(Occupation)

5.:.....
(Date of birth)

6.: Type and number of affected accounts

.....

.....

7.: Particulars of ID, e.g. National ID no., bank account no.

.....

PART C Transaction details

15.: Type of transaction (e.g. deposit, purchase travellers chq

.....

.....

16.: Date of transaction.....

17.: Amount of transaction ($BC).....

18.: If foreign currency involved, name.....

19.: Cheque/transfer/money order/etc

.....

(Name of drawer/Ordering customer)

.....

(Name of payee/beneficiary)

20.: Other bank involved (if applicable) – name/branch/country

.....

SUSPECT TRANSACTION REPORT

PLEASE WRITE IN BLOCK LETTERS

APPENDIX 3

DEED OF DECLARATION OF TRUST (GENERAL)

XXX, a domestic bank corporation formed under the laws of [_____], being resident and domiciled in [_____], with an office at XXX, [_____], W.I.
'Trustee'

XXX

WHEREAS pursuant to its power of appointment as Trustee of the XX Family Trust, the Trustee has appointed the XX Descendants Trust to receive certain assets to be distributed at the time of division of the XX Family Trust, (date);
AND WHEREAS the Trustee desires to settle the terms of trust under which it shall hold such assets as Trustee for the XX Descendants Trust;

NOW THEREFORE:

NAME OF TRUST

1. This trust shall be known as the 'XX Descendants Trust'

DECLARATION OF TRUST

2. Trustee acknowledges that it shall hold subject to the following trusts, all of the property described in Annex '1' attached and incorporated by reference which it shall hold effective at the time of division of the XX Family Trust on the (date) at (time), which together with any other property that may later become subject to this Trust, shall constitute the trust estate (the Trust Fund) and shall be held, administered and distributed by the Trustee as herein provided.

DEFINITIONS

3. In this Deed (including this paragraph) and in any instrument supplemental ancillary hereto, unless the context otherwise requires:
   (a) 'Assets' includes cash, securities, estates, property and any interests therein;
   (b) 'Beneficiary' means the person or persons who are entitled to any benefit hereunder whether such benefit is contingent or absolute and whether such benefit is a right to receive income or capital or is an interest in income to capital of the Trust Fund;
   (c) 'Emergency Event' means:
      (i) an Event of Duress; or
      (ii) an action on the part of any judicial or government authority of competent jurisdiction or under any applicable law, with the result that the Trustee shall have ceased to be authorized to act in the capacity of trustee, or as Trustee of this Trust;

(iii) an action on the part of any judicial or government authority of competent jurisdiction or under any applicable law, with the result that the Trustee shall have ceased to be authorized to hold foreign Assets for the benefit of the Beneficiaries.

(d) 'Event of Duress' means the occurrence of any one of the following:

(i) war or civil disturbance in the country of domicile of the Trustee which will or may endanger, whether directly or indirectly, the safety of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(ii) political action in the country of domicile of the Trustee whether instigated by any government, political organization or individual, whether constitutional or otherwise, which will or may endanger, whether directly or indirectly, the safety of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(iii) the enactment in the country of domicile of the Trustee of any law, regulation, decree or measure which will or may directly or indirectly expropriate, sequestrate or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(iv) any action or threat of action by any government, department or agency in the country of domicile of the Trustee or by any official purporting to act on the instructions and with the authority of such government, department or agency which will or may directly or indirectly expropriate, sequestrate, levy, lien or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(v) any order, decree or judgment of any court or tribunal in the country of domicile of the Trustee which will or may directly or indirectly, expropriate, sequestrate, levy, lien or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund and any distribution therefrom;

(vi) The Trustee makes a declaration that as a result of the laws (the 'Laws') of any country, domestic or foreign, there is or could be adverse consequences affecting or otherwise relating directly or indirectly to the property held by the Trust; for the purposes hereof, the term 'adverse consequences' shall include without limitation, any direct or indirect taxes which may be incurred by the Trust as a result of or in connection any such Laws.

(e) 'Proper Law' means the law, as determined in accordance with this Trust Deed, to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Trust shall be subject and by which such rights, construction and effect shall be construed and regulated.

(f) 'Time of Division' means the earliest of

(i) October 1, 2013; and

(ii) such date as the Trustee may in its absolute discretion determine by an instrument in writing signed by it and delivered in counterparts to every adult Beneficiary living at the time of signing such instrument, provided that such date shall not be later than the date 80 years from the date of coming into existence of this Trust Deed.

(g) 'Trust Fund' means the Assets referred to in paragraph 2 hereof and all other Assets which may at any time be substituted therefor and all capital accretions to and all income from such Assets; but excluding all amounts which have been paid or disbursed therefrom (whether out of capital or income) in the normal course of administration or pursuant to the provisions of this Deed.

(h) 'Trustee' means the trustee or trustees from time to time acting under this Deed and shall include the Original Trustee and any trustee or trustees appointed pursuant to the provisions of paragraph 12 hereof.

(i) 'Trustee Act' means the Trustee Act, [_____] of the laws of [_____] as from time to time amended and every statute substituted therefor, and in the case of such amendment or substitution, any references in this Trust Deed to provisions of the Trustee Act or to specific provisions of the Trustee Act, shall be read as references to the provisions as amended or substituted therefor in the amendment or the new statute or statutes.

PAYMENTS BEFORE TIME OF DIVISION

4. The Trustee shall hold the Trust Fund and, until Time of Division, it may from time to time pay to or apply for the benefit of XXX, XXX, XXX and XXX (such group being hereinafter collectively called the 'XXX Descendants'), or such one or more of them to the exclusion of the other or others and in such proportions as the Trustee in its uncontrolled discretion may from time to time determine, all or so much of the net income, if any, derived from the Trust Fund and so much of the capital thereof as the Trustee in its uncontrolled discretion from time to time may determine to be appropriate for the respective benefit of the XXX Descendants.

Any net income from the Trust Fund which is not so paid or applied in any calendar year in which it is earned or within one month thereafter shall be accumulated and added to the capital of the Trust Fund and dealt with as part thereof. Notwithstanding the foregoing the Trustee shall not pay or apply any net income from the Trust Fund in any calendar year in which it is earned to any Beneficiary who is resident in [_____], nor shall the Trustee pay or apply any proceeds of any gain on capital in any year in which the gain was realized to any Beneficiary who is resident in [_____]; nor shall the Trustee pay, allocate or apply any amount whatsoever to any person who is a resident or citizen of [_____] during such time that person is a resident or a citizen of [_____].

For greater certainty, in differentiating distributions out of capital from distributions out of income, the following procedures shall be adopted:

(a) Separate bank accounts shall be maintained for capital (the 'Capital Bank Account') and income (the 'Income Bank Account');

(b) Proceeds received by the Trust on account of capital, including the proceeds of disposition of capital Assets, shall be deposited to the credit of the Capital Bank Account;

(c) Proceeds received by the Trust on account of income shall be deposited to the credit of the Income Bank Account;

(d) On the first business day of each calendar year, all balances accumulated in the Income Bank Account to the end of the immediately preceding calendar year shall be transferred to the Capital Bank Account, subject to any reserve deemed necessary by the Trustee to meet obligations of the Trust other than distributions to beneficiaries;

(e) Distributions intended to be made to beneficiaries out of capital, should be made only out of the Capital Bank Account.

For greater certainty, no person shall until the Time of Division have any claim, right or entitlement whatsoever to any part or parts of the Trust Fund or income thereof except insofar as the same may arise by virtue of the exercise of the discretion to appoint by the Trustee contained herein.

DISTRIBUTION AT TIME OF DIVISION

5. At the Time of Division, the Trustee shall distribute the Trust Fund as follows:
   (a) to such of XXX, XXX, XXX and XXX, as may be then alive, or such one or more of them to the exclusion of the other or others in such proportion or proportions as the Trustee in its uncontrolled discretion may determine. A person shall be considered alive for the purposes of this distribution if they should die leaving issue surviving them at the date of distribution, who shall take the share of the deceased in equal shares *per stirpes*, provided however that the value of all property and income from property passing to XXX, XXX, XXX or XXX (a Beneficiary hereunder) who is married at the time such Beneficiary becomes entitled to such property, or property into which such property can be traced, shall be excluded in the case of any Beneficiary resident in (province) from such beneficiaries net family property within the meaning of the [_____] Family Law Act, or its successor, and for all beneficiaries hereunder wherever resident from any other community of property regime; and
   (b) if the Trust Fund or any part thereof should fail to vest one or more of XXX, XXX, XXX and XXX, pursuant to the foregoing provisions, the Trust Fund or part thereof shall be distributed as to X% to the University of XXX, [_____], as to XX% to the issue of XXX and XX in equal shares *per stirpes*, and as to the remaining XX% to the issue of and, in equal shares *per stirpes*.

APPOINTMENT TO ANOTHER TRUST

6. Notwithstanding the provisions of the foregoing paragraphs 4 and 5, the Trustee may if it sees fit appoint a portion of the Trust Fund or any share thereof directed by the said paragraph 5 to be set aside by it, to another trust (whether or not such trust is resident in the jurisdiction where this Trust is then resident, whether or not such trust is already existing or shall be established pursuant to such appointment, and whether or not the Proper Law of such trust is the Proper Law of this Trust) provided that the Trustee is of the opinion that the person(s) beneficially interested in such other trust include the Beneficiary(s) of such portion of the Trust Fund or such share and do not include any person other than the Beneficiary(s) of this Trust, and provided further that the terms of such other trust are substantially the same, *mutatis mutandis*, as the terms of the Trust Deed applicable to the Trust Fund prior to the time of such appointment. The appointment of a portion or a share as aforesaid shall be in satisfaction of all the interests of such Beneficiary(s) of such portion or share.

CAPITAL AND INCOME PAYABLE TO MINORS

7. If any capital of the Trust Fund or any of the net income therefrom shall be payable or distributable, whether or not as a result of the exercise of the discretionary power vested in

the Trustee, to a Beneficiary who is under the age of majority the amount payable or distributable (hereinafter referred to as an 'Infant's Share') may be held and kept invested by the Trustee and so much of the net income and capital of an Infant's Share as the Trustee in its uncontrolled discretion considers advisable from time to time may be used for the care, maintenance, education and advancement in life of such infant until he or she attains the age of majority and any net income of an Infant's Share not so used in any year shall be accumulated and added in such year to the capital thereof. The provisions of this Deed respecting the administration of the Trust Fund shall apply *mutatis mutandis* to any Infant's Share held by the Trustee.

The Trustee is authorized to make any payment or distribution whether of income or of capital, for any Beneficiary under the age of majority, or under other disability, to the parent, legal guardian, acting guardian or committee of such Beneficiary or to any one of whom the Trustee in its discretion deems it advisable to make such payment, whose receipt shall be a sufficient discharge to the Trustee.

IRREVOCABILITY OF TRUST

8. This Deed and trust hereby created is intended to and is hereby declared to be irrevocable. No part of the principal or income of the Trust shall ever revert to or be used for the benefit of the XX Family Trust or the Trustee, in the capacity as settlor, or be used to satisfy any legal obligations of the XX Family Trust or Trustee in the capacity as settlor. There shall be no interest, either vested or contingent, including any reversionary right or possibility of reverter, in the principal and income of the Trust, and no power to determine or control, by alteration, amendment, revocation, or termination, or otherwise, the beneficial enjoyment of the capital or income of the Trust in the XX Family Trust or in the Trustee in the capacity as settlor. Nothing herein shall in any way limit the Trustee in the exercise of the powers granted as Trustee of this Trust.

POWERS OF TRUSTEE

9. In addition to all other powers conferred upon them by the other provisions of this Deed or by any statute or general rule of law, the Trustee shall have and is hereby given the power and authority in its absolute and uncontrolled discretion at any time and from time to time to administer the Trust Fund in whatever manner it may determine and shall have the right to take any action in connection with the Trust Fund and to exercise any rights, powers and privileges which may exist or arise in connection therewith to the same extent and as fully as an individual could if he were the sole owner of the Trust Fund. Without in any way limiting the generality of the foregoing the Trustee shall have the authority:
   (a) To invest in, or to retain and hold as proper investments of this Trust any portion of the Trust Fund which may be invested, in any stocks, bonds, securities or other property, real, personal, or mixed, regardless of whether such stocks, bonds, securities or other property shall be proper investments for trusts under the laws of Barbados or any other jurisdiction.
   (b) To sell, transfer, assign, exchange, convey, mortgage, lease or otherwise dispose of any of the Assets from time to time constituting the Trust Fund in any manner the Trustee may deem proper and at such price, upon such terms and for such consideration as the Trustee shall deem suitable; to give any option with respect to any property in the Trust

Fund and generally to perform all acts of alienation and ownership with respect to the Trust Fund to the same extent and with the same effect as if they were the absolute owners of the Trust Fund. In so doing the Trustee is empowered to execute and deliver all deeds or other instruments as may be necessary or desirable to make good and sufficient title to any such trust Assets and it shall not be bound to secure the consent or approval of any person, official, authority, tribunal or Court whomsoever or whatsoever.

(c) To vote in person or by proxy, in Trustee's discretion, all stocks or other securities held by it.

(d) To exercise all rights incidental to the ownership of stocks, shares, bonds and other securities, and any other investments and property held as part of the Trust Fund, including voting all stocks, shares, and other securities and issuing proxies to others; to sell or exercise any subscription rights and, in connection with the exercise of subscription rights, to use trust moneys for such purpose; to consent to and join in any plan, reorganization, re-adjustment, merger, amalgamation or consolidation with respect to any corporation whose stock, shares, bonds or other securities at any time form part of the Trust Fund, and to exchange the securities held by Trustee or the securities issued in connection therewith; and to authorize the sale of the undertaking or Assets or any portion of the Assets or undertaking of any such corporation; and to enter into all or any agreements incidental thereto as Trustee may deem necessary.

(e) To pay all assessments, subscriptions and other sums of money as Trustee may deem expedient for the protection of Trustee's interest as holder of any stocks, bonds or other securities of any corporation or company.

(f) To exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities, or to take advantage of any right to subscribe for any additional stocks, bonds or other securities, and to make any and all necessary payments therefor.

(g) To execute and deliver all necessary assignments and conveyances required for the transfer of corporate stocks, bonds and all other securities, and all deeds of conveyance for real estate, sold and disposed of, without the order of any court, thereby relieving the purchaser from all liability in regard to the proper application of the purchase price so paid to Trustee.

(h) To make distributions and divisions in cash or in kind, or partly in cash and partly in kind, in Trustee's sole discretion.

(i) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favour of, or against this Trust, as Trustee shall deem best.

(j) To borrow money for such periods of time, from such persons or firms, including Trustee, and upon such terms and conditions as to rates, maturities, renewals and security that to Trustee seem advisable, and to pledge or mortgage such stocks, bonds and other portions of the capital of this Trust as may be required to secure such loans.

(k) To employ and pay at the expense of the income or capital of the Trust Fund any agent in any part of the world whether advocates, attorneys, solicitors, accountants, brokers, banks, trust companies or other advisors or agents without being responsible for the default of any agent if employed in good faith to transact any business or to do any act required to be transacted or done in the execution of the trusts hereof including the receipt and payment of moneys and the execution of documents and at any time employ on such terms and with such payment as they may think fit any individual firm or company in any part of the world as an investment adviser for the purpose of

advising them as to the investment policy to be followed in the administration of the Trust Fund and if and so far as the Trustee follow the advice proffered by such investment adviser they shall not be responsible for the success or failure of the policy so pursued.

(l) To apply for and purchase, as an authorized investment of the Trust Fund, life insurance on the life of any person; to accept as assignees, for a consideration or as a donation to the Trust Fund, any life insurance policy or policies on the life of any person and/or benefits under any such policy or policies; and to use and apply any portion of the Trust Fund in the payment or prepayment of premiums upon, or for the purpose of maintaining in force, any such insurance wither applied for and purchased by the Trustee or accepted by them as assignees or donees. Any insurance so purchased by, donated to or otherwise acquired and held by the Trustee shall be deemed to be an authorized investment for the purposes of the Trust and whenever from time to time the Trustee pays or prepay any premium or premiums on any insurance they shall be deemed to have made an authorized investment. The proceeds of any such insurance and any amount payable as a result of the prepayment of premiums shall be payable and paid to the Trustee and, when received by it, shall constitute part of the capital of the Trust Fund. The Trustee is empowered to exercise any and all rights and powers howsoever available or arising with respect to any policy of insurance applied for, purchased by, donated to or otherwise acquired by the Trustee and to dispose of such policy in such manner, at such time, and for such price and upon such terms as they consider advisable.

(m) To keep the whole or any part of the Trust Fund within or without the jurisdiction of the Proper Law of this Settlement.

(n) To guarantee, with or without security, the performance of contracts and the performance of undertakings and obligations of any person, corporation, partnership, firm or association, including the payment of interest, principal and premium, if any, of or on bonds debentures or other securities, mortgages or liabilities of any such person, corporation, partnership, firm or association.

(o) Upon any distribution or division of the Trust Fund or of any part thereof to distribute or divide the same either wholly or in part in money or in other Assets of the Trust Fund and for the purposes of such distribution or division, and for any other purpose hereunder, to place such value on the Assets from time to time forming the whole or any part of the Trust Fund or of any share therein as they deem just and proper and any such valuation shall be absolutely final and binding upon all persons entitled hereunder; upon any such distribution or division to determine to whom or to what share specified Assets shall be given or allocated and to distribute or divide the same subject to the payment of such amounts as shall be necessary to adjust the shares of the various beneficiaries; and upon such distribution should the Trustee in its sole discretion deems necessary, require entry by the Beneficiary into an agreement to indemnify the Trustee or any third party, with respect to any matter concerning the Trust property continuing after the time of the distribution. Without limiting the foregoing, the Trustee may prior to distribution require the agreement and indemnification of the beneficiaries to any agreements previously entered into with respect to any price adjustment agreement concerning shares held by the Trust, any indemnity or other agreement affecting the property, and any agreement with respect to recapture of depreciation or payment of any other taxes due in relation to the Trust property.

(p) To lend the whole or any part of the Trust Fund to any person with or without security and either free of interest or on such terms as to payment of interest and generally as the Trustee shall in its absolute discretion think fit.

(q) To incorporate any company or companies in any place in the world at the expense of the Trust Fund with limited or unlimited liability for the purpose of (inter alia) acquiring the whole or any part of the Trust Fund. The consideration on the sale of the Trust Fund or any part thereof to any company incorporated pursuant to this sub-clause may consist wholly or partly of fully paid shares or stocks or debentures (secured or unsecured) of the company and may be credited as fully paid and may be allotted to or otherwise vested in the Trustee and shall be capital moneys in the Trustee's hands.

(r) To determine whether any sums received or disbursed are on account of capital or income or partly on account of one and partly on account of the other and in what proportions and the decision of the Trustee whether made in writing or implied from the act of the Trustee shall be conclusive and binding on all the Beneficiaries.

(s) To give and satisfy out of the Trust Fund an indemnity to any person or corporation who has previously been one of the Trustees or is about to retire as a Trustee hereof against any tax, duty or fiscal liability whatsoever which may be claimed against him in any part of the world by reason of such person or corporation having been one of the Trustees.

(t) To pay and satisfy out of the Trust Fund any due debts or obligations in relation to the Trust Fund.

(u) Every Trustee being a corporation may exercise or concur in exercising any discretion or power hereby conferred on the Trustee by a resolution of such corporation or by a resolution of its Board of Directors or governing body or may delegate the right and power to exercise or concur in exercising any such discretion or power to one or more of its officers or members of its Board of Directors appointed from time to time by its Board of Directors for that purpose.

(v) In addition to all other powers and discretions granted to or vested in Trustee by this Deed or by law, Trustee shall have the additional powers and discretions, to be exercised only in a fiduciary capacity and in the interest of the beneficiaries, to do all acts, institute all proceedings, and exercise all rights and privileges in the management of the Trust Fund as if the absolute owner thereof, that Trustee may deem necessary or proper for the conservation and protection of the Trust Fund until the interest that it represents is ultimately distributed.

TITLE TO ASSETS

10. All Assets from time to time constituting the Trust Fund shall be held by and registered in the name of the Trustee or in the name of its nominee or nominees or otherwise, as the Trustee may deem expedient. The Trustee shall maintain the Assets of the Trust Fund separate from all other property in its possession whether held absolutely or in trust.

PAYMENT OF TAXES

11. The Trustee shall have the right to pay out of the income or capital of the Trust Fund, as it may from time to time in its absolute discretion determine, any taxes or other imposts payable by the Trustee or otherwise in connection with the Trust Fund or payable by any Beneficiary in respect of the Trust Fund or any part thereof, whether such taxes or imposts be levied in Canada or by any other jurisdiction whatsoever.

RESIGNATION, REMOVAL AND APPOINTMENT OF TRUSTEES

12. There shall be at least one Trustee in office at all times. The Trustee shall continue in the capacity of a Trustee hereof until any of the following events occurs namely, the resignation of the Trustee; or the refusal, unfitness, incapacity or incapability of the Trustee (for whatever reason including an adjudication of bankruptcy against the Trustee, or the liquidation of the Trustee) to act in the capacity of Trustee of this Trust.

    In the discretion of the Trustee (s) then in office, the number of Trustees may be increased at any time, but in any event the number of Trustees shall not exceed three persons, and at least one of the Trustees must be a company authorized under Proper Law to act as Trustee hereof.

    Should any vacancy or vacancies occur in the office of Trustee for any reason (including an increase in the number of Trustees) such vacancy or vacancies may be filled by instrument in writing signed by the Trustees then in office. Any new Trustee or Trustees so appointed need not be resident in the Commonwealth of Barbados, but no person resident outside the Commonwealth of Barbados may be appointed as one of the Trustees except by instrument in writing signed by all of the Trustees then in office, or by any sole Trustee who is voluntarily resigning. In the event of the death, incapacity, liquidation (other than a voluntary liquidation for purposes of amalgamation or reconstitution of a corporate Trustee), or the resignation of a sole Trustee without appointment of a successor, the court of the jurisdiction of the Proper Law shall appoint a successor.

    The resignation and removal of a Trustee, the appointment of an additional or replacement Trustee, the vesting of the Trust Fund or any specific part thereof, in the name of any replacement and additional Trustee, and any additional provisions respecting indemnity or otherwise, shall be in the manner prescribed under Proper Law.

    Any Trustee may resign on thirty days' notice to the other Trustee or Trustees, in the event there is more than one Trustee, or upon such shorter period of notice as the other Trustee or Trustees may deem acceptable. In the event that the resigning Trustee is the sole Trustee, the resigning Trustee shall first appoint a new Trustee or Trustees and vest the new Trust Fund in the name of the Trustee or Trustees as may be acceptable to the other Trustee or Trustees.

    Every person so appointed as a Trustee hereunder shall, as well before as after the Trust Fund becomes by law or by assurance or otherwise vested in him, have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a Trustee by this Deed. A certificate signed at any time by the Trustee stating who at that time are the persons serving in the office of Trustee, shall be accepted as conclusive evidence of that fact.

RENDERING OF ACCOUNTS AND AUDIT

13. The Trustee shall render an account of its administration of the Trust at such time as the Trustee may deem advisable and not less frequently than once per year, or at such other times, upon at least thirty days' notice, as any adult Beneficiary, or parent or guardian of a minor Beneficiary may request. Any adult Beneficiary, guardian or parent of a minor Beneficiary shall have the right to appoint auditors and have reviewed the actions and accounts of the Trustee. The Trustee and auditor shall provide full and complete access to all records in relation to the Trust to any person so entitled pursuant to the

paragraph herein, including the authorized accountant, auditor or representative of said person.

Upon at least thirty days notice to the Trustee by any adult Beneficiary, or guardian or parent of a minor Beneficiary, or such shorter period of notice as the Trustee may agree, the Trustee shall deliver a written status report with respect to any claims that have been made against the Trust.

MAJORITY OF TRUSTEES TO GOVERN

14. The Trustee or Trustees may adopt any rules and regulations which they may from time to time deem proper to govern its own procedure. At any time when there are more than two persons acting as the Trustees, all questions requiring action the Trustees shall be determined by a majority of the Trustees for the time being in office, and the Trustees may act either by a resolution passed by a majority thereof at a meeting or by an instrument in writing signed by a majority thereof, and any such decision or act of a majority of the Trustees shall, for all purposes of this Deed be deemed the decision or act of the Trustees. Any deed or instrument of every nature or description executed by a majority of the Trustees for the time being in office shall be as valid, effectual and binding as if executed by all.

BANKING ARRANGEMENTS

15. Notwithstanding any other provisions of this Deed, but without prejudice to paragraph 9 hereof, the following provisions shall govern the banking arrangement of the Trust hereby constituted:
    (a) the Trustee may appoint any bank or trust company to be its banker for the purposes of the Trust;
    (b) the Trustee from time to time in office, or at any time when there are two or more Trustees in office, any two of such Trustees, are authorized on behalf of the Trust:
        (i) to sign, endorse, make, draw, and/or accept any cheques, promissory notes, bills of exchange or other negotiable instruments, any orders for the payment of money, contracts for letters of credit or forward exchange and generally all instruments or documents for the purpose of binding or obligating the Trustee in any way in connection with the accounts and transactions of the Trust with the banker, whether or not an overdraft is thereby created, and instruments and documents so signed shall be binding upon the Trustee;
        (ii) to receive from the banker and where applicable give receipts for, all statements of account, cheques and other debit vouchers, unpaid and unaccepted bills of exchange and other negotiable instruments and to delegate in writing to be filed with the banker such authority to one or more other persons; and
    (c) any one of the Trustees is authorized on behalf of the Trustees to negotiate with, deposit with or transfer to the said banker (but for the credit of the Trust's account only) all or any cheques, promissory notes, bills of exchange or other negotiable instruments, and orders for the payment of money and for the said purpose to endorse all or any of the foregoing, and every signature shall be binding upon the Trustees.

AMENDMENT TO DEED

16. Any of the provisions of this Deed other than the provisions of paragraphs 4, 5 and 8 may be amended at any time and from time to time by an instrument in writing signed by all of the Trustees then in office.

PROTECTION OF THE TRUSTEE

17. The Trustee hereby accepts the trusts hereof and agrees to be bound by the provisions hereof and to hold the Trust Fund upon the trusts hereof.

    Every discretion or power hereby or by law conferred on the Trustee shall be an absolute and uncontrolled discretion or power and no Trustee shall be held liable for any loss or damage accruing as a result of the Trustee concurring or refusing or failing to concur in an exercise of any such discretion or power.

    In the professed execution of the trusts and powers hereof no Trustee shall be liable for or for the consequences of any error of judgment or mistake whether of law or fact of itself or its advisors legal or otherwise or any answer to any enquiries or generally any breach of duty or trust whatsoever whether by way of commission or omission unless it shall prove to have been made, given, done or omitted in personal conscious bad faith. And all persons claiming any beneficial interest in, over or upon the Trust Fund or any part thereof shall be deemed to take with notice of and subject to the protection conferred on the Trustee.

ACCOUNTS AND COMPENSATION OF TRUSTEE

18. Any Trustee being a trust company or corporation shall act in accordance with its standard terms and conditions now and from time to time in force and shall be entitled to charge and be paid out of the Trust Fund and the income thereof remuneration in accordance with its scale of fees now and from time to time in force and may without accounting for any resultant profit act as banker, stockbroker, underwriter or other agent and perform any service on behalf of the Trust estate and on the same terms as would be made with a customer.

    Any Trustee being a lawyer, chartered accountant, stockbroker, underwriter or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional and other charges for business transacted, time spent and acts done by him or any partner of his in connection with the trusts hereof including acts which a trustee not being in any profession or business could have done personally.

SOVEREIGN RISK

19. The Trustee shall be deemed to have transferred to such person or persons designated in writing by the Trustee (the 'Emergency Trustee'), all right title and interest to the Trust Fund, immediately prior to the occurrence of an Emergency Event, notwithstanding paragraph 13 of this Trust Deed.

    On the occurrence of any Emergency Event, the Trustee shall thereafter cease to be Trustee and the Emergency Trustee shall constitute the Trustee for the time being of this Trust.

Whenever the Trustee ceases to be Trustee of this Trust, by reason of occurrence of any Emergency Event, the Trustee shall as soon as is legally practicable execute all deeds, and do all things as shall be necessary in order to transfer legal title of the Trust Fund to the Emergency Trustee and perfect the title of the Emergency Trustee to the Trust Fund. Further the Trustee shall be bound to transfer to the Emergency Trustee all records and documents relating to the Trust.

The Emergency Trustee shall be the attorney for the former Trustee for the purposes of signing, sealing and delivering and in any way executing such documents of transfer as may in the opinion of the Emergency Trustee be requisite or desirable for transferring the Assets comprising the Trust Fund from the former Trustee to the Emergency Trustee. The Trustee shall be entitled to be indemnified and to retain out of the Trust Fund all sums due from the Trust and all expenses and costs incurred in such transfer.

Whenever the Trustee ceases to be Trustee of this Trust, by reason of occurrence of any Emergency Event, the Trustee shall be indemnified by the Emergency Trustee from and out of the Trust Fund against all liabilities incurred as a result of the *bona fide* actions or omissions of the Trustee with regard to the Trust Fund made in ignorance of the happening of an Emergency Event.

PROPER LAW AND FORUM FOR ADMINISTRATION OF THE TRUST

(of relevance in a jurisdiction such as Barbados with two tier trust regime)

20. Subject to the power conferred by this clause and under any further declaration to be made hereunder, the Proper Law of this Trust shall be the laws of [_____], and the Trust shall be established in [_____] as a domestic trust pursuant to the Trustee Act but not limited thereto (and for further certainty not as an International Trust under the [_____] Act) and the rights of all Beneficiaries and of the Trustee and the settlor, and the construction and effect of each and every provision hereof shall be governed by the laws of [_____] and subject to the exclusive jurisdiction of the courts of [_____]. The designation of this Trust as a domestic [_____] Trust shall be in the manner prescribed under the Proper Law, including specifically the Trustees Act.

    The Trustee may, by deed, at any time or times and from time to time, change the Proper Law of this Trust, by declaring that this Trust shall from the date of such deed take effect in accordance with the law of some other state or territory in any part of the world not being any place under the law of which any of the trust powers and provisions herein declared and contained would not be enforceable or capable of being exercised and so taking effect.

    Where any declaration changing the Proper Law of the Trust shall be made, the Trustees shall be at liberty to make such consequential alterations or additions in or to the trust powers and provisions of this Trust as the Trustees may consider necessary or desirable to ensure that the trust powers and provisions of this Trust shall be valid and effective *mutatis mutandis* as if made under the law of Barbados.

    Subject to the power conferred by this clause and under any further declaration to be made hereunder, the forum for the administration of the Trust shall be the jurisdiction of the Proper Law of the Trust.

The Trustee may, by deed, at any time or times and from time to time change the forum for the administration of the Trust to a jurisdiction different from the Proper Law of the Trust. The forum for the administration of the Trust shall as from the date of such declaration be the jurisdiction named in the deed.

NOTICE

21. All notices required or permitted to be given under the terms of this Deed shall be deemed to be sufficiently given if delivered at the addresses hereinafter set forth. Any notice given hereunder shall be deemed to be effective forthwith at the time of delivery, or where notice is given by telex or telecopier, notice shall be deemed to be effective forthwith at the time of transmission of such telex or telecopy. For purposes of this Deed, the addresses of the Trustee and of XXX, XXX, XXX and XXX hereto shall be as follows:

(a) In the case of the Trustee:

By telecopier with a copy sent by registered mail to:

XXXXX

Attention: XXX

Telephone

Telecopier

In the case of XXX

By telecopier with a copy sent by registered mail to:

Telephone

Telecopier

In the case of XXX

By telecopier with a copy sent by registered mail to:

Telephone

Telecopier

and a copy sent to:

Attention: XXX

Telephone

Telecopier

Provided that the Trustee or any of XXX and XXX may from time to time change its address as set out above by giving notice in accordance with the foregoing.

TRUSTEE MAY COMPETE WITH TRUST FUND

22. The Trustee and its affiliates may, from time to time, be engaged for their own account or on behalf of others (including as trustee, administrator or manager of other funds or portfolios) in investment and other activities identical or similar to or competitive with the activities of the Trust or of the Trustee and their affiliates in connection with the Trust. Neither the Trustee nor any of its affiliates shall incur or be under any liability to the Trust, any Beneficiary or any other person for by reason of, or as a result of any such engagement or competition or the manner in which they may resolve any conflict of interest or duty arising therefrom.

CONFIDENTIALITY

23. Except under an order of a court which exercises jurisdiction over the Trust, the Trustee or the Trust Fund, or in order to comply with the mandatory provision of applicable law, or an administrative requirement issued under applicable law, the Trustee shall not (except on receipt of a written request from a Beneficiary for the disclosure of any document or information relating to or forming part of the accounts of this Trust) disclose to any person not legally entitled, any information or documents respecting this Trust.

COMPLIANCE

24. The Trustee shall ensure compliance with the provisions of the Proper Law, and shall do all things necessary to ensure to give binding legal effect to this Trust Deed.

SEVERABILITY

25. If any provision of this Trust Deed shall be held invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provision in any other jurisdiction or any other provision of this Trust Deed in any jurisdiction.

    The Trustee may, by deed, at any time or times and from time to time change any of the severable aspects of this Trust, to a jurisdiction different from the Proper Law of the Trust.

DECLARED this (Date) in [_____] by:

_____

(Name)

Trustee

APPENDIX 4

PURPOSE TRUST DEED

[_____] [PRIVATE]

THIS TRUST DEED is made the [_____] day of [_____], 1999.

BETWEEN: _____, of _____
(hereinafter called the 'Settlor')

AND: _____of _____, and
_____ of _____, (together
the 'Original Trustees')

WHEREAS:

The Settlor intends hereby to create a purpose trust within the meaning of the [_____] Act (as hereinafter defined), and in pursuance of this said intention has transferred to the Original Trustees the sum of _____ United States Dollars (US$_____.00) to be held by the Trustees upon the trusts and with and subject to the powers and provisions hereinafter contained.

NOW THIS DEED WITNESSETH as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Trust Deed unless the context otherwise requires the following expressions shall bear the following respective meanings:

(a) '*Applicable Law*' means the law of any one or more jurisdictions which is applicable to the interpretation of the trusts created herein, or to the exercise of any power or discretion hereunder, whether by reason of the domicile of the Trustees, the purposes stated herein, the domicile of the Settlor, the *situs* of the Trust Fund, or other connecting factor (which is admissible under general principles of law, including relevant principles of conflicts of laws) and includes the Proper Law. The Trustees shall determine the Applicable Law by reference to the Proper Law, except where the Trustees have actual notice of the applicability of another system or systems of law to this Trust, and the Trustees shall obey the court orders of a court claiming jurisdiction over any Trustee or the Trust Fund;

(b) '*charity*' means any organisation or institution whether corporate or otherwise established for charitable purposes in accordance with the laws of the jurisdiction wherein it is established and recognised as charitable in the place where it is situated, registered, incorporated or established;

(c) '*Companies Act*' means the Companies Act, [_____] of the laws of [_____] as from time to time amended and every statute substituted

therefor; and in the case of such amendment or substitution, any references in the by-laws of the Company to provisions of the Act or to specific provisions of the Act, shall be read as references to the provisions as amended or substituted therefor in the amendment or the new statute or statutes;

(d) '*Company*' means _____, a corporation incorporated under the laws of [_____] and duly licensed as an international business company under the International Business Companies Act, 1991–24 of the laws of [_____] (the 'International Business Companies Act');

(e) '*corporation*' means any entity with corporate capacity (of whatsoever kind) incorporated or otherwise brought into existence in any part of the world and includes companies, limited liability companies and societies with restricted liability;

(f) '*country of domicile*' means any one of the country of residence, nationality or domicile (as appropriate);

(g) '*Deed*' means any instrument in writing whether in one or more counterparts, in the form appropriate under Applicable Law, and includes deeds, documents under seal, contracts, declarations in writing, memoranda, written resolutions of the Trustees and other instruments in writing;

(h) '*Eligible Persons*' means:–

(i) all and any of the persons specified in Schedule II hereto, and

(ii) such other persons designated in writing by the Protector in exercise of the power conferred upon the Protector by clause hereof,

provided that–

(i) no person shall be or become an Eligible Person under this Trust if such person is a 'resident of [_____]' as defined in the Act, and

(ii) any person who is or who becomes an Eligible Person shall not be entitled to be paid part of the income or corpus of the Trust or to have any part of the income or corpus of the Trust accumulated during the taxation year of the Trust, or to benefit in any manner whatsoever in any part of the income or capital of this Trust, whether directly or indirectly, under or by virtue of the powers, provisions and discretions herein contained whilst such person is a 'resident of [_____]' as defined in the Act;

(i) '*Eligible Person*' means the only or any one of the Eligible Persons;

(j) '*Event of Duress*' means the occurrence of any one of the following:

(i) war or civil disturbance in the country of domicile of any one of the Trustees which will or may endanger, whether directly or indirectly, the safety of any moneys,

investments or property which may from time to time be included in or forming part of the Trust Fund,

(ii) political action in the country of domicile of any one of the Trustees whether instigated by any government, political organisation or individual, whether constitutional or otherwise, which will or may endanger, whether directly or indirectly, the safety of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(iii) the enactment in the country of domicile of any one of the Trustees of any law, regulation, decree or measure which will or may directly or indirectly expropriate, sequestrate or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(iv) any action or threat of action by any government, department or agency in the country of domicile of any one of the Trustees or by any official purporting to act on the instructions and with the authority of such government, department or agency which will or may directly or indirectly expropriate, sequestrate, levy, lien or in any way control, restrict or prevent the free disposal by the Trustees of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(v) any order decree or judgement of any court or tribunal in the country of domicile of any one of the Trustees which will or may directly or indirectly, expropriate, sequestrate, levy, lien or in any way control, restrict or prevent the free disposal by the Trustees of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund and any distribution therefrom;

(k) '*Excluded Person*' means a person who is not entitled to benefit in any manner whatsoever in any part of the income or capital of this Trust, by virtue of being:–

(i) a Trustee of this Trust,

(ii) the Protector of this Trust,

(iii) a person resident or deemed resident in Canada for purposes of Canadian income taxation,

(iv) a person who by virtue of being a resident of Barbados (as defined in clause 1.1(h)), is not entitled to benefit in any manner whatsoever in any part of the income or capital of this Trust, or

(v) a person declared to be an Excluded Person pursuant to clause 12 hereof;

(l) '*foreign assets*' includes amounts of money in non-[_____] currency, the securities of the Company or of any [_____] company

licensed under the International Business Companies Act, non-[_____] securities and personal and moveable property and real or immovable property situate outside of [_____];

(m) '*International Trusts Act*' means the International Trusts Act 1995 of the laws of Barbados as from time to time amended and every statute substituted therefor, and in the case of such amendment or substitution, any references in this Trust Deed to provisions of the International Trusts Act or to specific provisions of the International Trusts Act, shall be read as references to the provisions as amended or substituted therefor in the amendment or the new statute or statutes;

(n) '*Original Property*' means the sum of [_____] United States Dollars (US$__), transferred to the Original Trustees as trustees hereof;

(o) '*person*' means any individual or any body of persons corporate or unincorporate, and includes individuals, corporations, limited liability companies, societies with restricted liability, partnerships (whether limited or general), firms, syndicates, joint ventures, trusts, unincorporated associations, governmental authorities and agencies, and any legal entity or any other association of persons;

(p) '*Proper Law*' means the law, as determined in accordance with this Trust Deed, to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Trust shall be subject and by which such rights, construction and effect shall be construed and regulated;

(q) '*Protector*' means the person appointed as the Protector herein, or any other person or persons appointed by Deed to act on behalf of the Protector;

(r) '*Shareholders Agreement*' means the agreement between the Company and each of the shareholders of the Company, and binding on all the parties thereto, and entered into as a unanimous shareholder agreement of the Company, in accordance with section [_____] of the Companies Act;

(s) '*Termination Date*' means the date of the termination of this Trust, which shall be the date of whichever the following dates shall first occur namely: –

(i) the date of the termination of the Shareholders Agreement,
(ii) the day on which shall expire the period of one hundred (100) years from the date of this Trust, or
(iii) such a day (if any) prior to the day specified in clause 1.1(s)(i) as the Trustee may at its discretion appoint by Deed;

(t) '*Trust*' means the trust created by this Trust Deed;

(u) '*Trustee*' means any one of the Original Trustees or other trustees for the time being and from time to time appointed subsequent to this Trust Deed;

(v) '*Trustee Act*' means the Trustee Act, [_____] of the laws of [_____] as from time to time amended and every statute substituted therefor, and in the case of such amendment or substitution, any references in this Trust Deed to provisions of the Trustee Act or to specific provisions of the Trustee Act, shall be read as references to the provisions as amended or substituted therefor in the amendment or the new statute or statutes;

(w) '*Trust Fund*' means:
(i) the Original Property,
(ii) all money, investments or other property hereafter paid or transferred by any person or persons to or so as to be under the control of and (in either case) accepted by the Trustee as additions to the Trust Fund, and
(iii) the money, investments and property from time to time representing the said money, property and additional property (referred to in clause 1.1(w)(ii) above) including any income accumulated therefrom;

(x) '*Trust Period*' means the period from the date hereof until the Termination Date.

1.2 Terms defined elsewhere in this Trust Deed, unless otherwise indicated, shall have such meaning in every clause herein.

1.3 Unless the context clearly requires otherwise, the words 'hereof' 'herein' and 'hereunder' and words of similar import, when used in this Trust Deed, shall refer to this Trust Deed as a whole and not to any particular clause; wherever the word 'include' 'includes' or 'including' is used in any provision of this Trust Deed, it shall be deemed to be followed by the words 'without limitation' unless clearly indicated otherwise.

1.4 The singular includes the plural and the plural includes the singular; and the masculine gender includes the feminine and neuter genders.

1.5 Reference to the issue of any person shall include the children and remoter issue of such person through all degrees.

1.6 The division of this Trust Deed into clauses, articles and paragraphs and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation hereof.

2. IRREVOCABILITY AND APPLICATION OF INTERNATIONAL TRUSTS ACT

2.1 Notwithstanding anything to the contrary herein contained the Settlor shall not have the power to vest or re-vest in himself title to all or any part of the capital or of the income of the Trust Fund or any accrued and unpaid income thereon and may not revoke or vary or amend this Trust or any of the trust powers and provisions herein contained.

2.2 This Trust being a duly qualified International Trust, it is hereby expressly declared, pursuant to section 4(a) of the International Trusts Act, that the International Trusts Act applies hereto.

3. DECLARATION OF TRUST

3.1 The Trustees shall hold and stand possessed of the Original Property together with any and all foreign assets which are hereafter transferred, conveyed or paid to the Trustees, as Trustees of this Trust, and accepted by the Trustees in such capacity, UPON TRUST and subject to the trust powers and provisions herein declared of and concerning the same.

4. NAME OF TRUST

4.1 The name of the Trust created by this Trust Deed shall be '.....'

4.2 As far as is practicable, legal and convenient, and except as otherwise provided by this Trust Deed or prohibited by any law, the Trustees shall conduct the trust activities and execute all documents under the name of the Trust.

4.3 The Trustees may where it is deemed necessary or advisable to do so, conduct the trust activities and execute documents in their own names, or such other name as they deem expedient or necessary for the purposes hereof.

5. OWNERSHIP OF TRUST FUND

5.1 As far as is practicable, legal and convenient, the Trust Fund shall be vested in the names of all of the Trustees jointly. Notwithstanding the foregoing, the whole or any part of the Trust Fund may be vested in the name of any one of the Trustees solely.

5.2.1 Notwithstanding that the Trust Fund or any part thereof, may be vested in the name of any one of the Trustees solely, the Trust Fund (or part thereof), shall be held upon the trusts herein and shall be administered and managed by the Trustees upon the terms of this Trust.

5.2.2 Notwithstanding that the Trust Fund or any part thereof, may be vested in the name of any one of the Trustees solely, the Trust Fund (or part thereof), shall be held upon the trusts herein and shall be administered and managed by the Trustees upon the terms of this Trust.

5.2.3 Any Trustee in whose name the Trust Fund (or part thereof) is vested solely, shall not dispose of, deal with or exercise any of the powers and duties herein in relation thereto except upon the terms of this Trust.

6. PURPOSES OF TRUST

6.1 The Trust is established for the following non-charitable purposes: –

(a) acquiring, owning and holding shares of the Company and of investing in any other corporation from time to time, with the consent of the Protector, for the benefit of the class of shareholders of the Company; and

(b) *[include any other specific purpose]*

6.2 It is hereby expressly declared that the purposes as stated in clause 6.1, are not invalid or otherwise illegal under the International Trusts Act, and that such purposes are: –

(a) specific, reasonable and capable of fulfilment; and

(b) not immoral, unlawful or contrary to public policy.

6.3 This Trust being a non-charitable purpose trust, it is hereby expressly declared, pursuant to section 14 of the International Trusts Act, that the doctrine of *cy-près* is, *mutatis mutandis*, applicable herein.

7. PURPOSE TRUSTS

7.1 The Trustees shall stand possessed of the Trust Fund and the income thereof upon the following trusts that is to say: –

(a) subject to the Shareholders Agreement, UPON TRUST to hold all assets comprising in the Trust Fund and in their absolute discretion either to retain the same in the existing state thereof for such period as they shall think fit or at any time or times to sell the same or any part thereof, subject to the purposes stated in clause 6.1, and the obligation to distribute the same in accordance with the terms of this Trust. The Trustees shall hold the net proceeds of any sale of assets comprising the Trust Fund and all other monies held or received by them as capital;

(b) UPON TRUST to invest the same at their absolute discretion in or upon any of the investments authorised by this Trust with power to vary or transpose such investments for or into any others of a like nature;

(c) UPON TRUST to pay, appropriate and apply the income and capital of the Trust Fund in furtherance of the purposes set out in clause 6 in such proportions and at such times and from time to time and generally in such manner as the Trustees in their absolute discretion consider appropriate; provided that the Trustees shall make distributions on at least an annual basis out of the Trust Fund in furtherance of the purposes aforesaid in an aggregate annual amount equal to the lesser of [_____] or [_____% of the consolidated after-tax income of this Trust (which, for the purposes of this calculation, shall include all of the after-tax income of any corporation owned directly or indirectly as to one hundred percent (100%) by this Trust, after taking into account any tax and other costs of distributing such income from such corporation to this Trust)].

(d) UPON TRUST to accumulate the whole or such part or parts (if any) of the income of the Trust Fund as has not been appropriated or applied under the provisions of the preceding paragraph of this clause, and to add the accumulations to the capital of the Trust Fund; and

(e) at the expiration of the Trust Period, UPON TRUST as to both capital and income of the Trust Fund, for all or such one or more exclusive of the other or others of the Eligible Persons, in such shares and proportions (if more than one), and generally in such manner as the Protector shall prior to or on the date of such expiration in their absolute discretion determine; provided that such distribution shall be made absolutely and further provided that no part of the Trust Fund shall be paid or transferred to the Protector or for his personal benefit; and further provided that if the Protector fails to so direct the Trustees before the Termination Date, the Trust Fund shall thereafter be held for such charity or charities as the Trustees shall determine in their absolute discretion.

7.2 In the event of the failure or determination of all or any of the trusts herein contained, or if the Trust Fund and the income thereof shall be otherwise undisposed of by such trusts, then the same shall be, subject to the powers of this Trust Deed or by Applicable Law vested in the Trustees; and to each and every exercise thereof, shall be held UPON TRUST for such charity or charities or any other charity or charities in substitution therefor, or in addition thereto as the Trustees in their absolute discretion shall determine.

7.3 The Trustees shall not be held liable for any breach of duty or loss or damage to any third party caused by virtue of or as a result of any distribution made pursuant to the direction of the Protector. The Trustees shall not have the responsibility or any duty to investigate or ascertain whether any discretion directed to be made by the Protector is properly in furtherance of the purposes hereof.

7.4 The Trustees shall exercise the trusts, powers and discretions vested in them as they shall consider appropriate for the benefit of and in furtherance of the purposes set out in clause 6.1 and in furtherance thereof may pay or apply the whole or any part or parts of the capital or income of the Trust Fund to or for the benefit of all or any one or more exclusive of the other Eligible Persons as the Protector in its absolute discretion may determine, and in such respective amounts if more than one and generally in such manner as the Protector shall in its discretion think fit.

7.5 The Trustees may pay or transfer the whole or any part or parts of the capital or income of the Trust Fund to the trustees for the time being of any other trust wheresoever established or existing, and whether governed by the laws of Barbados or by the laws of any other state or territory if the Trustees in their absolute discretion consider such appointment to be for the benefit of or in furtherance of the purposes set out in clause 6.1, notwithstanding that such other trust may also contain trusts, powers and provisions (discretionary or otherwise) different from the trusts under this Trust Deed or be for the benefit of some other object or objects. Upon payment or transfer in pursuance of this power, the Trustee shall not be bound to see to the application of such money or property.

7.6 The Trustee may settle any capital on all or any one or more of the Eligible Persons, and any settlement made by the Trustee under this present power upon or for the benefit of any one or more of the Eligible Persons as aforesaid, may be created in and under the law of any part of the world (being a part of the world, the law whereof recognises settlement of the kind proposed to be made), and may contain such trusts, powers and provisions whatsoever (including trusts, powers and provisions to be exercised at the discretion of any person or persons) as the Protector in its absolute discretion shall determine.

8. POWERS AND DUTIES OF TRUSTEES

8.1 GENERAL POWERS

8.1.1 Subject to clause 8.3 of this Trust Deed, the Trustees shall exercise the powers and discretions vested in them as they shall consider appropriate for the benefit of and in furtherance of the purposes set out in clause 6 of this Trust Deed.

8.1.2 Except as expressly provided for in this Trust Deed, the Trustees shall perform such duties, exercise such powers and suffer such liabilities as provided for by the Trustee Act, except that the Trustees shall not, in carrying out the investment powers and activities, be in any way restricted by the provisions of Applicable Law, limiting or purporting to limit investments that may be made by Trustees, except as specifically required by such Applicable Law.

8.1.3 The Trustees, subject only to the specific limitations contained in this Trust Deed and in accordance with the provisions of this Trust Deed, shall have without further or other authorisation and free from any power of control, full absolute and exclusive power over the Trust Fund and over the business affairs of the Trust, to the same extent as if the Trustees were the sole joint owners thereof in their own right, to do all such acts and things as in their sole judgement and discretion are necessary or incidental to or desirable for carrying out any of the purposes of the Trust, or for conducting the business of the Trust.

8.1.4 In construing the provisions of this Trust Deed there shall be a presumption in favour of the granted powers and authority to the Trustees and the enumeration of any specific power or authority herein shall not be construed as limiting the general powers or authority or any other specified power or authority conferred herein on the Trustees.

8.2 SPECIFIC POWERS AND DUTIES

8.2.1 Subject only to the express limitations contained in this Trust Deed and in addition to any powers and authorities contained by this Trust Deed, or which the Trustees may have by virtue of the Trustee Act or other Applicable Law, the Trustees, without any action or consent by any person shall have and may exercise at any time and from time to time the following powers and authorities which may be exercised by them in their sole judgement and discretion, and in such manner, and upon such terms and conditions as they may from time to time deem proper: –

(a) to subscribe for, invest in, reinvest, purchase or otherwise acquire, hold, pledge, sell, assign, transfer, exchange, distribute or otherwise deal in or dispose of the investments (not limited to the investments prescribed by the Trustee Act or other Applicable Law);
(b) to realise any asset in the Trust Fund in order to invest the proceeds of sale or any part thereof, in any investment permitted by this Trust Deed, or to provide the cash required for the purpose of carrying out any provision of this Trust;
(c) to sell, rent, lease, hire, exchange, release, partition, assign, mortgage, pledge, hypothecate, grant security interests in, encumber, negotiate, convey, transfer or otherwise dispose of any or all of the property of the Trust Fund by deeds, trust deeds, assignments, bills of sale, transfers, leases, mortgages, financing statements, security agreements and other instruments for any authorised purposes, and all such instruments may be executed and delivered for and on behalf of the Trust by any one of the Trustees or by a duly authorised officer, employee, agent or any nominee of the Trustees;
(d) to borrow money and give negotiable or non-negotiable instruments therefor, to guarantee, indemnify or act as surety with respect to payment or performance of obligations of third parties, to enter into other obligations on behalf of the Trust, and to secure any of the foregoing, to assign, convey, transfer, mortgage, subordinate, pledge, grant security interests in, encumber or hypothecate the whole or any part of the property which constitutes the Trust Fund;
(e) to lend money, whether secured or unsecured;
(f) to incur and pay out of the Trust Fund any charges or expenses, which charges, expenses or disbursements are, in the opinion of the Trustees, necessary, or incidental to, or desirable for the carrying out of any of the purposes of the Trust or conducting the business of the Trust, including without limitation, taxes or other governmental levies, charges and assessments, of whatever kind or nature, imposed upon or against the Trustees in connection with the Trust or the Trust Fund, or upon or against any property held in the Trust Fund, and for any of the purposes herein;
(g) to deposit the Trust Fund or any part thereof for safe keeping within banks, registered trust companies and other depositories, whether or not such deposits will draw interest, the same to be subject to withdrawal on such terms and in such manner and by such person or persons (including any one of the Trustees, its officers, agents or representatives) as the Trustees may determine;
(h) to possess and exercise all the rights powers and privileges appertaining to the ownership of all or any mortgages, securities or interests forming part of the Trust Fund, and without limiting the generality of the foregoing, to vote or give any consent, request or notice, or waive any notice, either in person or by proxy or power of attorney, with or without power of substitution, to one or more persons, which proxies and powers of attorney may be for meetings or action generally or for any particular meeting or action, and may include the exercise of discretionary power;

(i) to elect, appoint, engage or employ officers for the Trust in such capacity and for such office as may be designated by the Trustees (including a Secretary, Treasurer and such other officers as the Trustees may determine), who shall have such powers and duties and serve such terms as may be prescribed by the Trustees and may be removed or discharged at the discretion of the Trustees;

(j) to engage or employ any persons as agents, representatives, employees, independent contractors, professional advisors in one or more capacities, and to pay compensation from the Trust Fund for services, in as many capacities as such persons may be so engaged or employed. Except as prohibited by Applicable Law, the Trustees may delegate any of their powers and duties herein to any one or more agents, representatives, officers, employees, independent contractors or other persons;

(k) to collect, sue for, and receive all sums of money coming due to the Trust, and to engage in, intervene in, prosecute, join, defend, compromise, abandon or adjust, by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, demands or other litigation relating to the Trust, to enter into agreements therefor, whether or not any suit is commenced or claim accrued or asserted and in advance or any controversy and to enter into agreements regarding the arbitration, adjudication or settlement thereof;

(l) to renew, modify, release, compromise, extend, consolidate or cancel, in whole or in part, any obligations to or of the Trust;

(m) to purchase and pay for out of the Trust Fund insurance contracts and policies insuring the Trust Fund against any and all risks, and insuring the Trust and/or any or all of the Trustee, the Beneficiaries, and the officers against any and all claims and liabilities of any nature alleged to have been taken or omitted by the Trustee, Beneficiaries or officers;

(n) to exercise all voting rights appertaining to any investment from time to time or for the time being forming part of the Trust Fund in as full free and absolute manner as if they were absolute owners of such investments, provided that in the exercise of the powers conferred on them by this sub-clause the Trustee shall not incur any liability for responsibility by reason of any error of law or mistake of fact of any matter or thing done or approval voted or given nor withheld by the Trustee. In this sub-clause the expression 'voting rights' shall include not only a vote at a meeting but any consent to or approval of any arrangement scheme or resolution of any alteration or abandonment of any rights attaching to any security and the right to requisition or join in a requisition to convene any meeting or to give notice of any resolution or to circulate any statement;

(o) to take the opinion of legal counsel locally or where necessary or appropriate elsewhere concerning any legal issue arising under this Trust or any matter in any way relating to this Trust or to their duties in connection with the trusts hereof. The Trustees shall be at liberty to act or to refrain from acting in accordance with any advice so obtained and shall not be responsible for any loss resulting from any action or inaction taken or not taken in accordance with such advice; and

(p) to do all such other acts and things incidental to the foregoing and to exercise all powers necessary or useful to carry on the business of the Trust, to promote any of the purposes for which the Trust is formed, and to carry out the provisions contained herein.

8.2.2 The Trustees shall not be bound or required to interfere in the management or conduct of the business of any company wherever resident or incorporated in which the Trust shall be interested although holding the whole or a majority of the shares carrying the control of

the company, but so long as the Trustees shall have no notice of any act of dishonesty or misappropriation of money on the part of the directors having the management of such company, the Trustees shall be at liberty to leave the conduct of its business (including the payment or non-payment of dividends) wholly to such directors. No Beneficiary hereunder shall be entitled to require the distribution of any dividend by any company wherever incorporated or resident in which the Trust may be interested or require the Trustees to exercise any powers they may have of compelling any such distribution.

8.3 MANDATORY OBLIGATIONS

8.3.1 The Trustees shall obey the court orders of a court claiming jurisdiction over the Trustees or any one of them, or the Trust Fund.

8.3.2 The Trustees shall give to the Protector, in writing, not less than twenty-one (21) days notice (or such lesser period of notice as agreed by the Protector in writing), of any of the following actions: –

(a) the distribution of any part of the Trust Fund prior to the Termination Date;
(b) the sale or exchange of all or substantially all of the assets forming part of the Trust Fund;
(c) the incurrence of any debt or encumbrance of any assets forming part of the Trust Fund with a value that, when taken together with any related incurrence of debt or encumbrance, is in excess of [_____] United States Dollars (US$_____);
(d) the settlement of any claims against the Trustee or the Trust Fund that, when taken together with any related settlement, is in excess of [_____] United States Dollars (US$_____); and
(e) any matter which under this Trust Deed requires the consent or other action of the Protector.

8.3.3 In accordance with the International Trusts Act, the Trustee shall keep at offices in [_____] the following:

(a) a copy of this Trust Deed and any amending or supplemental instruments; and
(b) copies of annual financial statements or other documents as are necessary to reflect the true financial position of this Trust for each financial year and such financial statements shall include details of distributions of capital and income made by the Trustees during the financial year and the financial statements may be audited or unaudited as the Trustees in their absolute discretion shall determine.

8.3.4 The Trustees shall enter the details of this Trust, namely the name of the settlor, the summary of trust purposes and the name of the Protector, as required by the International Trusts Act, on registers kept for that purpose by the Trustees.

9. EXERCISE OF POWERS

9.1 Except where a Trustee: –

(a) is dead;
(b) is unavailable for more than three (3) consecutive months;
(c) indicates in a signed declaration the desire to be discharged from all or any of the trusts or powers vested under this Trust Deed;
(d) refuses to act in the capacity of Trustee of this Trust;
(e) is unfit or incapable (for whatever reason) of acting in the capacity of Trustee of this Trust; or

(f) is adjudicated bankrupt; the Trustees, shall exercise the trusts, powers and discretions vested in them in this Trust Deed jointly.

9.2 The Trustees shall exercise the powers and discretions vested in them in this Trust Deed in the manner they shall think most expedient for the benefit of all or any of the persons actually or prospectively interested under this Deed and may exercise (or refrain from exercising) any power or discretion for the benefit of any one or more of them without being obliged to consider the interests of the others or other.

9.3 Every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion and the Trustees shall have the same discretion in deciding whether or not to exercise any such power.

10. DELEGATION OF POWERS

10.1 The Trustees shall have power (to the extent not otherwise prohibited by the Proper Law) by Deed or Deeds revocable during the Trust Period or irrevocable to delegate to any person (including any one of the Trustees), the execution or exercise of all or any trust powers and discretions hereby or by law conferred on the Trustees.

11. NUMBER OF TRUSTEES

11.1.1 There shall always be at least two (2) Trustees in office. Each Trustee is hereby appointed for a term coinciding with the life of that Trustee, provided that a Trustee shall continue in the capacity of a Trustee hereof until any of the following events occurs namely: –

(a) the death of the Trustee;
(b) the unavailability of the Trustee for a continuous period of more than three (3) consecutive months;
(c) the resignation of the Trustee or any other refusal of the Trustee to act in the capacity of Trustee of this Trust;
(d) the unfitness, incapacity or incapability (for whatever reason) of the Trustee to act in the capacity of Trustee of this Trust;
(e) an adjudication of bankruptcy against the Trustee, or (in the event that the Trustee is a company), the liquidation of the Trustee, or
(f) the attainment by the Trustee of the age of seventy (70) years.

11.1.2 In the discretion of the Trustees then in office, and with the consent in writing of the Protector, the number of Trustees may be increased at any time, but in any event shall not exceed five (5) persons.

11.2 The resignation and removal of a Trustee, the appointment of an additional or replacement Trustee, the vesting of the Trust Fund or any specific part thereof, in the name of any replacement and additional Trustee, and any additional provisions respecting indemnity or otherwise, shall be in the manner prescribed under Applicable Law.

11.3.1 On every appointment of an additional or replacement Trustee, a Deed shall be endorsed on or permanently annexed to this Trust Deed stating the names of the Trustees as and from the date of such Deed, and shall be signed by each of the Trustees and the person appointed the additional or replacement Trustee.

11.3.2 Any person dealing with the Trust shall be entitled to rely upon the Deed endorsed on or permanently annexed to this Trust Deed in accordance with clause 11.3.1 (or the latest of such Deeds if more than one) as sufficient evidence that the Trustees named therein are the duly constituted Trustees for the time being hereof.

12. EXCLUDED PERSONS

12.1 The Protector, shall have power at any time or times during the Trust Period to add to the class of Eligible Persons such one or more persons (not being an Excluded Person) as the Protector shall in its absolute discretion determine. Any such addition shall be made in a declaration by Deed signed by the Protector:–

(a) naming or describing the person or persons to be thereby added to the class of Eligible Persons; and

(b) specifying the date (not being earlier than the date of the declaration but during the Trust Period) from which such person or persons shall be so added.

12.2 The Protector, may in a declaration by Deed, made at any time or times during the Trust Period declare that any persons or member of a class named or specified (whether or not ascertained) in such declaration who is would or might but for this clause be or become entitled to any distribution at the Termination Date or be otherwise able to benefit hereunder as the case may be, shall:

(a) be wholly or partially excluded from future benefit hereunder; or

(b) be an Excluded Person within the meaning of this Trust.

Any such declaration may be irrevocable or revocable during the Trust Period and shall have effect from the date specified in the said declaration provided that this power shall not be capable of being exercised so as to derogate from any interest to which any such person has previously become indefeasibly entitled whether in possession or in reversion or otherwise.

12.3 Any person or a member of a class named or specified (whether or not ascertained) shall immediately be an Excluded Person if that person, by reason of a change in residency or by reason of marriage, or by reason of any other matter, becomes an Excluded Person.

12.4 The Protector in exercising any of the powers conferred in favour of any particular person is hereby expressly authorised to ignore entirely the interests of any other person interested or who may become interested under this Trust.

12.5 Any person of full age to whom or for whose benefit any capital or income of the Trust Fund may be liable whether directly or indirectly to be appointed transferred or applied in any manner whatsoever by or in consequence of an exercise of any trust power or discretion vested in the Trustee or in any other person, may in a declaration by Deed, received by the Trustee during the Trust Period, either revocable (but revocable during the Trust Period only) or irrevocable: –

(a) disclaim his interest as an object of such trust power or discretion either wholly or with respect to any specified part or share of such capital or income; or

(b) disclaim any interest as a Eligible Person hereunder.

Any such declaration shall have effect from the date that the same is received by the Trustee.

12.6.1 No Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Trust and in particular but without prejudice to the generality of the foregoing provisions of this clause:

(a) the Trust Fund and the income thereof shall henceforth be possessed and enjoyed to the entire exclusion of any such Excluded Person and of any benefit to him by contract or otherwise;

(b) no part of the capital or income of the Trust Fund shall be paid or lent or applied for the benefit either directly or indirectly of any such Excluded Person in any manner or in any circumstance whatsoever; and

(c) no power or discretion hereby or by any appointment made hereunder or by law conferred upon the Trustees shall be capable of being exercised in such manner that any such Excluded Person will or may become entitled either directly or indirectly to any benefit or benefits in any manner or in any circumstance whatsoever.

12.6.2 Notwithstanding the provisions of clause 12.6.1, an Excluded Person shall not be dis-entitled from serving as a Trustee or as a Protector of this Trust.

13. LIABILITY AND INDEMNIFICATION OF TRUSTEE

13.1 ACT IN GOOD FAITH

13.1.1 The Trustees shall exercise their powers hereunder and carry out their functions as a Trustee honestly in good faith and in the best interests of the Trust and of the Beneficiaries as a class, and in connection therewith shall exercise that degree of care diligence and skill that a reasonably prudent person of comparable experience would exercise in comparable circumstances.

13.2 LIABILITY OF TRUSTEE

13.2.1 A Trustee shall not be liable to the Trust or to any person for: –

(a) the acts, omissions, receipts, neglects or defaults of any person, firm or corporation employed or engaged by it as permitted hereunder;

(b) for joining in any receipt or act of conformity;

(c) for any loss, damage or expense caused to the Trust through the insufficiency or deficiency of any security in or upon which any of the moneys of or belonging to the Trust shall be laid out or invested; or for any loss or damage arising from any investment activity of the Trustee or any loss incurred in any particular investment;

(d) for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person, firm or corporation with whom or which any moneys, securities or property of the Trust shall be lodged or deposited, or invested;

(e) for any loss occasioned by error in judgement or oversight on the part of the Trustees;

(f) for the payment of any taxes that may be subject to assessment or payment in respect of the Trust period, which result from any failure to withhold report or pay any taxes relating to the Trust Fund or any distributions therefrom; or

(g) for any other loss, damage or misfortune which may happen in the exercise by the Trustees of any discretion herein or in the execution by the Trustees of their powers or duties hereunder, except to the extent set out in this Trust Deed, or required under Applicable Law.

13.2.2 A Trustee may rely and act upon any statement, report or opinion prepared by, or any advice received from the auditors, attorneys-at-law or other professional advisors of the Trust and shall not be responsible or held liable for any loss or damage resulting from so relying or acting.

13.2.3 Nothing in the foregoing clauses shall be read or construed as creating or extending the liability of any Trustee under the Trustee Act or under any provision of Applicable Law.

13.3 INDEMNIFICATION OF TRUSTEE

13.3.1 In addition to the indemnities and protections afforded to the Trustees under the Trustee Act, and other Applicable Law, a Trustee shall at all times be indemnified and saved harmless out of the Trust Fund from and against all claims whatsoever, including costs, charges and expenses in connection therewith, brought, commenced or prosecuted against them or any one or more of them for or in respect of any act, deed, matter or thing whatsoever made, done, acquiesced in or omitted in or about or in relation to the execution of their duties as Trustees and also from and against all other costs, charges and expenses which they sustain or incur in or about or in relation to the affairs of the Trust. Further, a Trustee shall not be liable to any person for any loss or damage relating to any matter regarding the Trust, including any loss or diminution in the value of the Trust or its assets.

13.3.2 Without restricting the generality of clause 13.3.1, every Trustee shall at all times be indemnified and saved harmless out of the Trust Fund from any taxes, penalties, fines, levies, assessments or damages arising as a result of the failure of the Trustees to withhold, report or pay any taxes, penalties or other charges in respect of the Trust Fund, any receipts thereof or distributions therefrom, notwithstanding that any such taxes, penalties, fines, levies, assessments or damages become payable when the Trustee has ceased to be a Trustee of this Trust, whether by reason of the determination of the Trust Period or the resignation, removal or otherwise of the Trustee.

13.3.3 The above provisions of clauses 13.3.1 and 13.3.2, do not apply to the extent that in any circumstance there has been wilful negligence, wilful default or dishonesty on the part of the Trustee or to the extent that the Trustees have failed to fulfil their obligations and their fiduciary duty as provided by law and this Trust Deed.

13.4 DEALINGS WITH THIRD PARTIES

13.4.1 No purchaser, lender, registrar and transfer agent or other person dealing with a Trustee or any officer, employee or agent of the Trustees shall be bound to make any enquiry concerning the validity of any transaction purporting to be made by the Trustees or their said officer, employee or agent or be liable for the application of money or property paid, loaned or delivered to or on the order of the Trustees or of their said officer, employee or agent. Every obligation, contract, instrument, certificate or undertaking and every other act or thing whatsoever executed in connection with this Trust shall be conclusively taken to have been executed or done by the executor thereof only in his capacity as an officer, employee or agent of the Trustees.

13.5 CONTINUING INDEMNITY

13.5.1 Every Trustee who shall retire from his or its position as Trustee of this Trust shall in respect of his or its period of trusteeship continue to have the benefit of all indemnities, powers and privileges given to the Trustee by this Trust Deed and any Deeds

supplemental hereto executed during such period in addition to the indemnities, powers and privileges given by Applicable Law or the successor Trustee to a retiring Trustee.

14. PROTECTOR

14.1 The person named in Schedule II is hereby appointed the Protector of this Trust, to exercise the powers of the Protector of this Trust. The Protector shall execute this Trust Deed (at the said Schedule II), in acknowledgement of his appointment to the office of Protector, and his acceptance of the powers and duties of Protector of this Trust.

14.2 The person appointed Protector shall continue in that office until any of the following events occurs namely: –

(a) death;
(b) unavailability for a continuous period of more than three (3) consecutive months;
(c) resignation or any other refusal to act in the capacity of Protector of this Trust;
(d) unfitness, incapacity or incapability (for whatever reason) to act in the capacity of Protector of this Trust;
(e) an adjudication of bankruptcy against such person, or (in the event that such person is a corporation), the liquidation of such person, or
(f) the attainment of the age of seventy (70) years.

14.3.1 The Protector and each Protector hereof shall have the power to nominate a successor by instrument in writing revocable or irrevocable and delivered to the Trustees and to the successor named therein and if the Protector so nominating shall for reason cease to act as a protector hereof then the person who is the subject of such a nomination that has not been revoked shall forthwith become and be a protector hereof.

14.3.2 In the event that there is no Protector in office for a period of thirty (30) days, and no successor protector shall have been nominated by any protector previously in office, the Trustees shall have the power exercisable in their absolute discretion by deed to appoint any person or persons who is or are not a trustee or trustees hereof to be the Protector.

15. POWERS AND DUTIES OF PROTECTOR

15.1 GENERAL POWERS

15.1.1 In the manner provided for in this Trust Deed, the Protector shall be responsible for ensuring that the terms of this Trust Deed are complied with and are given effect to. The Protector shall not except as expressly provided for by law, be responsible to the Trustees, the Settlor, the Eligible Persons (or any one of them) for the manner in which he exercises his duties and discretions hereunder, or for any omission or failure to act, except to the extent that in any circumstance there has been wilful negligence, wilful default or dishonesty on the part of the Protector; or except to the extent that the Protector has failed to fulfil his obligations and his duty as provided by law.

15.2 SPECIFIC POWERS AND DUTIES

15.2.1 The Protector shall have the following powers vested in him: –

(a) to act with the Trustees in the manner provided in this Trust Deed;
(b) to remove the Trustee or any Trustee at any time from time to time; and

(c) to do all such other acts and things incidental to the foregoing and to exercise all powers necessary or useful to carry on the business of the Trust, to promote any of the purposes for which the Trust is formed, and to carry out the provisions contained herein.

15.2.2 On every removal of a Trustee, under clause 15.2.1(b), a Deed shall be endorsed on or permanently annexed to this Trust Deed stating the names of the Trustee as and from the date of such Deed, and shall be signed by the Protector.

15.2.3 Any person dealing with the Trust shall be entitled to rely upon the Deed endorsed on or permanently annexed to this Trust Deed in accordance with clause 15.2.2 (or the latest of such Deeds if more than one) as sufficient evidence that the Trustee named therein is the duly constituted Trustee for the time being hereof.

15.2.4 Any act, consent or notice given to the Trustee by the Protector shall be by Deed executed by the Protector under his hand (either in one or several instruments) or if there be more than one, by all of them.

15.3 NO FIDUCIARY DUTY

15.3.1 Notwithstanding the provisions of Applicable Law, the Protector shall have an absolute and uncontrolled discretion in exercising and in deciding whether or not to exercise any power hereby conferred, and in deciding whether to give or to withhold any consent to any act or thing requiring hereunder the consent of the Protector. The Protector may exercise such discretion upon consideration of such facts or information and in such manner for the benefit of the Eligible Persons or any one or more of them exclusively of the others or other of them as the Protector may think fit and the Protector shall not be liable or accountable in any manner for any exercise of or non-exercise of such discretion. The powers granted under this Trust are conferred upon the Protector (or any successor protector) personally and beneficially and not in a fiduciary capacity. In particular, and without limiting the generality of the foregoing, the Protector shall not owe any fiduciary duty whatsoever to the Settlor or to the Eligible Persons or to a Eligible Person (whether or not ascertained).

16. REMUNERATION

16.1 Each Trustee shall be entitled to be paid out of the Trust Fund, an annual fee of [_____] United States Dollars (US$_____), (the 'Annual Trustee Fee') in respect of the Trustee acting in the capacity as Trustees of this Trust. For the avoidance of doubt, it is hereby expressly acknowledged and declared that the Annual Trustee Fee is in respect solely of the engagement of the Trustee as a Trustee of this Trust, and of that Trustee acting in the office of Trustee of this Trust, and is not intended to constitute a 'taxable activity' in the definition of 'taxable supply' for the purposes of determining a charge of value added tax under the Value Added Tax Act, 1996–15 of the laws of Barbados in respect thereof.

16.2 Any Trustee being an attorney-at-law, accountant, investment manager or otherwise engaged in any profession or business, or any such person associated with such Trustee (or in the case of a corporate trustee any such person associated or beneficially interested or in any way connected with such Trustee), shall be entitled to charge and be paid all usual professional or other charges for business done and time spent and services rendered by him or his firm in the execution of the trusts and powers hereof whether in the ordinary course of his professional business or not and although not of a nature requiring the employment of an attorney-at-law or other professional person.

16.3 The Trustee shall be entitled to retain any commission which would or may become payable to such Trustee notwithstanding such commission is payable as a direct or indirect result of any dealing with property which is or may become subject to the trusts hereof.

16.4 The Trustee who shall be a corporation empowered to undertake trust business shall be entitled in addition to reimbursement of its proper expenses to remuneration for its services in accordance with such corporation's terms and conditions in accordance with such rates as it shall from time to time determine.

16.5 No Trustee hereof or director or other officer of any corporation which is a trustee hereof shall be liable to account for any remuneration or other profit received by it in consequence of its acting as or being appointed to be a director or other officer or servant of any corporation even though its appointment was procured by an exercise by it of voting rights attached to securities in the Trust Fund or by any abstention from exercising such voting rights.

16.6 Any Trustee or associate of a Trustee who carries on the business of banking may act as banker for this Trust on the same terms as those made with an ordinary customer without being liable to account to the Trust Fund for any profits earned thereby except for interest payable on any sums placed with such trustee or associate on an interest bearing account as an investment of any part of the Trust Fund.

17. PROPER LAW AND FORUM FOR ADMINISTRATION OF TRUST

17.1 Subject to the power conferred by this clause and under any further declaration to be made hereunder, this Trust is established under the laws of Barbados and the rights of all Beneficiaries and of the Trustees and the Protector; and the construction and effect of each and every provision hereof shall be governed by the laws of Barbados and subject to the exclusive jurisdiction of the courts of Barbados.

17.2 To the extent permitted under Applicable Law, the Trustees may, by Deed, at any time or times and from time to time during the Trust Period, with the consent in writing of the Protector, change the Proper Law of this Trust, by declaring that this Trust shall from the date of such Deed take effect in accordance with the law of some other state or territory in any part of the world not being any place under the law of which any of the trust powers and provisions herein declared and contained would not be enforceable or capable of being exercised and so taking effect.

17.3 Where any declaration changing the Proper Law of the Trust shall be made, the Trustees shall be at liberty to make such consequential alterations or additions in or to the trust powers and provisions of this Trust as the Trustees may consider necessary or desirable to ensure that the trust powers and provisions of this Trust shall be valid and effective mutatis mutandis as if made under the law of Barbados, except that no alteration shall be made to the definition of charity hereinbefore contained.

17.4 Subject to the power conferred by this clause and under any further declaration to be made hereunder, the forum for the administration of the Trust shall be the jurisdiction of the Proper Law of the Trust.

17.5 To the extent permitted under Applicable Law, the Trustees may, by Deed, at any time or times and from time to time during the Trust Period, with the consent in writing of the Protector, change the forum for the administration of the Trust to a jurisdiction different from the Proper Law of the Trust, The forum for the administration of this Trust shall as from the date of such declaration be the courts of the jurisdiction named in the Deed.

18. TRANSFER OF TRUST FUND

18.1 The Trustees shall be deemed to have transferred to the Protector, or to any other person or persons designated in writing by the Protector (which may include any one or more of the Trustees) (the 'Emergency Trustee'), all right title and interest to the Trust Fund, immediately prior to the occurrence of any one of the following events ('Emergency Events'):–

(a) an Event of Duress; or

(b) an action on the part of any judicial or government authority of competent jurisdiction or under any Applicable Law, with the result that the Trustees shall have ceased to be authorised to act in the capacity of trustees, or as Trustees of this Trust;

(c) an action on the part of any judicial or government authority of competent jurisdiction or under any Applicable Law, with the result that the Trustees shall have ceased to be authorised to hold foreign assets for the benefit of persons other than Excluded Persons.

18.2 On the occurrence of any Emergency Event, the Trustees shall thereafter cease to be Trustees and the Emergency Trustee shall constitute the Trustee for the time being of this Trust.

18.3.1 Whenever the Trustees cease to be Trustees of this Trust, by reason of occurrence of any Emergency Event, the Trustees shall as soon as is legally practicable execute all Deeds, and do all things as shall be necessary in order to transfer legal title of the Trust Fund to the Emergency Trustee and perfect the title of the Emergency Trustee to the Trust Fund. Further the Trustee shall be bound to transfer to the Emergency Trustee all records and documents relating to the Trust.

18.3.2 The Trustees shall be entitled to be indemnified and to retain out of the Trust Fund all sums due from the Trust and all expenses and costs incurred in such transfer.

18.4 Whenever the Trustees cease to be Trustees of this Trust, by reason of occurrence of any Emergency Event, the Trustees shall be indemnified by the Emergency Trustee from and out of the Trust Fund against all liabilities incurred as a result of the bona fide actions or omissions of the Trustees with regard to the Trust Fund made in ignorance of the happening of an Emergency Event.

19. AMENDMENT TO TRUST DEED

19.1 To the extent permitted under Applicable Law, the Trustees may, by Deed, at any time or times and from time to time during the Trust Period, with the consent in writing of the Protector, make any alterations, amendments, modifications or additions to the provisions of this Trust Deed, which the Trustees in their absolute discretion consider to be for the benefit of all of the Beneficiaries as a class, or for the proper and due exercise of the trusts and powers created herein, or for the purpose of complying with Applicable Law.

20. GENERAL

20.1 Fund Assets to be Kept Separate: The Trustees shall maintain the assets of the Trust Fund separate from all other property in their possession, whether held by them absolutely or in trust.

20.2 Trustee May Compete With Fund: The Trustees and their affiliates may, from time to time, be engaged, for their own account or on behalf of others (including as trustee, administrator or manager of other funds or portfolios) in investment and other activities identical or similar to or competitive with the activities of the Trust or of the Trustees

and their affiliates in connection with the Trust. Neither the Trustees nor any of their affiliates shall incur or be under any liability to the Trust, any Beneficiary or any other person for by reason of, or as a result of any such engagement or competition or the manner in which they may resolve any conflict of interest or duty arising therefrom.

20.3 Compliance: The Trustees shall ensure compliance with the provisions of the Applicable Law, and shall do all things necessary to ensure to give binding legal effect to this Deed.

20.4.1 Severability: To the extent permitted under Applicable Law, and in the manner consistent with the proper and due exercise of the trusts and powers created herein, if any provision of this Trust Deed shall be held invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provision in any other jurisdiction or any other provision of this Trust Deed in any jurisdiction.

20.4.2 To the extent permitted under Applicable Law, the Trustees may, by Deed, at any time or times and from time to time during the Trust Period, with the consent in writing of the Protector, change any of the severable aspects of this Trust to a governing law different from the forum for the administration of the Trust to a jurisdiction different from the Proper Law of the Trust.

20.5 Confidentiality: Except under an order of a court which exercises jurisdiction over the Trust, any one of the Trustees or the Trust Fund, or in order to comply with the mandatory provision of Applicable Law, or an administrative requirement issued under Applicable Law, the Trustees shall not (except on receipt of a written request from a Beneficiary for the disclosure of any document or information relating to or forming part of the accounts of this Trust) disclose to any person not legally entitled, any information or documents respecting this Trust.

IN WITNESS WHEREOF the Settlor and the Original Trustees have hereunto set their respective hands and Common Seal the day and year first hereinbefore appearing.

SIGNED SEALED AND DELIVERED)
by)
in the presence of:) _____

Witness:____
Name:

SIGNED SEALED AND DELIVERED)
by)
in the presence of:) _____

Witness:____
Name:

SIGNED SEALED AND DELIVERED)
by)
in the presence of:)

Witness: ____ _____
Name:

SCHEDULE I

CHARITIES

SCHEDULE II

PROTECTOR

SIGNED SEALED AND DELIVERED)
by)
in the presence of:) _____

Witness: _____
Name:

APPENDIX 5

UNIT TRUST DEED

[_____] [PRIVATE]

THIS DECLARATION OF TRUST is made the_____day of_____, 1997.

BY: [_____], a [financial institution] duly registered and licensed under Part [ ] of the Financial Intermediaries Regulatory Act of the Laws of [_____] and whose principal office is situated at [_____] hereinafter called (the 'Trustee').

WHEREAS:

1. The Trustee is licensed as a [_____] under Part [____] of the Financial Intermediaries Regulatory Act of the Laws of [_____] and is authorised to accept in trust amounts of money in currency, securities, personal and moveable property and real or immoveable property (the 'assets') to be administered managed or invested for the benefit of persons resident in [_____].
2. In particular the Trustee is authorised to operate a Trust Fund by pooling the assets received from a number of persons who are entitled to share as beneficiaries under the acquisition, holding, management or disposal of assets acquired for the trust subject to the further conditions of the Financial Intermediaries Regulatory Act.
3. In pursuance of the said authority the Trustee desires to establish a Trust Fund under the Laws of [_____] for the purpose of investing and re-investing assets acquired for the trust in the manner herein contained.
4. The Trustee proposes to divide the beneficial interest in the assets of the Trust into transferable units of beneficial interest as hereinafter provided so as to constitute a Unit Trust under the Laws of [_____].
5. Subject to the approval of the Exchange Control Authority of [_____] being obtained, the Trust Fund is to be denominated in several currencies as the Trustee may approve and the assets of the Trust Fund so denominated in an approved currency shall be a separate and distinct Class Fund so that the Unit Trust hereby established shall be an Open Ended Multi-Class Unit Trust.

NOW THIS DEED WITNESSETH AND IT IS AGREED as follows: –

That the Trustee hereby declares that it agrees to hold and stand possessed of in Trust as Trustee the sum of ONE HUNDRED DOLLARS in the lawful currency of [_____] together with any and all assets which are hereafter transferred conveyed or paid to them as such trustees through the issue of units in several currencies and all income profits and gains arising therefrom (the 'Trust Fund') in separate and distinct Class Funds upon Trust for the benefit of the unit holders of each particular class subject to the powers and provisions herein declared of and concerning the same.

Definitions and Interpretation

As used in this Trust Deed and the Schedules hereto the following terms shall (where the context so admits) have the following respective meanings: –

Banking Day	any day on which banks are authorised to open for business in [_____], (not including Saturday and Sunday).
Class	each class of units of a specified currency from time to time established by the Trustee hereunder.
Class Fund	that part of the Trust Fund in the specified currency derived from the issue of the relevant Class of Units from time to time.
Eligible Investor	any person not disqualified from being registered as a Unitholder by reason of terms herein, or any provision of any statute governing the operations of the Trustee or the Trust Fund.
Net Asset Value	in relation to each Class Fund the value of securities, cash and other assets constituting the Class Fund of that particular Class of Units issued pursuant to the terms hereof (including interest accrued and not collected) less all liabilities (including accrued expenses and distributions payable) calculated as herein provided and, in relation to each Unit of a Class, means the Net Asset Value of the Class Fund of that Class of Units from time to time divided by the total number of Units owned by Unitholders of that Class of Units outstanding at the time of calculation.
Persons	individuals, corporations, partnerships, trusts, associations, joint ventures and other entities (whether or not legal entities) and governments and agencies and political subdivision thereof.
Transaction Day	the first Banking Day of each calendar week on or after the termination of the Offering Period on which Units may be issued or redeemed (ordinarily a Monday).
Trustee	the Original Trustee and its successor as Trustee hereafter to be appointed or such other successor Trustee or Trustees for the time being of this Unit Trust.
Trust Fund	the initial sum of BDS$100.00 and as of any particular time any and all other property, real or personal, tangible or intangible in respect of all Class Funds which at such time is owned or held by or for the account of this Unit Trust.
Unit	in relation to any particular Class of Units a beneficial interest in the Class Fund of that particular Class of Units equal to the Net Asset Value of the Class Fund of that particular Class of Units divided by the total number of Units of that Class owned by Unitholders from time to time.
Unitholders	in relation to any particular Class of Units the beneficial owners for the time being of the Class Fund whose names appear on the Register of the Unitholders kept by or at the direction of the Trustee.
Unit Trust	the unit trust created by this Declaration of Trust and to be known as '_____'.
Valuation Day	the Banking Day preceding each Transaction Day whilst Units remain outstanding on which the Net Asset Value is calculated (ordinarily a Friday).

(a) Words importing the masculine include the feminine and words importing the singular include the plural and words importing persons only shall include companies or associations or bodies of persons whether incorporated or not (and vice versa) unless the context otherwise requires, and the words 'written' and 'in writing' include printing, engraving, lithographing or other means of visible reproduction.

(b) The headings of the clauses inserted herein are for convenience only and shall not affect the construction of this Deed.

1. **Name of Trust:**

1.1 The name of the Trust created by this Deed shall be '_____' and shall be abbreviated '_____'.

1.2 As far as practicable and except as otherwise provided in this Deed the Trustee shall conduct the trust activities, hold the assets, execute all documents and take all legal proceedings under that name.

1.3 Should the Trustee determine that the use of the name provided for in clause 1.1 is not practicable, legal or convenient, the Trustee may use such other designation or adopt such other name for the Trust as they deem appropriate and the Trust may conduct its activities or any particular activity under such other designation or name.

2. **Trust-Office:**

2.1 The principal office and centre of administration of the Trust shall be at the offices of the Manager of the Trust.

2.2 The Trustee may designate for use by the Manager or any other person such other offices or places for the conduct of the affairs of the Trust as it may deem necessary or desirable.

3. **Nature of Trust:**

3.1 In this Deed the relationship between the unit-holders to the Trustee shall be solely that of beneficiaries of the Trust, and the rights of unit-holders shall be limited to those conferred by this Deed and the Laws of [_____], the Trustees are not and shall not be deemed to be the agents of the unit-holders.

3.2 The Trust is and is intended to be an Open Ended Multi-Class Unit Trust, formed for the purpose of investing and reinvesting the Trust Fund. The Trust is not intended to be shall not be deemed to be and shall not be treated as a general partnership, limited partnership, syndicate, association, joint venture, or company, nor shall the Trustees or the unit-holders or any of them for any purpose be or be deemed to be treated in any way whatsoever to be liable or responsible hereunder as partners or joint venturers.

4. **Powers and Duties of Trustee:**

4.1 General Powers

4.1.1 Except as expressly provided for in this Declaration of Trust the Trustee shall perform such duties, exercise such powers and suffer such liabilities as provided for by the Trustee Act Cap. 250 of the Laws of [_____], except that the Trustee shall not, in carrying out its investment activities, be in any way restricted by the provisions of the laws of any jurisdiction (including the said Trustee Act) limiting or purporting to limit investments that may be made by Trustees except as specifically required by such laws.

4.1.2 The Trustee subject only to the specific limitations contained in this Declaration of Trust shall have without further or other authorisation and free from any power of control on the part of the unit-holders full absolute and exclusive power over the Trust Fund and over the business affairs of the Trust to the same extent as if the Trustee was the sole owner thereof in its own right to do all such acts and things as in its sole judgement and discretion are necessary or incidental to or desirable for carrying out any of the purposes of the Trust or the conducting of the business of the Trust.

4.1.3 In construing the provisions of this Declaration of Trust there shall be a presumption in favour of the granted powers and authority to the Trustee and the enumeration of any specific power or authority herein shall not be construed as limiting the general powers or authority or any other specified power or authority conferred herein on the Trustees.

4.2 Specific Powers and Duties

4.2.1 Subject only to the express limitations contained in this Declaration of Trust and in addition to any powers and authorities contained by this Declaration of Trust or which the Trustee may have by virtue of the said Trustee Act, the Trustee without any action or consent by the unit-holders shall have and may exercise at any time and from time to time the following powers and authorities which may be exercised by it in its sole judgement and discretion and in such manner and upon such terms and conditions as they may from time to time deem proper:–

(a) to subscribe for, invest in, reinvest, purchase or otherwise acquire, hold, pledge, sell, assign, transfer, exchange, distribute, or otherwise deal in or dispose of the investments described in Schedule I hereto as 'permitted investments', in accordance with the Investment Policy and Guidelines for the time being prescribed by the Trustee;

(b) to realise any asset in the Trust Fund in order to invest the proceeds of sale or any part thereof in any permitted investment and/or other property or to provide the cash required for the purpose of carrying out any provision of this Declaration of Trust;

(c) to sell, rent, lease, hire, exchange, release, partition, assign, mortgage, pledge, hypothecate, grant security interests in, encumber, negotiate, convey, transfer or otherwise dispose of any or all of the property of the Trust Fund by deeds, trust deeds, assignments, bills of sale, transfers, leases, mortgages, financing statements, security agreements and other instruments for any authorised purposes; and all such instruments may be executed and delivered for and on behalf of the Trust or Trustee by the Trustee or by a duly authorized officer, employee, agent or any nominee of the Trust;

(d) to borrow money and give negotiable or non-negotiable instruments therefor; to guarantee, indemnify or act as surety with respect to payment or performance of obligations of third parties; to enter into other obligations on behalf of the Trust; and to assign, convey, transfer, mortgage, subordinate, pledge, grant security interests in, encumber or hypothecate the property of the Trust to secure any of the foregoing;

(e) to lend money, whether secured or unsecured;

(f) to incur and pay out of the Trust Fund any charges or expenses, and disburse any Trust Funds, which charges, expenses or disbursements are, in the opinion of the Trustees, necessary, or incidental to, or desirable for the carrying out of any of the purposes of the Trust or conducting the business of the Trust, including without limitation, taxes or other governmental levies, charges and assessments, of whatever kind or nature, imposed upon or against the Trustee in connection with the Trust or the Trust Fund or upon or against any property held in Trust Fund or any part thereof and for any of the purposes herein;

(g) to deposit the Trust Fund or any part thereof with the Custodian, or in banks, trust companies and other depositories, whether or not such deposits will draw interest, the same to be subject to withdrawal on such terms and in such manner and by such person or persons (including any one of the Trustee, its officers, agents or representatives) as the Trustees may determine;

(h) to possess and exercise all the rights, powers and privileges appertaining to the ownership of all or any mortgages, securities or interests forming part of the Trust Fund, to the same extent that an individual might, and, without limiting the generality of the foregoing, to vote or give any consent, request or notice, or waive any notice, either in person or by proxy or power or attorney, with or without power of substitution, to one or more persons, which proxies and powers of attorney may be

for meetings or action generally or for any particular meeting or action, and may include the exercise of discretionary power;

(i) to elect, appoint, engage or employ officers for the Trust in such capacity and for such office as may be designated by the Trustee (including a President, Secretary, Treasurer and such vice-presidents and other officers as the Trustee may determine), who shall have such powers and duties and serve such terms as may be prescribed by the Trustee and may be removed or discharged at the discretion of the Trustee;

(j) to engage or employ any persons as agents, representatives, employees, independent contractors, professional advisors or in one or more capacities, and to pay compensation from the Trust Fund for services in as many capacities as such persons may be so engaged or employed. Except as prohibited by law, the Trustee may delegate any of its powers and duties herein to any one or more agents, representatives, officers, employees, independent contractors or other persons;

(k) to collect, sue for, and receive all sums of money coming due to the Trust, and to engage in, intervene in, prosecute, join, defend, compromise, abandon or adjust, by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, demands or other litigation relating to the Trust, to enter into agreements therefor, whether or not any suit is commenced or claim accrued or asserted and in advance or any controversy; and to enter into agreements regarding the arbitration, adjudication or settlement thereof;

(l) to renew, modify, release, compromise, extend, consolidate or cancel, in whole or in part, any obligation to or of the Trust;

(m) to purchase and pay for out of the Trust Fund insurance contracts and policies insuring the Trust Fund against any and all risks and insuring the Trust and/or any or all of the Trustee, the Unitholders, the Manager or officers against any and all claims and liabilities of any nature alleged to have been taken or omitted by the Trustees, Unitholders the Manager or officers;

(n) to distribute all or any part of the capital or income of any Class Fund to the Unitholders of that Class and to make any interim or periodic distribution that it deems fit;

(o) to register the Trust Fund or itself as Trustee thereof in accordance with the securities laws of any jurisdiction and to otherwise comply with the laws of any jurisdiction relating to the sale or offer for sale of units, or otherwise of the Trust Fund; and

(p) to do all such other acts and things incidental to the foregoing and to exercise all powers necessary or useful to carry on the business of the Trust, to promote any of the purposes for which the Trust is formed, and to carry out the provisions of this Declaration of Trust;

4.3 Further Powers of the Trustees

4.3.1 The Trustee shall have the power to prescribe any form provided for or contemplated by this Declaration of Trust.

4.3.2 The Trustees may make, adopt, amend or repeal regulations containing provisions relating to the business of the Trust, the conduct of its affairs, their rights or powers and the rights or powers of its Unit-holders or officers not inconsistent with law or with this Declaration of Trust.

4.3.3 The Trustees shall also be entitled to make any reasonable decisions, designations or determinations not contrary to this Declaration of Trust which they may determine to be necessary or desirable in interpreting, applying or administering this Declaration of Trust or in administering, managing or operating the Trust.

4.3.4 Any regulations, decisions, designations or determinations made pursuant to this section shall be conclusive and binding upon all persons affected thereby.

5. **Liability and Indemnification of the Trustees:**

5.1 The Trustee shall exercise its power hereunder and carry out its functions as Trustee honestly in good faith and in the best interests of the Trust and the Unit-holders and in connection therewith shall exercise that degree of care diligence and skill that a reasonably prudent person of its experience would exercise in comparable circumstances.

5.2 Liability of the Trustees

5.2.1 The Trustee shall not be liable to the Trust or to any Unit-holder for the acts, omissions, receipts, neglects or defaults of any person, firm or corporation employed or engaged by it as permitted hereunder; or for joining in any receipt or act of conformity; or for any loss, damage or expense caused to the Trust through the insufficiency or deficiency or any security in or upon which any of the moneys of or belonging to the Trust shall be laid out or invested; or for any loss or damage arising from any investment activity of the Trustee or any loss incurred in any particular investment; or for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person, firm or corporation with whom or which any moneys, securities or property of the Trust shall be lodged or deposited, or invested; or for any loss occasioned by error in judgment or oversight on the part of the Trustee; or for any other loss, damage or misfortune which may happen in the execution by the Trustee of its duties hereunder, except to the extent set out in clause 5.3.2.

5.2.2 The Trustee may rely and act upon any statement, report or opinion prepared by or any advice received from the auditors, attorneys-at-law or other professional advisors of the Trust and shall not be responsible or held liable for any loss or damage resulting from so relying or acting.

5.3 Indemnification of the Trustees

5.3.1 The Trustees shall at all times be indemnified and saved harmless out of the funds of the Trust from and against all claims whatsoever, including costs, charges and expenses in connection therewith, brought, commenced or prosecuted against them for or in respect of any act, deed, matter or thing whatsoever made, done, acquiesced in or omitted in or about or in relation to the execution of their duties as Trustees and also from and against all other costs, charges and expenses which they sustain or incur in or about or in relation to the affairs of the Trust. Further, the Trustees shall not be liable to the Fund or to any Unitholder for any loss or damage relating to any matter regarding the Trust, including any loss or diminution in the value of the Trust or its assets.

5.3.2 The foregoing provisions of this clause do not apply to the extent that in any circumstance there has been wilful negligence, wilful default or dishonesty on the part of the Trustees or to the extent that the Trustees have failed to fulfil their obligations and their fiduciary duty as provided by law and this Trust Deed.

5.4 Dealings with Third Parties

5.4.1 No purchaser, lender, registrar and transfer agent or other person dealing with the Trustee or any officer, employee or agent of the Trustee shall be bound to make any enquiry concerning the validity of any transaction purporting to be made by the Trustee or its said officer, employee or agent or be liable for the application of money or property paid, loaned or delivered to or on the order of the Trustee or of its said officer, employee or agent. Every obligation, contract, instrument, certificate or undertaking and every other act or thing whatsoever executed in connection with the Unit Trust shall be conclusively taken to have been executed or done by the executor thereof only in his capacity as an officer, employee or agent of the Trustee.

6. **Custodian:**

6.1 The Trustee shall appoint_____(hereinafter called the 'Custodian') to serve as Custodian of the Trust Fund and to exercise custodial functions in accordance with and subject to the powers, restrictions, limitations as contained in a Custodian Agreement between the Trustee and the Custodian.

6.2 The Trustee has an absolute discretion to settle the terms of the Custodian Agreement, in accordance with and subject to the provisions of this Deed and may impose such additional limitations or vest additional powers as it may deem necessary or desirable.

6.3 The Trustee may appoint such other person to act as Custodian instead of or in addition to the Custodian named herein if satisfied that such other person has demonstrated capabilities and recognised reputation in the exercise of custodial functions.

6.4 The Custodian in the exercise of its custodial functions shall receive, pay for and hold the securities or other property constituting the Trust Fund and deliver the same upon order from the Trustee.

6.5 The Trustee may also authorize the Custodian to employ one or more sub-custodians from time to time to perform such of the acts and services of the Custodian and upon such terms and conditions as may be agreed upon between the Custodian and such sub-custodian and approved by the Trustee provided that in every case such sub-custodian shall be a bank or trust company which the Custodian is satisfied has a demonstrated capability and recognised reputation as aforesaid.

6.6 The Trustee may direct the Custodian to deposit all or any part of the Trust Fund in a system for the central handling of securities operating in any part of the world pursuant to which system securities may be transferred or pledged by bookkeeping entry without physical delivery.

7. **Manager:**

7.1 The Trustee shall act as Investment Manager to the Trust and as such Manager shall make all decisions concerning the investment of the relevant Class Fund and shall be responsible for and effect all trades and transactions in such Investments with power with the consent of the Trustee to delegate such duties and responsibilities.

7.2 The Trustee may engage or appoint any other person (where the Trustee is satisfied that such person has a demonstrated capability and recognised reputation in Managing the Investments proposed for the relevant Class Fund) to serve as Manager to the Trust or in the investment of any relevant Class Fund subject to such powers, restrictions, limitations and other requirements, if any (including a power with the consent of the Trustee to delegate such duties and responsibilities) as may be contained in the Agreement between the Trustee and that person.

7.3 The Trustee may appoint the Manager upon such terms as it may best negotiate to perform for the benefit of the Trust administrative services including the following:

(i) the bookkeeping and accounting of the unit Trust;

(ii) the weekly determination of Net Asset Value of the Units of the relevant Class Fund;

(iii) the maintenance of a register of Units in respect of each Class;

(iv) the processing of issue, transfer and redemption of Units; and

(v) all administrative and secretarial services incumbent upon the Unit Trust.

7.4 Any person appointed as Manager pursuant to this Trust and in accordance with the provisions of this clause shall be deemed an Officer of the Trust for the purposes of clause 5 hereof, and shall be subject to such liabilities and indemnities as the Trustee.

7.5 The Manager of the Trust shall be entitled to be paid a Management Fee in accordance with the fee schedule established by the Trustee.

8. **Investment Advisors:**

8.1 The Trustee may appoint any qualified person to give advice to the Trustee or the Manager on the Investments of any Class Fund.

9. **Sales Agents and Dealers:**

9.1 The Trustee may in its discretion from time to time employ agents or dealers to sell Units or providing for the sale of Units on such terms and conditions as the Trustee may in its discretion determine. Any person may be so employed although an affiliate of the Trustee or any other of its members, shareholders, directors, officers, employees or agents (an 'associate') and such appointment shall not be invalidated or rendered voidable by reason of the existence of any such relationship nor shall any such Associate be liable merely by reason of such relationship for any loss or expense to Trust or accountable for any profit realised directly or indirectly therefrom provided that the terms of such employment were reasonable and fair.

10. **Other Powers of Delegation:**

10.1 The Trustee shall have power to delegate from time to time to agents the doing of all such other things and the execution of such instruments either in the name of the Trust or in the name of the Trustee or otherwise as the Trustee may deem expedient.

11. **Units:**

11.1 The beneficial interest in the Trust Fund shall be divided into units of equal value which shall be, without preference or priority, entitled to the rights and subject to the limitations, restrictions and conditions set out herein.

11.2 The Trustee shall have the power at any time to issue units in any currency approved by it in accordance with the provision of this Deed and the sum of units so issued shall constitute a 'Class.'

11.3 The number of units of any class which the Trustee may issue is unlimited. Nothing herein shall prevent the Trustee from issuing more than one Class of Units in the same currency.

11.4 The Trustee may fix a minimum and/or maximum number of units of any Class, and may, in its absolute discretion, change that minimum and/or maximum which has been fixed.

11.5 The Trustee shall maintain the proceeds obtained from the issue of one Class of Units in a separate account (the 'Class Fund') and the said Class Fund to be designated by the currency in which the units are issued, and any such other designation as the Trustee may determine.

11.6 Only the Unitholders of a class are entitled to share in the income gains or profits of that Class Fund.

11.7 The units shall be the personal property of the Unitholder and shall confer upon the said Unitholder the interest and rights set out herein.

12. **Ranking of Units:**

12.1 Each Unit of a Class represents an equal interest in the Class Fund with an outstanding unit of the same class.

12.2 All Units of a Class outstanding from time to time participate *pro rata* in any distribution by the Trustee of the assets of that Class Fund and in the event of termination of that Class Fund or of the Trust in the net worth of the Class Fund.

12.3 No unit has any preference or priority over any other unit of the same class or any unit of another class.

13. **Interest of Unitholders:**

13.1 No Unitholder has or shall be deemed to have any right of ownership in any part of the Trust Fund.

13.2 The legal ownership of the Trust Fund and the right to conduct the business of the Trust are vested exclusively in the Trustees. The Unitholders shall have no interest other than a beneficial interest in the Class Fund conferred by their ownership of a Class of Unit. No Unitholder shall have a right to compel any partition, division, dividend or distribution of their Class Fund or of the Trust Fund.

14. **Eligibility to be a Unitholder:**

14.1 No unit may be issued to any person who is not a resident of Barbados, nor shall any such person retain any beneficial interest in the units of the Trust, without the prior approval of the Exchange Control Authority of Barbados.

14.2 The Trustee may at any time require evidence sufficient to be reasonably satisfied that a person about to be registered or recognised as Unitholder does not fall within the class of person excepted by Clause 14.1 hereof.

15. **Issue of Units:**

15.1 Initial Issuing of Units

15.1.1 Units of any class shall be offered on the Initial Valuation Date and for such period as the Trustee may determine at such price per unit as the Trustee shall establish (the 'Initial Offering Period').

15.2 Subsequent Issues of Units

15.2.1 At the end of the initial offering period the Trustee may issue units to any subscriber where the full purchase price of the units has been paid to the account of the Trust, and where satisfied that the issue to any subscriber does not infringe any rule of law in Barbados, or is otherwise in violation of the terms contained herein (the 'Initial Issue').

15.2.2 Any person may subscribe for the purchase of units of any class offered by delivering to the Trustee, Manager (or to an agent appointed by the Trustee in exercise in his powers herein) the subscription amount and the duly completed subscription form as prescribed for use by the Manager.

15.2.3 Notwithstanding clause 15.2.1 the Trustee may in its absolute discretion refuse to accept any subscription amount and to issue units to any subscriber without assigning any reasons therefor.

15.2.4 The Trustee may issue additional units of an existing class or may issue a new Class of Units.

15.2.5 Every additional issue of an existing Class of Units shall be offered at the current Net Asset Value of that Class Fund as at the relevant valuation day preceding the transaction day.

15.2.6 Any person may subscribe for the purchase of units of any class by sending an application to the Manager (or to an agent appointed by the Trustee) in the form prescribed for use by the Trustee. The Trustee may in its absolute discretion, alter, modify or vary the form used for the initial offer.

15.2.7 The terms and conditions of issue more fully described in Schedule II hereof shall apply to the initial issue of units, and shall remain binding and in full force and effect

unless varied by the Trustee. The Trustee has an absolute discretion over the charges and fees payable by the Unitholder, as described in Schedule II, and shall notify all subscribers of their fees and charges.

15.2.8 The Trustee must advise all subscribers of the current fees and charges payable out of the Trust Fund.

16. **Unit Register:**

16.1 The Trustee or the Manager shall establish and maintain a register at the principal office of the Trust for every Class of Units issued and shall record therein the names, addresses and numbers of units of that Class held by Unitholders.

16.2 Upon any issue of units the name of the subscriber shall be promptly entered on the register of units of that Class as the owner of the number of units issued to such subscriber or if a subscriber is already a Unitholder of that Class, the register shall be amended to include the additional units.

16.3 The Trustee shall for all purposes be entitled to treat the Unitholder in whose name any units are registered as the absolute owner thereof, notwithstanding any notice to the contrary. The Trustee shall not be charged with notice of or be bound to see to the execution of any trust in respect of any unit whether express implied or constructive and may deal with any unit on the direction of the registered Unitholder whether named as trustee or otherwise.

16.4 No Unitholder shall be entitled to vote, or to receive distributions or otherwise exercise or enjoy the rights or Unitholders unless recorded on the register, as the holder thereof.

17. **Transfer of Units:**

17.1 Units shall be transferable on the records of the Trust only by the Unitholder of record or by his agent duly authorised in writing, on delivery to the Trustee or Manager of a fully executed instrument of Transfer in such form as is approved for use by the Trustee. Upon such delivery the transferee shall be recorded on the register of the Class of Unit being transferred.

17.2 Before registering any transfer of units on the records of the Trust, the Trustee or Manager may require evidence of the genuineness of the execution and authorisation and of such other matters as may reasonably be required.

17.3 Until such record is made the Unitholder of record shall be deemed to be the holder of such units and no other person shall be entitled to exercise rights of such Unitholder notwithstanding notice having been given to the Trustee, the Manager, or any other person appointed by the Trustee, who may have some degree of custody or control over the records of the Trust.

17.4 On any transfer of units all conditions attaching to the original issue of units must be satisfied, and where these conditions whether imposed herein or by the Trustee in its absolute discretion are not satisfied, the Trustee or Manager may refuse to register the transfer of units or require the Unitholder and/or the transferee to take such action to secure compliance with the condition of the original issue. Without restricting the generality of the foregoing, where the trustee has established a number of units of any one class to be held by Unitholder of that class and in transfer, neither the Unitholder nor the transferee would obtain the minimum number of units in that class. The Trustee may require the Unitholder to either retain the minimum number or relinquish to be transferred to any other person, including the Trustee, all units in that class held by the Unitholder.

18. **Transmission of Units:**

18.1 Any person becoming entitled to any units as a consequence of the death, bankruptcy or incompetence of the registered Unitholder or otherwise by the operation of law shall be entitled or be registered in the records of the Trust as the registered Unitholder of such units on production of the proper evidence thereof to the Trustee or the Manager.

18.2 Until such record is made the Unitholder of record shall be deemed to be the holder of such units and neither the Trustee, or the Manager shall be affected by any notice of such death, bankruptcy, or incompetence or other operation of law.

19. **Redemption of Units:**

19.1 Redemption by Unitholders

19.1.1 Outstanding units of any class may be redeemed on any Transaction Day at the option of a Unitholder by delivering to the Trustee notice in writing of the Unitholder's intention to have his units redeemed, on or before the next Valuation Day.

19.1.2 Where any notice given pursuant to Clause 19.1.1 hereof is not received by the Trustee on or before any such Valuation Day, the units may not be redeemed until the Transaction Day following the next succeeding Valuation Day.

19.1.3 The Trustee shall, upon receiving written notice in accordance with Clause 19.1.1 hereof redeem the outstanding units requested to be redeemed at the Net Asset value of such units calculated as at the relevant Valuation Day preceding the Transaction Day on which the Units are redeemed.

19.1.4 Where the Trustee has established a minimum number of units to be held by one Unitholder of that class, or where the Trustee has established a minimum number of units of any class that may be outstanding, and the request for redemption would have the effect of reducing the number of units held by the Unitholder below the minimum established, or of reducing the number of units outstanding in that class, below the minimum established, the Trustee may refuse to redeem the units, or may take such other action as it may deem necessary to secure compliance with the conditions established by it.

19.2 Redemptions by Trustee

19.2.1 The Trustee shall have the power to redeem Units as at any Transaction Day:

(a) if at any time it is ascertained that Units are not held by an Eligible Investor; or

(b) if the number of Units held by a Unitholder does not exceed or does not have a Net Asset Value greater than such minimum number or amount as the Trustee may from time to time determine to be the minimum acceptable number or amount; or

(c) if by reason of the transmission of Units any Unitholder fails to obtain or retain the minimum number or amount of Units in any particular Class Fund; or

(d) if a request for redemption by one Unitholder would, if accepted, result in the number of Units in that Class remaining outstanding falling below the minimum number or amount of Units set for that Class; or

(e) if for any other reason the Trustee considers it advisable and in the interests of the Trust to redeem any units of one class, or all the units outstanding of the Trust or any particular class thereof.

19.3 Suspension of Right of Redemption

19.3.1 The Trustee may suspend the right of Unitholders to redeem Units from the Unit Trust or any particular Class thereof during any period because:

(a) of the existence of a war, national disruption, major financial crisis, Act of God or any like state of affairs which constitutes an emergency as determined by the Trustee in its

sole discretion, as a result of which the Trustee shall determine that disposal of the Trust Fund or any Class Fund by the Unit Trust is not possible in an orderly manner;

(b) means of communication or data processing facilities necessary to determine the price or value of any part of the relevant Class Fund or of the Unitholders' beneficial interests do not function satisfactorily;

(c) the transfer of funds involved in the realization or acquisition of any Investments of any relevant Class is not physically possible; or

(d) the redemption would result in violation of any provision of law in any relevant jurisdiction.

(e) if the Trustee considers it advisable and in the interests of the Trust to suspend the right of Unitholders of a Trust or any one thereof to redeem units.

20. **Meetings of Unitholders:**

20.1 Meetings of the Unitholders of the Trust shall be constituted in accordance with the Regulations set out in Schedule III hereto.

20.2 The Unitholders may by special resolution, alter, amend, vary or replace the regulations set out in Schedule III hereto.

21. **Notices:**

21.1 Any communication or notice required to be given to or served upon may be delivered personally or sent by pre-paid mail or cable or telex or facsimile and shall be deemed to have been duly given or served if written in the English language and sent or left at his address as appearing in the register.

21.2 The Trustee shall not be bound to dispatch any communication or notice to any Unitholder who has given no address for service, or who has otherwise requested that notices not be sent to him, or whose address on the register is incomplete, or in any case in which such communication or notice could subject the Trustee or the Unit Trust to penalties for unlawful conduct in the jurisdiction of the Unitholder.

21.3 The Trustee may give effective notice to all such persons by advertising the same in such form (and if deemed appropriate in shortened form) in any newspaper or newspapers in circulation in such place or places (and in language in which such newspaper is published) as the Trustee may in its discretion determine. Any such notice shall be deemed effective notice to all such Unitholders on the first day on which such advertisement shall appear.

21.4 Any communication or notice sent by post to or left at the registered address of a Unitholder shall (notwithstanding that such Unitholder be then dead or bankrupt and whether or not the Trustee shall have notice of his death or bankruptcy) be deemed to have been duly served and such service shall be deemed a sufficient service on all persons interested (claiming through or under him) in the Units concerned.

21.5 Where by reason of the death or bankruptcy of a Unitholder more than one person become interested in the Units registered in his name they shall nominate one of their number to be the Unitholder of Record and in default the Trustee may designate one such person or redeem the Units.

21.6 Whenever service of any communication or notice is made by post by the Trustee to any Unitholder or any other person, such communication or notice shall be deemed to have been served 7 days after the same was posted and in proving such service it shall be sufficient to prove that the communication was properly addressed, stamped and posted.

21.7 No advertisement or circular relating to the Trust Fund which refers to the Trustee shall be issued without the prior knowledge of the Trustee.

21.8 Where any approval, direction, consent, request, notice, certification or other communication is required to be given or made pursuant to any of the provisions of this Deed by the Trustee the recipient thereof may accept as sufficient evidence thereof a document setting forth the same purporting to be signed on behalf of the Trustee by its representative.

22 **Accounts and Audits:**

22.1 The Trustee shall keep account of all receipts, disbursements, investments and other transactions of each Class Fund and all accounting records of each Class Fund. The financial statements of each Class Fund shall consist of a statement of the assets and liabilities, a statement of income and expense and such other statements as the Trustee may deem necessary in relation to each Class Fund. Such statements shall be prepared as at the end of each financial year of the Unit Trust.

22.2 The Trustee shall arrange for the accounts and financial statements of each Class Fund of the Unit Trust for each financial year to be audited by an independent firm of chartered accountants.

23 **Amendment of Trust Deed:**

23.1 Upon ten (10) days written notice to the Unitholders the Trustee shall be entitled by Deed supplemental hereto to amend, modify, alter or add to the provision of this Deed in such manner and to such extent as it may consider to be in the best interests of the Unitholders provided that:

(i) unless the Trustee shall certify in writing that, in its opinion, such amendment, modification, alteration, or addition does not materially prejudice the interests of the then existing Unitholders and does not operate to release the Trustee from any responsibility to Unitholders no amendment, modification, alteration or addition shall be made without the Trustee having first convened a meeting of the Unitholders in accordance with Schedule III hereto and such modification, alteration, or addition shall have been approved by a majority of votes of the Unitholders present at such Meeting:

(ii) that no such amendment, modification, alteration or addition shall impose upon a Unitholder any obligation to make any further payment in respect of his Units or to accept any liability in respect thereof; and

(iii) that no such amendment, modification, alteration or addition shall detract from the current Net Asset Value of the Class Fund of any Class without the unanimous consent in writing of the Unitholders of that Class.

24. **Remuneration and Expenses:**

24.1 The Trustee for the time being shall be entitled to receive remuneration out of the Trust Fund for its services as Trustee hereof by quarterly payment in arrears at the rate and in the manner specified in Schedule II or at such other rate as may be agreed to by the Unitholders and the Trustee.

24.2 The remuneration payable to the Manager shall be payable out of each individual account of each class Fund and be assessed thereon as an annual fee at a percentage of the Net Asset Value of each account on the last Valuation Day in the preceding quarter; such fee shall be pro-rated on a daily basis for periods of less than one quarter.

24.3 All fees, charges and costs of any Auditor, Attorneys-at-Law, Custodian or any other professional (but excluding any sub-custodian) shall be out of the Trust Fund.

24.4 All remuneration and expenses payable in accordance with this Clause shall be deemed to accrue from day to day and shall continue to be payable until the Trust shall be finally wound up or be in course of administration by or under the direction of the Court.

24.5 In the event that the Trustee determines that any amendment be made to the foregoing fee charging arrangements, and to the provisions of Schedule II hereof, the Trustee may, subject to any agreement to the contrary, give notice to the Unitholders in accordance with the Schedule III hereto and such amendment shall take effect on the expiration of the notice period and shall not require the approval of the Unitholders or any majority thereof.

24.6 The Trustee shall also be entitled to be reimbursed for all costs and expenses incurred by it in connection with the Unit Trust including but not limited to all legal and auditing fees, in accordance with the terms of Schedule II hereof.

24.7 On the termination of the Unit Trust, the Trustee shall have the right to charge a reasonable fee on a time spent basis in respect of such termination.

25 **Appointment of New Trustee:**

25.1 The Trustee shall not be entitled to retire voluntarily except upon the appointment and consent to serve of a successor Trustee.

25.2 In the event that the Trustee shall desire to retire, or shall go into voluntary liquidation, or shall be subject to any reconstruction or amalgamation, the Trustee shall be entitled to appoint a successor company resulting from any winding up, reconstruction or amalgamation of the Trustee or any affiliate thereof provided that any such appointee shall be duly qualified to administer the trusts hereof and shall be approved by the Unitholders.

25.3 Every Trustee who shall retire from its position as Trustee of the Unit Trust shall in respect of its period of Trusteeship of the Unit Trust continue to have the benefit of all indemnities, powers and privileges given to the Trustee by this Trust and any Deeds supplemental hereto executed during such period in addition to the indemnities power and privileges given by law or the successor Trustee to a retiring Trustee.

25.4 In any of the following events and upon the due appointment by the Trustee of a successor Trustee approved by the Unitholders, the Trustee shall thereafter cease to be a Trustee:

(i) if the Trustee goes into compulsory liquidation or if a receiver shall be appointed of the undertaking of the Trustee or any part thereof; or

(ii) if by virtue of any action on the part of any judicial or government authority of competent jurisdiction under the laws of the forum for the administration of the trusts of the Unit Trust it shall have been determined that the Trustee has ceased to be authorised to act as the Trustee or to carry out the functions of the Trustee hereunder.

25.5 Whenever a Trustee ceases to be a Trustee it shall be entitled and bound to transfer to the successor Trustee all of the Trust Fund and all records and documents relating to the Unit Trust and shall be entitled to be indemnified and to retain out of the Trust fund all sums due to it from the Unit Trust and all expenses and costs incurred in such transfer.

26. **Termination:**

26.1 The Trust created hereby shall determine either:

(a) on the day on which shall expire the period of eighty years from the date hereof; or

(b) such day (if any) prior to the day specified in sub-paragraph (a) of this clause as the Trustees may in their absolute discretion appoint by Deed.

26.2 Any Class Fund of the Unit Trust may be terminated if the number of Units or aggregate Net Asset Value of the Class Fund shall fall below the minimum number of value, if any, set by the Trustee and if the Trustee shall thereupon determine to terminate the relevant Class of the Unit Trust;

26.3 The Unit Trust shall be terminated on the happening of any of the following events:

(i) If it becomes illegal or, in the opinion of the Trustee, impractical or inadvisable or contrary to the interest of the Unitholders either to continue the Unit Trust or to remove it to another legal jurisdiction.

(ii) If the Trustee shall desire to retire under Clause 25 or if the Trustee shall be placed in compulsory or voluntary liquidation, and the Trustee as provided in Clause 25 shall be unable to appoint or procure the appointment of another person ready to accept the office of Trustee as a successor Trustee;

(iii) If the Trustee shall determine to terminate the Unit Trust on any day earlier than the happening of any other the above events.

26.4 If the Unit Trust or any Class Fund of the Unit Trust shall be terminated under the provisions of this Clause the Trustee shall forthwith give notice of such termination to the Unitholders concerned.

26.5 Upon the Unit Trust being terminated the Trustee shall proceed to realise all Investments comprised in the Trust Fund. Such realisation shall be carried out and completed in such manner and within such period as the Trustee determines.

26.6 Following any such realisation, the Trustee shall from time to time and at such time or times as it shall deem convenient and subject to clause 26.7 below distribute to the Unitholders pro rata to the number of Units held or deemed to be held by them respectively in such amount or amounts as the Trustee shall determine all net cash proceeds derived from the realisation of the Trust Fund and any other cash then forming part thereof and available for the purpose of such distribution.

26.7 The Trustee shall be entitled to retain out of any money in its hands under the provision of this Clause full provision for all remuneration, fees, costs, charges, expenses, claims and demands incurred, made or apprehended by the Trustee in connection with or arising out of the termination of the Trust.

26.8 The provisions of this clause shall apply in relation to the termination of a Class Fund as they apply in relation to termination of the Unit Trust.

27. **General:**

27.1 Fund Assets to be Kept Separate

The Trustees shall maintain the assets of the Trust separate from all other property in their possession.

27.2 Trustee May Compete With Fund

The Trustee and its affiliates may, from time to time, be engaged, for their own account or on behalf of others (including as Trustee, Administrator or Manager of other funds or portfolios) in investment and other activities identical or similar to or competitive with the activities of the Trust or of the Trustee and its affiliates in connection with the Trust. Neither the Trustee nor any of its affiliates shall incur or be under any liability to the Trust, any Unitholder or any other person for by reason of, or as a result of any such engagement or competition or the manner in which they may resolve any conflict of interest or duty arising therefrom.

27.3 Trustee May Hold Units

The Trustee, or any affiliate of the Trustee may be a Unitholder.

27.4 Governing Law

This Declaration of Trust is established under the Laws of [_____] and the rights of all Unitholders and of the Trustee and the construction and effect of each and every provision hereof shall be governed by the laws of [_____] and subject to the exclusive jurisdiction of the Courts thereof.

27.5 Illegality

If any provision of this Deed shall be held invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provision in any other jurisdiction or any other provision of this Deed in any jurisdiction.

27.6 Compliance

The Trustee shall ensure compliance with the provision of the Laws of [_____] and shall do all things necessary to ensure that binding legal effect be given to this Deed.

IN WITNESS WHEREOF the Trustee has hereunto set its hands and Common Seal the day and year first hereinbefore appearing.

SIGNED SEALED and DELIVERED by_____in the presence of:–_____

Witness:
Name:
Address:
Occupation:

SCHEDULE I

Permitted Investments

Permitted Investments

Permitted Investments include, but are not limited to: –

1. Debt obligations of governments, corporations, financial institutions
2. Equity related securities
3. Mortgages
4. Private Placements
5. Real Estate
6. Financial Derivative Products
7. Synthetic securities
8. Foreign exchange
9. Commodities
10. Money-market instruments
11. Any other investments approved by the Trustee's Board of Directors.

The approved list of issuers, and purchase limits, as approved by the Trustee will apply. This may include limits by individual issuers and maximum exposure in any one country.

A copy of the approved list of issuers will be made available to unitholders on request.

SCHEDULE II

A. Terms and Conditions of Issue:

The Terms and conditions of issue shall be as provided in the Trust Deed (as such may be added to varied or amended by the Trustee in its discretion). The terms and conditions attaching to the initial issue shall be as prescribed by the Trustee from time to time in the 'Application Form to Participate in the Trust Fund' but shall always specifically include: –

Method of Payment:

A) Purchase of Units:

Funds will be transferred to the Manager in accordance with the instructions provided on the Application Form submitted to the Trustee.

Funds must be fully cleared in the Manager 's account before units will be purchased on the following Transaction Day.

Funds to be invested must be received by the Manager net of any transfer or associated fees.

B) Sale of Units:

Funds will be available on the next business day following each transaction day.

Funds may be paid to the unit holder in the form of a cheque available at the Trustee's principal office by courier or bank wire transfer. The amount of funds sent will be net of the cost of transfer.

Cost Allowances:

A) Cost allowances referred to in Section 24 will apply as determined by the Trustee in its sole discretion.

Fees and Charges:

The following fees and charges shall be payable out of the assets of the Trust Fund:

(i) Trustee's Fees (not to exceed 5.00% p.a.)
(ii) Legal Fees (as incurred)
(iii) Audit Fees (as incurred)
(iv) Custodian Fees (as agreed)
(v) Such other fees and charges as are applicable to the whole of a Trust Fund and in the opinion of the Trustee are properly payable pro rata by the Unitholders.

The Manager's fees are payable out of the assets of the account of each unitholder at initial rates not exceeding the rates set out below:–

Transaction Charges:

The following initial transaction charges shall apply: –

Purchase Fee – nil

Sale Fee (Per transaction)

Transfers between funds

Unitholders will bear the cost of all bank transfer charges and related fees.

General:

The Trustee may in accordance with the terms of the Trust Deed vary the fees and charges specified in this Schedule II.

The Fund Manager reserves the right to negotiate the investment management fees with any participant.

SCHEDULE III

1. MEETING:

1.1 Meetings of the unitholders or of any class of unitholders may be convened by order of the Manager or the Trustee at any date and time and at any place within [_____] or, if all the unitholders so agree, outside [_____].

2. NOTICE:

2.1 A printed, written or typewritten notice stating the day, hour and place of meeting shall be given by serving such notice on each unitholder, on the Manager and the Trustee and on the auditor of the Trust Fund, not less than twenty-one days nor more than fifty days (in each case exclusive of the day on which the notice is delivered or sent and of the day for which notice is given) before the date of the meeting. Notice of a meeting shall state (a) the nature of that business in sufficient detail to permit the unitholders to form a reasoned judgment thereon, and (b) the text of any resolution to be submitted to the meeting.

2.2 All notices of other meetings and other communications hereunder shall be in writing and shall be deemed duly given if delivered by any of the following methods: (a) personal delivery; (b) facsimile transmission; (c)registered or certified mail, postage prepaid, return receipt requested; or (d) overnight delivery services, at the registered address of each Unitholder and at the office address of the auditors and the Managers.

3. WAIVER OF NOTICE:

3.1 A unitholder and any other person entitled to attend a meeting of unitholders may in any manner waive notice of a meeting of unitholders and attendance of any such person at a meeting of unitholders shall constitute a waiver of notice of the meeting except where such person attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

4. OMISSION OF NOTICE:

4.1 The accidental omission to give notice of a meeting or any irregularity in the notice of any meeting or the non-receipt of any notice by any Unitholder, Trustee, Manager or the auditor of the Company shall not invalidate any resolution passed or any proceedings taken at any meeting of the Unitholders.

5. VOTES:

5.1 Every question submitted to any meeting of unitholders shall be decided by a show of hands unless a Unitholder shall demand a ballot.

5.2 At every meeting, every Unitholder, proxy holder or individual authorised to represent a Unitholder, who is present in person shall have one vote on a show of hands. Upon a ballot, every Unitholder, proxy holder or individual authorised to represent a Unitholder shall, subject to the articles, have one vote for every unit held by the Unitholder.

5.3 At any meeting, unless a ballot is demanded, a declaration by the chairman of the meeting that a resolution has been carried or carried unanimously or by a particular majority or lost or not carried by a particular majority shall be conclusive evidence of the fact.

5.4 If two or more persons hold units jointly, one of those holders present at a meeting of Unitholders may, in the absence of the other, vote the shares; but if two or more of those persons who are present, in person or by proxy, vote, they must vote as one on the shares jointly held by them.

5.5 'Special Resolution' means a resolution:–

(i) passed by a majority of not less than two-thirds of the votes cast by the Unitholders who voted in respect of the resolution, or

(ii) signed by all the Unitholders entitled to vote on the resolution.

6. PROXIES:

6.1 Votes at meetings of Unitholders may be given either personally or by proxy or, in the case of a Unitholder who is a body corporate or association, by an individual authorised by a resolution of the directors or governing body of that body resolution or association to represent it at meeting of Unitholders of the Company and a body corporate or association so represented shall be deemed to be present in person.

6.2 A proxy shall be executed by the Unitholder or his attorney authorised in writing and is valid only at the meeting in respect of which it is given or any adjournment thereof.

6.3 A person appointed by proxy need not be a Unitholder.

6.4 A proxy shall be in the following form:

The undersigned Unitholder of_____hereby appoints_____of_____or failing him_____of_____as the nominee of the undersigned to attend and act for the undersigned and on behalf of the undersigned at the meeting of the Unitholders of the said Unit Trust to be held on the_____day of_____19_____and at any adjournment or adjournments thereof in the same manner, to the same extent and with the same powers as if the undersigned were present at the said meeting or such adjournment or adjournments thereof.

Dated this_____day of_____19__.

Signature of Unitholder_____

7. ADJOURNMENT:

7.1 The chairman of any meeting may with the consent of the meeting adjourn the same from time to time to a fixed time and place and no notice of such adjournment need be given to the Unitholders, unless the meeting is adjourned by one or more adjournments for an aggregate of thirty days or more in which case notice of the adjournment meeting shall be given as for an original meeting.

Any business that might have been brought before or dealt with at the original meeting in accordance with the notice calling the same may be brought before or dealt with at any adjourned meeting for which no notice is required.

8. QUORUM:

8.1 A quorum of Unitholders is present at a meeting of unitholders if at least two (2) Unitholders holding between them a clear majority of units entitled to vote at the meeting, are present in person or by proxy. If there is only one Unitholder, he shall constitute a meeting if present in person or by proxy. If a quorum is present at the opening of any meeting of the Unitholders, the Unitholders present or represented may proceed with the business of the meeting notwithstanding a quorum is not present throughout the meeting. If a quorum is not present within thirty minutes of the time appointed for a meeting of Unitholders, the meeting shall stand adjourned to the same day two weeks thereafter at the same time and place; and, it at the adjourned meeting a quorum is not present within thirty minutes of the appointed time, the Unitholders present constitute a quorum.

APPENDIX 6

THE ASSET PROTECTION TRUST DEED

(date)

Deed of Trust
known as

The Asset Protection Trust Deed

Dated:_____(date)

Between

XX

and

XX

THIS TRUST SETTLEMENT is made on the_____day of_____(date) between XX, of the City of XX, in the Province of XX, XX hereinafter called 'the Settlor') of the one part and XX whose registered office is situate at (hereinafter called 'the Original Trustee') of the other part.

Whereas:

(a) The Settlor is desirous of making the trust hereinafter contained and with that object in view has paid or transferred to the Original Trustee or otherwise placed under its control the property specified in the First Schedule hereto to the intent that it should hold it upon the trusts and in the manner hereinafter declared.

(b) For the purposes of identification this trust shall be known as 'The XXX Trust' (sometimes hereinafter referred to as 'the Trust' or 'this Trust') or by such other name as the Trustee may from time to time in its discretion declare to be the name of this trust.

Now this Deed witnesses as follows:

Part A

1. Proper Law

Subject to the powers conferred on the Trustee by clause 14 and to each and every exercise thereof the Proper Law of this Trust is the law of [_____] notwithstanding that the Trustee may from time to time be resident or domiciled elsewhere than in [_____].

This Trust is settled under the International Trusts Act 1995 of the Laws of [_____] (as amended).

2. Definitions and interpretation

(i) In this Deed the following expressions shall have the following meanings:

'Beneficiaries' means the persons specified in the Second Schedule hereto.

'benefit' shall be construed in its widest possible sense.

'charity' means any organization or institution whether corporate or otherwise established for charitable purposes in accordance with the laws of the jurisdiction wherein it is established and recognized as charitable in the place it is situated, registered, incorporated or established.

'children of the Settlor' means XXXX, all of the City of XX, in the Province of XXX (such place of residence being stated as at the date of this Deed of Trust) and 'child of the Settlor' means anyone of the children of the Settlor.

'deed' means a written instrument executed under seal.

'Excluded Person' means any person resident in [_____].

'Investment' includes any laying out of moneys by acquisition of any property or any interest therein whether or not the same is made with a view to earning income or realizing a profit and includes such property or interest itself and 'invest' has a corresponding meaning.

'Minor' means a person who under the Proper Law or under the law of his domicile has not reached the age of legal capacity.

'Proper Law' means the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Trust be subject.

'Protector' means the person specified in the Third Schedule hereto or the person as may, from time to time, be appointed to replace such person as provided for herein.

'trust' includes any trust created by any settlement, declaration of trust, will, codicil or other instrument under the law of any jurisdiction provided that such trust must expressly or implicitly require by its terms that all property subject to it must be distributed absolutely to and vested indefeasibly in possession in the persons or entities entitled thereunder no later than the end of the Trust Period.

'Trustee' means the Original Trustee or such other trustee from time to time of this Trust.

'Trust Fund' means while and to the extent that the same shall be subject to this Trust:

(a) the said property specified in the First Schedule hereto;
(b) all other money investments or other property which may hereafter be transferred or paid to or into the control of or otherwise vested in and accepted by the Trustee as additions to the Trust Fund;
(c) any accumulations made in pursuance of any power hereinafter contained; and
(d) the property from time to time representing the said property, additions and accumulations.

'Trust Period' means the period from the date of this Deed until the day on which shall expire the period of eighty years from the date hereof.

(ii) Words importing the singular shall include the plural and the masculine gender shall include the feminine and the neuter and vice versa in each case where the context so requires.
(iii) Words importing persons shall include bodies of persons whether corporate or unincorporated.
(iv) Reference to a clause shall be a reference to a clause of this Deed.
(v) The headings in this Deed are for reference only and shall not affect its construction.

3. Renunciation by Beneficiaries

Notwithstanding anything hereinafter contained any of the Beneficiaries shall have the power from time to time by deed delivered to the Trustee to declare that he is no longer to be included among the Beneficiaries and whether in respect of the whole or any part of the Trust Fund and as and from the date of delivery of such deed to the Trustee the Trustee shall be absolutely prohibited from exercising in favour or for the benefit of the person making such declaration or his estate any power or discretion conferred on them either as regards payment, appropriation or application of the whole or any part of the Trust Fund or the income thereof to which such declaration may relate provided always that:

(i) the Trustee shall not be liable in respect of any such payment, appropriation or application which may be made by it before receiving notice of such declaration; and

(ii) where such declaration is expressed to be revocable the same may if permitted by the Proper Law be revoked by deed delivered to the Trustee.

4. Exclusion of and addition of Beneficiaries or other persons

(i) Any person who is a Beneficiary or a member of a class of Beneficiaries named or specified shall immediately cease to be a Beneficiary if that person becomes an Excluded Person.

(ii) The Trustee shall have the power at any time at which there is a Protector (with the prior or simultaneous written consent of the Protector) by deed revocable during the Trust Period or irrevocable to exclude any person from the class of Beneficiaries or wholly or partially exclude any Beneficiary or other person from future benefit under this Trust and thereupon such person shall be excluded accordingly provided that this power shall not be capable of being exercised so as to derogate from any interest to which any person has previously become indefeasibly entitled whether in possession or in reversion or otherwise.

(iii) The Trustee may at any time at which there is a Protector (with the prior or simultaneous written consent of the Protector) by deed add any charity or charities to the class of Beneficiaries and no Beneficiary may prevent any such addition.

5. Trust for Sale

(i) The Trustee shall hold any immovable property for the time being forming part of the Trust Fund upon trust to sell the same with power to postpone the sale thereof for such period as it shall in its discretion think fit and shall hold all other investments or other property from time to time forming part of the Trust Fund upon trust in its discretion either to retain the same in the existing state thereof or at any time to sell, call in and convert into money the same or any part thereof.

(ii) The Trustee shall hold the net proceeds of sale of any investments or other property movable or immovable and any other moneys from time to time forming part of the Trust Fund upon Trust to invest or lay out the same either in or upon any of the investments authorized hereunder with power at a like discretion from time to time to vary or transpose any investments for others of a nature authorized hereunder.

6. Trusts

The Trustee by joining in the execution of this Deed, signifies its acceptance of this Trust and the duties and obligations contained herein and it shall, and hereby agrees to, hold the Trust Fund in trust and administer it upon the following trusts, subject always to the powers and provisions hereinafter contained:

(i) Discretionary Income Interest. The Trustee shall invest and keep invested the Trust Fund. Income of the Trust shall be calculated on a calendar year basis. The Trustee may pay any amount or amounts of income of the Trust Fund to or for the benefit of any one or more of the Beneficiaries at such time or times, in such proportion or proportions, and in such manner as the Trustee, in its absolute discretion, shall think fit. In making any such payment of the income the Trustee may, in its absolute discretion, exclude any one or more of the Beneficiaries. The Trustee shall accumulate any amount or amounts of the income of the Trust Fund not paid to or for the benefit of any one or more of the Beneficiaries within sixty days after the year end of the Trust and shall add such amount or amounts of the income not paid to or for the benefit of any one or more of the Beneficiaries to the capital of the Trust Fund.

(ii) Discretionary Capital Interest. The Trustee may, in its discretion, encroach upon the capital of the Trust Fund and pay or transfer any amount or amounts of the capital of the Trust Fund to or for the benefit of any one or more of the Beneficiaries at such time or times, in such proportion or proportions, and in such manner as the Trustee, in its discretion shall think fit. In making any such encroachment upon the capital of the Trust Fund, the Trustee may, in its absolute discretion, completely exclude any one or more of the Beneficiaries.

(iii) Extent of Encroachment. Notwithstanding the generality of the provisions of clause 6(ii) herein, the Trustee may encroach upon the Trust Fund to such an extent that the Trust Fund is completely used up.

(iv) Power of Appointment During Lifetime of Settlor. During the lifetime of the Settlor, the Trustee shall distribute the Trust Fund or any part thereof to such one or more of the Beneficiaries, on such terms and conditions, either outright or in trust, as the Settlor may from time to time appoint by signed written deed delivered to the Trustee, with such deed specifically referring to and exercising this power of appointment.

(v) Power of Appointment on Death of Settlor. Upon the death of the Settlor, the Trustee shall distribute the Trust Fund or any part thereof to such one or more of the Beneficiaries, on such terms and conditions, either outright or in trust as the Settlor may appoint by a will or codicil (which will or codicil has been admitted to probate in the jurisdiction where the Settlor was domiciled at the time of his death) specifically referring to and exercising this power of appointment.

(vi) Powers of Appointment Limited. Notwithstanding anything else in clauses 6(iv) or 6(v) to the contrary, the powers of appointment set forth in clauses 6(iv) and 6(v) are non-general, limited powers of appointment, and therefore, notwithstanding anything to the contrary herein, such powers of appointment may not be exercised to any extent or in any manner in favour of the Settlor, the Settlor's estate, the Settlor's creditors, or the creditors of the Settlor's estate.

(vii) Notwithstanding anything else in clauses 6(iv) or 6(v) to the contrary, the powers of appointment in clauses 6(iv) and 6(v) may be disregarded by the Trustee if the Settlor is insolvent or the exercise of the power is compelled by a court in the Settlor's domicile or by a trustee in bankruptcy of the Settlor.

(viii) Power of Appointment Not Exercised on Death of Settlor. Upon the death of the Settlor, if the Settlor fails to exercise the power of appointment referred to in clause 6(v) hereof or fails to extend its exercise to the entirety of the Trust Fund, and if XX, the spouse of the Settlor at the date of this Trust, survives the Settlor, the Trust Fund shall be divided among and paid in equal shares to XX and to the children of the Settlor who have survived the Settlor, for their own use absolutely (such that, by way

of example, if XX and three children of the Settlor survive the Settlor, there shall be four such shares); provided however that if any child of the Settlor should predecease the Settlor leaving any issue him or her surviving and alive at the time of the death of the Settlor, then such deceased child of the Settlor shall be considered to have survived the Settlor for the purpose of such division and the share to which such deceased child would have been entitled on the death of the Settlor had such deceased child survived the Settlor shall be paid to the issue of such deceased child in equal shares per stirpes for their own use absolutely. Upon the death of the Settlor, if the Settlor fails to exercise the power of appointment referred to in clause 6(v) hereof or fails to extend its exercise to the entirety of the Trust Fund, and if XX, the spouse of the Settlor at the date of this Trust, has predeceased the Settlor, then the Trust Fund shall be divided among and paid in equal shares to the children of the Settlor who have survived the Settlor, for their own use absolutely; provided however that if any child of the Settlor should predecease the Settlor leaving any issue him or her surviving and alive at the death of the Settlor, then such deceased child of the Settlor shall be considered to have survived the Settlor for the purpose of such division and the share to which such deceased child would have been entitled on the death of the Settlor had such deceased child survived the Settlor shall be paid to the issue of such deceased child in equal shares per stirpes for their own use absolutely.

7. Ultimate Trusts

If at any date (the 'Relevant Date') there are no Beneficiaries who are individuals who are still living and all of the Trust Fund has not yet been disposed of by the Relevant Date, the Trustee shall stand possessed of the Trust Fund upon trust to distribute the Trust Fund to the persons who would have been entitled thereto (and in the shares or amounts and for the interest in and for which such persons respectively would have become so entitled thereto) under the law relating to the distribution of the movable estate of a person dying intestate in force in the Province of Canada at the Relevant Date if the Settlor had died on the Relevant Date (but after the death of any other person dying on the Relevant Date) wholly intestate and domiciled in the Province of Manitoba, Canada without leaving any spouse him surviving and possessed only of an absolute beneficial interest in the net proceeds of sale and conversion of the Trust Fund provided that no benefit shall accrue to an Excluded Person.

8. Manner in which property may be appointed or applied

(i) Any appointment or application of any of the Trust Fund or the income thereof for the benefit of any Beneficiary pursuant to the powers hereinbefore contained may (without prejudice to any other method of appointment or application) provide for or comprise a payment or transfer to the Trustee of any other trust wherever established or existing under which such Beneficiary is interested (provided that only the issue of such Beneficiary and no other person or persons may also be interested thereunder) if the Trustee shall in its discretion consider such payment or transfer to be for the benefit of such Beneficiary, and any such other trust shall be considered a Beneficiary of this Trust.

(ii) For the purpose of the power conferred by clause 8(i) a person shall be deemed to be interested under a trust if any capital or income thereof is to be or is capable of being transferred, paid, applied or appointed to him or for his benefit whether pursuant to the terms of the trust or in consequence of any exercise of any power or discretion conferred on any person by the trust or otherwise.

9. Appointment of Trustee

(i) Subject to clause 16(ii) the Trustee or the personal representative or the liquidator of the Trustee shall have power to appoint a new or additional Trustee of this Trust and any person whether an individual or a body corporate may be appointed and if appointed may act as a new or additional Trustee of this Trust.

(ii) There shall be no requirement that there be more than one Trustee.

(iii) The office of a Trustee shall be ipso facto determined and vacated if such Trustee being an individual shall be found to be a lunatic or of unsound mind or if he shall become subject to any proceedings under any bankruptcy or insolvency laws applicable to him or if such Trustee being a company shall enter into liquidation or dissolution whether compulsory or voluntary (not being merely a voluntary liquidation for the purposes of amalgamation or reconstruction).

10. Liabilities of Trustee

(i) The Trustee shall exercise its power hereunder and carry out its functions as a Trustee honestly and in good faith and shall exercise the degree of care diligence and skill of a reasonable prudent person with comparable experience.

(ii) The Trustee shall be discharged from any further liability in respect of the whole or any part of the Trust Fund which is transferred to any person interested under this Trust or otherwise pursuant to the terms of this Trust.

(iii) In the purported execution of this Trust no Trustee or delegate of a Trustee shall be liable for any loss or loss of profit to the Trust Fund arising in consequence of the failure depreciation or loss of any investments made or retained in good faith or any failure to enhance the value of the Trust Fund or any part thereof or by reason of any act or omission made in good faith or of any other matter or thing except fraud, willful misconduct or gross negligence on the part of the Trustee or delegate who is sought to be made liable and in the case of a corporate Trustee or corporate delegate of a Trustee all references in this clause thereto shall include the officers and employees thereof.

11. Remuneration

(i) Any Trustee who shall be a company shall be entitled to act as a Trustee on its usual standard terms force from time to time including (in addition to reimbursement of such company's proper expenses, costs and other liabilities) the right to remuneration and the incidence thereof and in addition such company or any person connected with such company being a banker, broker, investment adviser or engaged in any other profession, business or trade may without accounting for any resultant profit act in such capacity and perform any service on behalf of the trusts hereof and on the same terms as with a customer.

(ii) Any Trustee or person connected with a Trustee who shall be a solicitor, advocate, attorney or accountant or engaged in any other profession, business or trade shall be entitled to charge, be reimbursed and be paid out of the Trust Fund his usual professional or other charges for work or business done or transacted or time expended by him or his firm or any employee or partner of his in the execution of or otherwise in relation to this Trust including acts which a Trustee not being in that or any profession business or trade could have done.

(iii) Any Trustee or person connected with a Trustee shall be entitled to retain any commission which would or may become payable to him notwithstanding that such

commission is payable as a direct or indirect result of any dealing with property which is or may become subject to the trusts hereof.

(iv) Nothing in this Trust shall prevent the Trustee or any person connected with the Trustee from contracting or entering into any financial, banking or other transaction with the Trustee or any company or body any of whose shares or securities form part of the Trust Fund or from being interested in any such contract or transaction and the Trustee shall not be liable to account to any person interested under this Trust for any profit or benefit made or derived by the Trustee thereby or in connection therewith.

12. Powers and immunities of Trustee

(i) The Trustee shall in relation to the Trust property have all the same powers as a natural person acting as the beneficial owner of such property and without prejudice thereto and to all statutory powers and immunities shall have the powers and immunities set out herein without being limited by any specific powers expressed herein provided that the Trustee shall not exercise any of its powers so as to conflict with its fiduciary duties, or with the beneficial provisions of this Trust or to infringe any restrictions expressly imposed herein upon the exercise of any powers.

(ii) Without prejudice to the generality of the provisions of the foregoing clause 12(i) and subject thereto the Trustee in exercising any of the powers vested in it in favour of any particular person may ignore entirely the interests of any other person interested under this Trust and in particular (but without prejudice to the generality of the foregoing) no appointment, advancement or application made in exercise of any power shall be invalid on the grounds that:

(a) an insubstantial, illusory or nominal share is appointed or advanced to or applied for any objects of such power or left unappointed, unadvanced or unapplied; or

(b) any objects of such power are thereby altogether excluded; but every such appointment, advancement or application shall be valid notwithstanding that any objects of the power are not thereby or in default of appointment, advancement or application to take any share in the Trust Fund.

13. Variation and rectification

The Trustee shall have power from time to time by deed to rectify any manifest errors in this Trust or to revoke or vary any of the provisions of Part B hereof or to add any administrative provisions thereto in such manner in all respects as the Trustee may think fit, provided such action shall not conflict with its fiduciary duties, or with the beneficial provisions of this Trust, or otherwise infringe any restrictions otherwise expressly imposed herein upon the exercise of its powers hereunder.

14. Change of Proper Law

Notwithstanding anything contained in this Trust the Trustee may from time to time by deed declare that the Proper Law of this Trust shall be the law of some other place in any part of the world under which the terms of this Trust shall be capable of taking effect and such law shall thereupon become the Proper Law of this Trust but subject to the power conferred by this clause and until any further declaration be made under such power provided always that so often as any such declaration as aforesaid shall be made the Trustee shall be at liberty to make such consequential alterations or additions in or to the trusts, powers and provisions of this Trust as the Trustee may consider necessary or desirable to ensure that the trusts, powers and provisions of this Trust shall (mutatis mutandis) be as valid and effective as they are under the law of [_____].

15. Declaration of end of Trust Period

The Trustee may by deed revocable or irrevocable at any time declare that a day earlier than the day mentioned in the definition of the Trust Period in clause 2 but not earlier than the date of such deed shall be the date of expiration of the Trust Period.

16. Provisions relating to Protector

(i) The first Protector shall be the person specified in the Third Schedule hereto of this Deed.

(ii) The Protector shall have the power by notice in writing to appoint one or more other persons or corporations (wherever resident) to be an additional Trustee hereof or to fill any vacancy in the office of Trustee and to remove any Trustee provided that such power to remove any Trustee shall not be exercised unless there is a remaining Trustee or unless by such notice the Protector shall also appoint a replacement Trustee. Upon receipt of such notice by the Trustee the Trustee being removed shall cease to be a Trustee hereof to all intents and purposes except as to acts and deeds necessary for the proper vesting of the Trust Fund in the continuing or new Trustee or Trustees or otherwise as the case may require.

(iii) To the extent allowed by the Proper Law of the Trust, the Protector shall represent all beneficiaries who are minors, or beneficiaries not having legal capacity, or beneficiaries who, after the best reasonable endeavours of the Trustee, are unable to be contacted (a 'Represented Beneficiary'). The Protector may, on behalf of a Represented Beneficiary, consent to or ratify any act or omission on the part of a Trustee. Every consent or ratification provided shall be deemed to be the consent or ratification of the Represented Beneficiary to that act or omission;

(iv) In addition to the powers specifically conferred on the Protector by this Trust the Protector shall have the power on reasonable notice to request and to obtain any and all information and accounts from the Trustee pertaining to the Trust and Trust Fund. The Protector shall have the power to require that the Trustee have the accounts of the Trust Fund audited at the expense of the Trust Fund;

(v) The Protector may from time to time by notice to the Trustee (a memorandum of which shall be endorsed on or permanently attached to this Deed) declare (either generally or in relation to any particular act or acts and either permanently or for such period as shall be specified in the notice) that any act or acts herein declared to require the giving of notice by the Trustee to the Protector shall not require the giving of such notice and the said notice shall be effective according to its terms.

(vi) If and whenever and so long as there is no Protector capable of acting a memorandum to that effect shall be endorsed on or permanently attached to this Deed and all the provisions of this Deed (other than this clause, clause 4, clause 17 and clause 38) shall be read and have effect as if all references to the Protector were omitted.

(vii) The Protector shall owe no fiduciary duty to the Beneficiaries. The Protector shall not be liable for any loss to the Trust Fund or any of the Beneficiaries or any person who may at any time have been a Beneficiary arising either directly or indirectly from any act or omission in the professed execution or non-execution or exercise or non-exercise of the powers and discretions hereby or by law conferred upon the Protector unless due to the fraud or wilful misconduct of the Protector (or in the case of a corporate Protector of any director, officer or employee of the Protector) and without limiting the generality of the foregoing the Protector shall not be liable for any mistake or omission made in good faith. The Protector may take as correct such accounts as may be furnished to it and shall not be obliged to verify the same. The Protector shall

be indemnified out of the Trust Fund against all losses, liabilities, claims, demands, actions, damages, costs and expenses incurred by the Protector in connection with this settlement except those resulting from the fraud or wilful misconduct of the Protector (or in the case of a corporate Protector of any director, officer or employee of the Protector) and shall have a charge over the Trust Fund in respect thereof such charge to take precedence over all beneficial interests in or over the Trust Fund.

(viii) The Protector shall be entitled to charge and be paid all usual professional and other charges for business done and time spent and services rendered by it and expenses incurred by it in the execution of its position and of its powers hereunder whether in the ordinary course of its business or not and although not of a nature requiring the employment of a solicitor, accountant or other professional person.

17. Change of Protector

(i) A new Protector shall be appointed whenever the Protector for the time being (being an individual) dies or is desirous of being discharged from the position of Protector or (being a company) is put into liquidation (either voluntary or compulsory) or otherwise ceases to exist or (in either case) signs a notice to the effect that it desires to be discharged from the position of Protector or is removed from its position in accordance with this clause.

(ii) Whenever occasion arises for appointing a new Protector, such new Protector shall be appointed by deed by the Settlor and provided to the Trustee and the same shall be effective according to its terms when the deed effecting the same is received by the Trustee who shall cause a memorandum of such appointment to be endorsed on this Deed.

(iii) If at any time there is for a period of six months no Protector, the Trustee shall from the expiration of that period and unless and until a Protector is appointed under the provisions of sub-clause (ii) of this clause have power itself to appoint a person other than the Trustee to be the Protector.

(iv) If for any reason there is no Protector who has been appointed during any period of time, then during such period of time the trusts hereby created shall be administered without any Protector.

17A. Accounting

The Trustee shall at all times prepare and maintain proper accounts of the affairs of the Trust Fund. The financial statements of the Trust Fund shall be prepared on a calendar year basis. At the request of the Protector at any time or times, the Trustee shall do all things necessary or advisable to pass such accounts before a judge or official of the court of competent jurisdiction and to provide the Protector such information as the Protector may request regarding such passing of accounts.

17B. Spendthrift Provision

No Beneficiary hereunder shall have any right, power, or authority to sell, assign, pledge, mortgage or in any other manner to encumber, alienate, anticipate, or impair all or any part of his interest in the Trust Fund. The beneficial and legal interest in, and the capital and income of, the Trust Fund shall be free from interference or control of any creditor of any Beneficiary and shall not be subject to the claims of any such creditor, including claims for the payment of alimony or the like, nor liable to attachment, execution, bankruptcy, or any other legal or equitable process. No creditor of any Beneficiary shall be entitled to obtain an order for attachment of the Trust Fund either by way of execution, in bankruptcy proceedings or otherwise.

17C. Fraudulent Transfers

To the extent that, under the Proper Law of the Trust, it is determined in a final, non-appealable order, that a transfer of assets to the Trust is fraudulent as to a particular creditor, then the value of such assets (not including any income or gain on such assets, and not including any other assets) shall be held for the exclusive benefit of such creditor, it being the intention of the Settlor not to defraud any of the Settlor's creditors.

17D. Sovereign Risk

Any Trustee hereof shall automatically cease to be a Trustee hereof on the happening of any of the following events within the jurisdiction, where such Trustee is incorporated (in the case of a corporate Trustee) or resident (in the case of a natural person), that is to say:

(a) the invasion of such territory by military forces;

(b) the enactment of any law or the taking of any action by or on the part of any governmental authority agency or officer of or within the said jurisdiction the aim or purpose or effect of which is or would be if such Trustee had sole control of the assets comprising the Trust Fund:

  (i) the acquisition, expropriation or confiscation of any of the assets comprising the Trust Fund or any part thereof;

  (ii) to jeopardize or interfere with or hamper the free exercise by such Trustee of its administrative or executive functions in respect of the trusts herein or the Trust Fund or its discretion in respect thereof;

  (iii) the restriction, suspension, abrogation, withdrawal, cancellation or rescission of any exemption, relief or contract in relation to the trusts hereby created or the Trust Fund or any part thereof whether in respect of exchange or currency control or any other matter;

  (iv) to levy any tax or duty on the capital of the Trust Fund in excess of five percent (5%) thereof;

  (v) to levy any tax or charge or fee on the income of the Trust Fund or any part thereof in excess of five percent (5%) per annum thereof;

(c) the nationalization or attempted nationalization of the Trustee or the intervention in its affairs by a government official or government body or agency.

18. Irrevocability

The Trust hereby created shall be irrevocable. Notwithstanding anything to the contrary herein contained, the Settlor shall not have the power to vest or re-invest in himself title to all or any of the capital or of the income of the Trust Fund or any accrued and unpaid income thereon and may not revoke, vary or amend this Trust or any of the trust powers and provisions herein contained.

Part B—Powers of Trustee

19. General investment power

Any monies requiring investment hereunder may be invested in or upon any such investments of whatsoever nature and wheresoever situate and whether producing income or not (including the purchase of any immovable or movable property whatsoever or any interest therein) as the Trustee shall in its discretion think fit without being limited by any specific powers expressed herein.

20. Power to acquire property for occupation use or enjoyment

The Trustee may purchase or otherwise acquire, improve, repair, replace, build, rebuild, demolish, decorate, furnish or equip any immovable or movable property of whatsoever nature and wheresoever situate for occupation, use or enjoyment by or of any person.

21. No duty to balance or diversify investments

The Trustee shall not be bound to maintain a balance between income and capital nor shall it be under any obligation to diversify the investments in the Trust Fund.

22. No duty to oversee companies

If the Trust Fund shall include any shares or other interests in a company the ownership of which gives to the Trustee the right in any circumstances to control the affairs of the company or of any of its subsidiaries the Trustee shall be under no liability or duty to appoint any representative to the Board of the said company or of any of its subsidiaries and further shall have no responsibility to enquire into oversee or take part in the management or affairs or business of the company or any of its subsidiaries.

23. Power to retain family property

The Trustee may accept acquire or retain within the Trust indefinitely all and any property contributed or introduced by or acquired from any Settlor of the Trust Fund or any part thereof or any member of his family notwithstanding that such property represents the whole or a substantial part of the Trust Fund and notwithstanding that the same may be shares, stock or other securities relating to companies engaged or interested in speculative or trading activities and the Trustee shall bear no liability as a result of any such acceptance, acquisition or retention.

24. Power to permit persons to use and enjoy property

The Trustee may permit any person to occupy or reside in or upon or have the use and enjoyment of any immovable or movable property (as the case may be) for the time being held upon the Trusts hereof for such periods and upon such terms and conditions as the Trustee shall in its discretion think fit (including without prejudice to the generality of the foregoing conditions as to payment of rent, rates, taxes and other expenses and outgoings and as to insurance and repair and decoration).

25. Power to lend or hire out property

The Trustee may lend, let or hire any money or other property to any person (whether or not being a person interested under this Trust) upon such terms and for such periods as the Trustee shall in its discretion think fit and where any money or other property is so lent let or hired the Trustee shall not be responsible for any loss of or damage to the same howsoever incurred and where any money or other property is lent, let or hired to a person interested under this Trust who dies before repaying or returning the same the Trustee shall have the power to waive its right to the repayment or return thereof.

26. Power of appropriation

The Trustee may at any time in its discretion appropriate any part of the Trust Fund in its then actual state and condition in or towards satisfaction of the whole or any part of any share or interest therein which may become absolutely vested in any person and so that

any appropriation so made shall be final and binding on all persons interested or who may become interested under the trusts thereof.

27. Power to value the Trust Fund

Upon and for the purpose of any distribution or appropriation of the Trust Fund or any part thereof the Trustee may at its discretion place such value on the Trust Fund or any property comprising the Trust Fund as the Trustee shall think fit and any such valuation made in good faith shall be absolutely final and binding and further upon any such distribution or appropriation may determine to whom specified assets shall be given and may distribute the same subject to the payment of such amounts as may be necessary to adjust the shares of the persons interested under this Trust.

28. Power to determine whether moneys are capital or income

The Trustee may determine as the Trustee shall in its discretion think fit and the law may permit whether any moneys for the purposes of this Trust be considered as capital or income and whether out of the capital or income any taxes, expenses, outgoings or losses shall or ought to be paid or borne but unless the Trustee shall otherwise determine all dividends and other income received by the Trustee shall be treated as income at the date of receipt whether or not such dividends or other income shall have been earned wholly or partially in respect of a period prior to the date of receipt.

29. Power to pay taxes

In the event of any probate, succession, estate or other duties or fees or of any taxes upon capital, income or wealth or of any other taxes of whatsoever nature and wheresoever arising (including without prejudice to the generality of the foregoing any interest or penalty chargeable thereon) becoming payable in any part of the world in respect of the Trust Fund or any part thereof or in respect of any property transferred by or to or under the control of the Trustee or any person interested under this Trust the Trustee may pay all or any part of such duties fees, taxes, interest and penalties out of the Trust Fund and shall have entire discretion as to the time and manner in which the said duties, fees, taxes, interest and penalties shall be paid (whether or not any such payment shall be capable of being enforced by law) and no person interested under this Trust shall be entitled to make any claim whatsoever against the Trustee by reason of it making such payment.

30. Power to employ agents

The Trustee may employ and pay at the expense of the Trust Fund any agent in any part of the world other than the Settlor and whether a solicitor, advocate, attorney, banker, accountant, stock-broker or other agent to transact any business or do any act required to be transacted or done in the execution of the trusts hereof including the receipt and payment of money and the execution of documents.

31. Power to effect life insurance

The Trustee may effect any policies of insurance upon the life of any person (subject to the Trustee having an insurable interest therein) and may apply the whole or any part of the Trust Fund or the income thereof in the payment of any premiums for effecting or maintaining any such policies and may maintain, surrender, exchange, convert, exercise any option under or otherwise deal with any such policies as if the Trustee was absolutely and beneficially entitled thereto.

32. Power to purchase annuities

The Trustee may apply the whole or any part of the Trust Fund or the income thereof for the purchase of annuities.

33. Power to form companies

The Trustee may at any time and in any part of the world and either alone or jointly with any other person form or incorporate or cause to be formed or incorporated any company or corporation aggregate whether or not with limited liability and with such objects, powers, rules, articles and regulations as the Trustee shall in its discretion think fit and may vary or amend any of such objects, powers, rules, articles and regulations or if the Trustee shall think fit as aforesaid may effect the reconstruction of any such company or corporation or its amalgamation with some other body or may put it into liquidation.

34. Power to trade and carry on business

The Trustee may trade or carry on business either alone or in partnership or in other association of any nature with any persons either within or without the jurisdiction of the Proper Law.

35. Power to accept further property

The Trustee may accept and hold in trust as additions to the Trust Fund at any time and from time to time any further property gifted to the Trust by the Settlor or any other person, corporation, or entity, either inter vivos or by will.

36. Power to insure

The Trustee may insure against any loss or damage from any peril, any property for the time being forming part of the Trust Fund for any amount and to pay the premiums due on account thereof out of the income or capital of the Trust Fund as the Trustee shall think fit.

37. Power to enter into contracts and incur obligations

The Trustee may give all such undertakings and enter into such contracts and incur all such obligations relating to the Trust Fund or any part thereof as the Trustee shall in its discretion think fit whether or not such undertakings contracts or obligations extend or may extend until after the termination of this Trust.

38. Power to create other Trusts or Settlements

Notwithstanding any of the trust powers and provisions herein, at any time at which there is a Protector, provided the prior written consent of such Protector is first obtained, the Trustee may, in its discretion, from time to time and at any time or times, transfer and convey the whole or any share, portion, part or parts of the Trust Fund, save and except any such share, portion, part or parts thereof which shall be indefeasibly vested in possession in one or more of the Beneficiaries, to any other trust whether established under or pursuant to the laws of XX, or any other jurisdiction whatsoever, to be held by the trustee or trustees of such other trust, with and subject to the powers and provisions of such other trust or settlement, provided that the Beneficiaries of this Trust as at the date of such transfer shall be the sole beneficiaries of such other trust at all times. Upon such transfer being made, the trusts herein declared concerning the property comprised in such transfer

shall cease and determine and the said property shall for all purposes be subject to the trusts, powers and provisions contained in such other trust.

39. Power to give warranties

The Trustee may give or enter into any indemnity, warranty, guarantee, undertaking or covenant or enter into any type of agreement (including any agreement for payment on deferred terms or according to a specified formula) that it shall in its discretion think fit relating to the transfer or sale of a business or private company shareholding held or owned for the time being by the Trustee whether relating to the business or company itself its assets, liabilities, shares or employees or any other aspect of the business or company in favour of any transferee purchaser or other relevant party and including any limitation or restriction on value or otherwise as the Trustee shall in its discretion think fit.

40. Power to compromise rights

The Trustee may enter into any compromise or arrangement with respect to all or any of its rights as debenture holders, debenture stockholders, creditors, stockholders or shareholders of any company (whether in connection with a scheme of reconstruction or amalgamation or otherwise) and accept in or towards satisfaction of all or any of such rights such consideration as it shall in its discretion think fit whether in the form of cash or options or debentures or debenture stock, stock, shares, obligations or securities of the same or of any other companies or in any other form whatsoever.

41. Conversion of companies into unlimited companies

The Trustee may consent to and vote in favour of any resolution for the conversion of any company whose shares or securities are comprised in the Trust Fund into an unlimited company if the Trustee shall in its discretion think fit notwithstanding that the Trustee may thereby assume responsibility for the debts and liabilities of such company.

42. Winding up dissolution and liquidation of companies

The Trustee may promote or concur in the winding up dissolution or liquidation of any company in which it is interested as a holder of shares or other securities and accept in satisfaction of all or any of its rights therein a distribution in specie of the assets of any such company and shall have power thereafter to hold and carry on business with such assets either alone or in conjunction with any other person whatsoever and wheresoever.

43. Exercise of voting rights

The Trustee may exercise all voting rights appertaining to any investments forming part of the Trust Fund in as full free and absolute manner as if it was absolute owner of such investments.

44. Power to act as directors and employees of companies

The Trustee may act as director or other officer or employee of any company in which any part of the Trust Fund may be invested either within or without the jurisdiction of the Proper Law and may retain any fees or other remuneration received in respect of any such directorship, office or employment notwithstanding that it is held by virtue of votes attaching to the Trustee holding any shares or stock in such company.

45. Power to use nominees

At any time at which there is a Protector, provided the prior written consent of such Protector is first obtained, the Trustee may invest or hold or allow to remain in the name or under the control of any person or corporation as nominee of the Trustee the whole or such part of the Trust Fund as the Trustee shall in its discretion think fit.

46. Power to employ investment advisors

The Trustee may appoint or employ investment advisers and managers and may delegate to any such advisers or managers (for such periods to such extent and generally on such terms and in such manner as the Trustee may from time to time think fit) all or any of the Trustee's powers and discretions with regard to making, retaining, varying or transposing investments.

47. Power to give proxies and powers of attorney

At any time that there is a Protector, provided that the written consent of the Protector is first obtained, the Trustee may give proxies and powers of attorney other than to the Settlor or spouse of the Settlor (with or without power of substitution) for voting or acting on behalf of the Trustee in relation to the Trust Fund or any part thereof.

48. Power to transfer Trust property to any company

The Trustee may sell or transfer to any company the Trust Fund or any part thereof in consideration for the issue to the Trustee of shares, stock, debentures or debenture stock or the payment of cash or otherwise whether the same be issued transferred or payable immediately or by instalments and any such shares, stock, debentures or debenture stock, cash or other property whatsoever received by the Trustee in consideration for such transfer shall be held by it as forming part of the capital of the Trust Fund.

49. Powers in relation to immovable property

(i) Where the Trust Fund for the time being includes any real or immovable property:

(a) the Trustee shall in relation to such property have all the powers of granting, entering into and accepting surrenders of leases and tenancies, mortgages, charges, easements, restrictive covenants, options, licences and other rights of any nature and for any term and subject to any conditions and for any consideration whatsoever as the Trustee shall in its discretion think fit and generally all the powers of disposition and management of a single absolute beneficial owner of land;

(b) the Trustee shall not be bound to see nor be liable or accountable for omitting or neglecting to see to the repair or insurance of any buildings on such property or any part thereof or to the payment of any outgoings in respect thereof but may repair and insure any such buildings in such manner and to such extent as it shall in its discretion think fit and pay out of the Trust Fund or the income thereof the costs of all such repairs and of effecting and keeping up any such insurance and any such outgoings as aforesaid and in the case of payments out of the income of the Trust Fund in priority to any other trusts affecting the same income.

50. Disclosure

(i) Save as required by law and subject to an order of any competent court the Trustee shall not be bound to disclose to any person any document or other matter relating to this Trust and in particular but without limiting the foregoing the Trustee shall not be bound to notify any person that he has an interest under this Trust.

(ii) The Trustee may make such disclosures concerning this Trust or any shares or other securities held by or on behalf of this Trust including without limitation disclosure of any direct or indirect beneficial interests therein and of any dealings therein as may be properly required by any competent authority or person whether or not such requirements shall have the force of law in the jurisdiction of the Proper Law and whether or not such disclosure may be enforced upon the Trustee it being expressly provided without prejudice to the generality of the foregoing that this power shall include any disclosure required under any legislation regulating transactions in securities and any rules of any stock exchange or regulated market or authority in any place in which the Trust Fund or any part thereof or any asset held directly or indirectly therefore is situate from time to time. The Trustee may in addition make disclosure concerning this Trust to any taxing authority if in the opinion of the Trustee reached in good faith such disclosure is required by a law to which the Trustee is subject.

51. Payments to persons not of full capacity

Where the Trustee is authorized or required to pay, transfer or apply any income, moneys or other property to or for the benefit of any person who is a minor or otherwise not of full capacity the Trustee may pay or transfer the same to any parent, guardian or curator of such person without seeing to the application thereof or apply the same in such manner as may be directed in writing by such parent, guardian or curator and the receipt of such parent, guardian or curator shall be a sufficient discharge to the Trustee for any income, moneys or other property so paid transferred or applied and in the event that any such person has under the law of his domicile reached the age of legal capacity the Trustee may pay or transfer the same to such person or apply the same in such manner as may be directed in writing by such person and the receipt of such person shall be a sufficient discharge to the Trustee for any income moneys or other property so paid transferred or applied.

52. Power to institute and defend legal proceedings

The Trustee may institute and defend proceedings at law and may proceed to the final end and determination thereof or compromise the same as the Trustee shall consider advisable.

53. Indemnities to Former Trustee

The Trustee shall have power by instrument at any time to indemnify to the extent permitted by law any person who has at any time been Trustee of this Trust (hereinafter called 'Former Trustee') and the respective heirs, successors, personal representatives and estates of such Former Trustee and the respective officers and employees of such Former Trustee and the respective heirs, successors, personal representatives and estates of such officers and employees and each of them (hereinafter together called 'the Indemnitees') from and against all and any actions, proceedings, accounts, costs, claims and demands which may be brought or made in connection with the trusts of this Trust or in any way relating thereto or to the Trust funds comprised herein from time to time including without prejudice to the generality of the foregoing any taxes, duties, or other fiscal liabilities whether or not then existing payable in any part of the world on or in respect of the Trust Fund or any part thereof or in respect of any property transferred by or to or under the control of the Trustee or any person interested under this Trust and whether or not in respect of a period or event falling wholly or partly after or prior to the date thereof and whether the same shall be enforceable in law or not provided always that there shall be excluded from such indemnity any liability of any of the Indemnitees in respect of which such Indemnitees would not have

been entitled to reimbursement or payment out of the said Trust Fund if such Former Trustee had remained Trustee of this Trust and to assign, pledge, charge, mortgage, hypothecate or otherwise encumber the whole or any part of the Trust Fund as security for such indemnity in such manner as the Trustee shall in its discretion think fit.

54. Expenses of the administration and management of the Trust

(i) The Trustee shall keep accurate accounts of its Trusteeship and may have them audited annually at the expense of the Trust Fund or the income thereof as the Trustee shall determine by a firm of chartered accountants selected by the Trustee.

(ii) The expenses in connection with the preparation, establishment and administration of this Trust including without prejudice to the generality of the foregoing the remuneration and charge of the Trustee herein provided for and of the investment and re-investment of any part of the Trust Fund and the collection of income and other sums derivable therefrom may be paid out of the Trust Fund and may be charged against capital or income or partly out of one and partly out of the other at the discretion of the Trustee.

(iii) Any Trustee may receive reimbursement from the Trust Fund of any expenses, costs and other liabilities including without prejudice to the generality of the foregoing liabilities to taxation incurred by him purely by reason of his duties relating to this Trust.

55. Majority decisions

If at any time there is more than one Trustee hereof, every decision resolution or exercise of a power or discretion required to be or capable of being made by the Trustees shall be validly made if so made by a majority in number of the Trustees and any instrument executed in pursuance of any such decision resolution or exercise shall have binding legal effect (as if executed by all the Trustees) if it shall be executed by a majority in number of Trustees but not so as to render any of the Trustees liable for any act or thing done or omitted without his consent by reason of the provisions of this clause or for any act in which he joins for conformity only.

56. Acts of corporate Trustee

Every Trustee who is a corporation or company may exercise or concur in exercising any discretion or power conferred on the Trustee by a resolution of such corporation or company or by a resolution of its Board of Directors or governing body or may delegate the right and power to exercise or concur in exercising any such discretion or power to one or more members of its Board of Directors or governing body or one or more of its officers or employees duly authorised for that purpose.

57. General

(i) The Trustee shall maintain the assets of the Trust separate from all other property in its possession whether held by it absolutely or in trust.

(ii) The Trustee and its affiliates may, from time to time, be engaged, for its own account or on behalf of others (including as trustee administrator or manager of other funds or portfolios) in investment and other activities identical or similar to or competitive with the activities of the Trust or of the Trustee and its affiliates in connection with the Trust. Neither the Trustee nor any of its affiliates shall incur or be under any liability to the Trust, any Beneficiary or any other person, for, by reason of, or as a result of any engagement or competition or the manner in which it may resolve any conflict of interest or duty arising therefrom.

(iii) If any provision of this Deed shall be invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provision in any other jurisdiction or any other provision of this Deed in any jurisdiction.

(iv) This Settlement of Trust shall be binding on and enure to the heirs, successors and permitted assigns of and to the respective parties hereto.

In witness whereof this Deed for THE XXX TRUST has been duly executed in three (3) counterparts any of which may be considered as the original.

Signed by the said _____)
On the_____day of _____ (date)_____
In the presence of: _____) Name
_____

The common seal of XXX)
XXX) (affix seal here)
XXX was hereunto)
Affixed by:)
_____)
and)
_____)
both duly authorized officers of the)
said Company in the presence of:)
_____)
Witness) For and on behalf of XX
) XX, Trustee

The First Schedule hereinbefore referred to:

PROPERTY

[TO BE COMPLETED]

The Second Schedule hereinbefore referred to:

Name	Address	Date of Birth.
XXXXX	[TO BE COMPLETED]	

(The grandchildren)
as may be born after the date of this Deed of Trust

The Third Schedule hereinbefore referred to:

Name	Address	Date of Birth
PROTECTOR	[TO BE COMPLETED]	

APPENDIX 7

DECLARATION OF TIME OF DIVISION, TRUSTS, AND APPOINTMENTS

made this (date)

XXX
a domestic bank corporation formed under the laws of [_____],
being resident and domiciled in [_____], with an office at
XXX
[_____], W.I.

Trustee

WHEREAS pursuant to a Trust Agreement (the 'Trust Agreement') made on the (date), between XXX as Settlor and XXX as Trustee, a trust was established for the benefit of the Beneficiaries named therein, which trust is known as the XXX Family Trust (the 'Trust');

AND WHEREAS XXX Limited (the 'Trustee') is the sole Trustee of the Trust;

AND WHEREAS pursuant to its terms, the Trust Agreement was amended by Deed of Amendment of Trust Deed (1st Amendment) made the (date); Deed of Appointment of Trustee, Retirement of Trustee and Indemnity (2nd Amendment) made the (date); and Deed of Appointment of Trustee, Retirement of Trustee and Indemnity (3rd Amendment) made the (date), and was restated by an instrument in writing dated (date) and the document as so amended and restated is hereafter referred to as the 'Restated Trust Deed';

AND WHEREAS paragraph 3 of the Restated Trust Deed provides that the Time of Division shall be the earliest of October 1, 2013 or such date as the Trustee may in its absolute discretion determine by an instrument in writing signed by it and delivered in counterparts to every adult Beneficiary living at the time of signing such instrument;

AND WHEREAS paragraph 5 of the Restated Trust Deed provides for distribution at the Time of Division to (1) XXX, or her estate, as to one half of the Trust Fund and (2) as to such of XXX, XXX, XXX and XXX, in such shares as the Trustee may determine in its uncontrolled discretion, as to the remaining half of the Trust Fund;

AND WHEREAS XXX died on (date);

AND WHEREAS XXX, XXX, XXX and XXX are alive at the time of the Declaration herein and it is anticipated that they will be alive at the Time of Division;

AND WHEREAS paragraph 6 of the Restated Trust Deed provides for appointment by the Trustee, at the Time of Division, of any share in the Trust Fund to another trust on such further conditions as appear therein;

AND WHEREAS the Trustee is desirous of determining the Time of Division, declaring two new Trusts for the Beneficiaries at Time of Division on substantially the same terms as the Restated Trust Deed, and appointing and distributing the Assets of the Trust Fund to such trusts:

NOW THEREFORE witnesseth as follows:

1. All capitalized terms shall have the meaning defined in the Restated Trust Deed.
2. The Trustee hereby declares that the Time of Division is determined as (time) on (date).
3. Pursuant to paragraph 6 of the Restated Trust Deed, the Trustee hereby establishes by declaration a trust for the benefit of the Estate of XXX (the 'XXX Estate Trust'), as a

domestic trust under the laws of [_____], to which one-half of the Assets of the Trust Fund shall be appointed at Time of Division, on the terms as set forth in the Trust Declaration, as signed and initialed by the Trustee in identification thereof, the Trustee being of the opinion that the XXX Estate Trust is the sole person beneficially interested in such share, and that the terms of the XXX Estate Trust are substantially the same mutatis mutandis as the terms of the Restated Trust Deed applicable to the Trust Fund prior to the time of such appointment.

4. Pursuant to paragraph 6 of the Restated Trust Deed, the Trustee hereby establishes by declaration a trust for the benefit of XXX, XXX, XXX, and XXX (the 'XXX Descendants Trust'), as a domestic trust under the laws of [_____], which shall be named the XXX Trust, to which one-half of the Assets of the Trust Fund shall be appointed at Time of Division, on the Terms set forth in the Trust Declaration, as signed and initialed by the Trustee in identification thereof, the Trustee being of the opinion that XXX, XXX, XXX, and XXX are the sole persons beneficially interested in such share, and that the terms of the XXX Descendants Trust are substantially the same mutatis mutandis as the terms of the Restated Trust Deed applicable to the Trust Fund prior to the time of such appointment.
5. At the Time of Division, the Trustee shall distribute the Assets of the Trust Fund into two equal shares as follows:

   To the Trustee of the XXX Estate Trust one-half of the Trust Fund, which without limitation includes:

   (a) title to shares of XXX, which corporation holds (address property);
   (b) one half of all of the capital of the Trust Fund at Time of Division including one-half of all amounts in the capital bank account;
   (c) one half of the all the income of the Trust Fund at Time of Division, subject to adjustment for (1) the value of shares in (a) above, and (2) any amount necessary for the Trustee to hold back to satisfy the foreseeable liabilities of the XXX Family Trust; and
   (d) one-half in value of any other Assets in the Trust Fund as at the Time of Division.

   To the Trustee of the XXX Descendants Trust one-half of the Trust Fund which without limitation includes:

   (e) one half of all of the capital of the Trust Fund at Time of Division including one-half of all amounts in the capital bank account;
   (f) one half of the all the income of the Trust Fund at Time of Division, subject to adjustment for (1) the value of shares in (a) above, and (2) any amount necessary for the Trustee to hold back to satisfy the foreseeable liabilities of the XXX Family Trust;
   (g) one-half in value of any other Assets in the Trust Fund as at the Time of Division.

6. The Trustee declares that upon satisfaction of all liabilities from Trust Fund reserved for such purpose it shall distribute any balance then remaining to the new trusts in equal shares.
7. Notice of the Time of Division, the appointments, the declaration of trust, and the distributions hereunder shall be given this day by the delivery of a copy of this document to each of the Adult Beneficiaries by the following methods at the following addresses:

By telecopier with a copy sent by mail to:
The Estate of XXX
Telephone: XXX
Telecopier XXX
XXX (name)
(address)
Telephone XXX
Telecopier XXX
XXX
Telephone XXX
Telecopier XXX
XXX
Telephone XXX
Telecopier XXX
XXX
Telephone: XXX
Telecopier XXX
with a copy to:
XXX
Attention: XXX
Telephone: XXX
Telecopier: XXX

Declared this day in the Commonwealth of [_____] by:

XXX

Trustee

APPENDIX 8

RESTATEMENT OF TRUST AGREEMENT

RESTATEMENT made the (date)
OF TRUST AGREEMENT made the (date)
AS AMENDED BY AMENDMENTS 1, 2 and 3
dated the (date), the (date) and the (date), respectively

BETWEEN

XXX
of XXX, USA

Settlor'

AND

XXX

a domestic bank corporation formed under the laws of [_____], being resident and domiciled in [_____], with an office at XXX, [_____], WI

'Trustee'

THE XXX FAMILY TRUST

WHEREAS Settlor wishes to make provisions for the care and management of certain property in the manner and for the benefit of the beneficiaries named herein, and in pursuance of such object does transfer to the Trustee the assets listed in Annex A hereto to be held upon and subject to the trusts hereof;

NOW THEREFORE this agreement witnesseth that the parties hereto have agreed and do hereby covenant and agree as follows:

NAME OF TRUST

1. This trust shall be known as the 'XXX Family Trust'

SETTLEMENT

2. Settlor hereby transfers and delivers to Trustee, all of the property described in Annex 'A' attached and incorporated by reference. The receipt of such property is hereby acknowledged by Trustee. Such property, together with any other property that may later become subject to this Trust, shall constitute the trust estate (the Trust Fund) and shall be held, administered and distributed by the Trustee as herein provided.

DEFINITIONS

3. In this Agreement (including this paragraph) and in any instrument supplemental ancillary hereto, unless the context otherwise requires:

(a) 'Assets' includes cash, securities, estates, property and any interests therein;

(b) 'Beneficiary' means the person or persons who are entitled to any benefit hereunder whether such benefit is contingent or absolute and whether such benefit is a right to receive income or capital or is an interest in income to capital of the Trust Fund;

(c) 'Emergency Event' means:

(i) an Event of Duress; or

(ii) an action on the part of any judicial or government authority of competent jurisdiction or under any applicable law, with the result that the Trustee shall have ceased to be authorized to act in the capacity of trustee, or as Trustee of this Trust;

(iii) an action on the part of any judicial or government authority of competent jurisdiction or under any applicable law, with the result that the Trustee shall have ceased to be authorized to hold foreign Assets for the benefit of the Beneficiaries.

(d) 'Event of Duress' means the occurrence of any one of the following:

(i) war or civil disturbance in the country of domicile of the Trustee which will or may endanger, whether directly or indirectly, the safety of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(ii) political action in the country of domicile of the Trustee whether instigated by any government, political organisation or individual, whether constitutional or otherwise, which will or may endanger, whether directly or indirectly, the safety of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(iii) the enactment in the country of domicile of the Trustee of any law, regulation, decree or measure which will or may directly or indirectly expropriate, sequestrate or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(iv) any action or threat of action by any government, department or agency in the country of domicile of the Trustee or by any official purporting to act on the instructions and with the authority of such government, department or agency which will or may directly or indirectly expropriate, sequestrate, levy, lien or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund,

(v) any order, decree or judgement of any court or tribunal in the country of domicile of the Trustee which will or may directly or indirectly, expropriate, sequestrate, levy, lien or in any way control, restrict or prevent the free disposal by the Trustee of any moneys, investments or property which may from time to time be included in or forming part of the Trust Fund and any distribution therefrom;

(vi) The Trustee makes a declaration that as a result of the laws (the 'Laws') of any country, domestic or foreign, there is or could be adverse consequences affecting or otherwise relating directly or indirectly to the property held by the Trust; for the purposes hereof, the term 'adverse consequences' shall include without limitation, any direct or indirect taxes which may be incurred by the Trust as a result of or in connection any such Laws.

(e) 'Proper Law' means the law, as determined in accordance with this Trust Agreement, to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Trust shall be subject and by which such rights, construction and effect shall be construed and regulated.

(f) 'Time of Division' means the earliest of

(i) October 1, 2013; and

(ii) such date as the Trustee may in its absolute discretion determine by an instrument in writing signed by it and delivered in counterparts to every adult Beneficiary living at the time of signing such instrument, provided that such date shall not be later than the date 80 years from the date of coming into existence of the Trust Agreement.

(g) 'Trust Fund' means the Assets referred to in paragraph 2 hereof and all other Assets which may at any time be substituted therefor and all capital accretions to and all income from such Assets; but excluding all amounts which have been paid or disbursed therefrom (whether out of capital or income) in the normal course of administration or pursuant to the provisions of this Agreement.

(h) 'Trustee' means the trustee or trustees from time to time acting under this Agreement and shall include the Original Trustee and any trustee or trustees appointed pursuant to the provisions of paragraph 12 hereof.

(i) 'Trustee Act' means the Trustee Act, Cap. 250 of the laws of Barbados as from time to time amended and every statute substituted therefor, and in the case of such amendment or substitution, any references in this Trust Agreement to provisions of the Trustee Act or to specific provisions of the Trustee Act, shall be read as references to the provisions as amended or substituted therefor in the amendment or the new statute or statutes.

PAYMENTS BEFORE TIME OF DIVISION

4. The Trustee shall hold the Trust Fund and, until Time of Division, it may from time to time pay to or apply for the benefit of XXX, and her children, XXX, XXX, XXX and XXX (such group being hereinafter collectively called 'The XXX Family') or such one or more of them to the exclusion of the other or others and in such proportions as the Trustee in its uncontrolled discretion may from time to time determine, all or so much of the net income, if any, derived from the Trust Fund and so much of the capital thereof as the Trustee in its uncontrolled discretion from time to time determine to be appropriate for the respective benefit of The XXX Family. Any net income from the Trust Fund which is not so paid or applied in any calendar year in which it is earned or within one month thereafter shall be accumulated and added to the capital of the Trust Fund and dealt with as part thereof. Notwithstanding the foregoing the Trustee shall not pay or apply any net income from the Trust Fund in any calendar year in which it is earned to any Beneficiary who is resident in Canada, nor shall the Trustee pay or apply any proceeds of any gain on capital in any year in which the gain was realized to any Beneficiary who is resident in Canada; nor shall the Trustee pay, allocate or apply any amount whatsoever to any person who is a resident or citizen of the United States of America during such time that person is a resident or a citizen of the United States of America. For greater certainty in differentiating distributions out of capital from distributions out of income, the following procedures shall be adopted:

(a) Separate bank accounts shall be maintained for capital (the 'Capital Bank Account') and income (the 'Income Bank Account');

(b) Proceeds received by the Trust on account of capital, including the proceeds of disposition of capital Assets, shall be deposited to the credit of the Capital Bank Account;

(c) Proceeds received by the Trust on account of income shall be deposited to the credit of the Income Bank Account;

(d) On the first business day of each calendar year, all balances accumulated in the Income Bank Account to the end of the immediately preceding calendar year shall be transferred to the Capital Bank Account, subject to any reserve deemed necessary by the Trustee to meet obligations of the Trust other than distributions to beneficiaries;

(e) Distributions intended to be made to beneficiaries out of capital, should be made only out of the Capital Bank Account.

For greater certainty, no person shall until the Time of Division have any claim, right or entitlement whatsoever to any part or parts of the Trust Fund or income thereof except insofar as the same may arise by virtue of the exercise of the discretion to appoint by the Trustee contained herein.

DISTRIBUTION AT TIME OF DIVISION

5. At the Time of Division, the Trustee shall distribute the Trust Fund as follows:

(a) as to one half of the Trust Fund to XXX or to her estate;

(b) as to the remaining one half of the Trust Fund, to such of XXX, XXX, XXX and XXX, as may be then alive, or such one or more of them to the exclusion of the other or others in such proportion or proportions as the Trustee in its uncontrolled discretion may determine. A person shall be considered alive for the purposes of this distribution if they should die leaving issue surviving them at the date of distribution, who shall take the share of the deceased in equal shares per stirpes, provided however that the value of all property and income from property passing to XXX, XXX, XXX or XXX (a Beneficiary hereunder) who is married at the time such Beneficiary becomes entitled to such property, or property into which such property can be traced, shall be excluded in the case of any Beneficiary resident in Ontario from such beneficiaries net family property within the meaning of the Ontario Family Law Act, or its successor, and for all beneficiaries hereunder wherever resident from any other community of property regime; and

(c) If the Trust Fund or any part thereof should fail to vest in one or more of XXX or one of her children, XXX, XXX, XXX and XXX, pursuant to the foregoing provisions, the Trust Fund or part thereof shall be distributed as to X% to the University of XXX, Ontario, as to X% to the issue of XXX and XXX in equal shares *per stirpes*, and as to the remaining X% to the issue of XXX and XXX, in equal shares *per stirpes*. .

APPOINTMENT TO ANOTHER TRUST

6. Notwithstanding the provisions of the foregoing paragraphs 4 and 5, the Trustee may if it sees fit appoint a portion of the Trust Fund or any share thereof directed by the said paragraph 5 to be set aside by it, to another trust (whether or not such trust is resident in the jurisdiction where this Trust is then resident, whether or not such trust is already existing or

shall be established pursuant to such appointment, and whether or not the Proper Law of such trust is the Proper Law of this Trust) provided that the Trustee is of the opinion that the person(s) beneficially interested in such other trust include the Beneficiary(s) of such portion of the Trust Fund or such share and do not include any person other than the Beneficiary(s) of this Trust, and provided further that the terms of such other trust are substantially the same, mutatis mutandis, as the terms of the Trust Agreement applicable to the Trust Fund prior to the time of such appointment. The appointment of a portion or a share as aforesaid shall be in satisfaction of all the interests of such Beneficiary(s) of such portion or share.

CAPITAL AND INCOME PAYABLE TO MINORS

7. If any capital of the Trust Fund or any of the net income therefrom shall be payable or distributable, whether or not as a result of the exercise of the discretionary power vested in the Trustee, to a Beneficiary who is under the age of majority the amount payable or distributable (hereinafter referred to as an 'Infant's Share') may be held and kept invested by the Trustee and so much of the net income and capital of an Infant's Share as the Trustee in its uncontrolled discretion considers advisable from time to time may be used for the care, maintenance, education and advancement in life of such infant until he or she attains the age of majority and any net income of an Infant's Share not so used in any year shall be accumulated and added in such year to the capital thereof. The provisions of this Agreement respecting the administration of the Trust Fund shall apply mutatis mutandis to any Infant's Share held by the Trustee.

   The Trustee is authorized to make any payment or distribution whether of income or of capital, for any Beneficiary under the age of majority, or under other disability, to the parent, legal guardian, acting guardian or committee of such Beneficiary or to any one of, whom the Trustee in its discretion deems it advisable to make such payment, whose receipt shall be a sufficient discharge to the Trustee.

IRREVOCABILITY OF TRUST

8. This agreement and trust hereby created is intended by the parties and is hereby declared to be irrevocable. No part of the principal or income of the Trust shall ever revert to or be used for the benefit of the Settlor or be used to satisfy any legal obligations of the Settler. The Settlor hereby renounces for himself and his estate any interest, either vested or contingent, including any reversionary right or possibility of reverter, in the principal and income of the Trust, and any power to determine or control, by alteration, amendment, revocation, or termination, or otherwise, the beneficial enjoyment of the capital or income of the Trust.

POWERS OF TRUSTEE

9. In addition to all other powers conferred upon them by the other provisions of this Agreement or by any statute or general rule of law, the Trustee shall have and is hereby given the power and authority in its absolute and uncontrolled discretion at any time and from time to time to administer the Trust Fund in whatever manner it may determine and shall have the right to take any action in connection with the Trust Fund and to exercise

any rights, powers and privileges which may exist or arise in connection therewith to the same extent and as fully as an individual could if he were the sole owner of the Trust Fund. Without in any way limiting the generality of the foregoing the Trustee shall have the authority:

(a) To invest in, or to retain and hold as proper investments of this Trust any portion of the Trust Fund which may be invested, in any stocks, bonds, securities or other property, real, personal, or mixed, regardless of whether such stocks, bonds, securities or other property shall be proper investments for trusts under the laws of [_____] or any other jurisdiction.

(b) To sell, transfer, assign, exchange, convey, mortgage, lease or otherwise dispose of any of the Assets from time to time constituting the Trust Fund in any manner the Trustee may deem proper and at such price, upon such terms and for such consideration as the Trustee shall deem suitable; to give any option with respect to any property in the Trust Fund and generally to perform all acts of alienation and ownership with respect to the Trust Fund to the same extent and with the same effect as if they were the absolute owners of the Trust Fund. In so doing the Trustee is empowered to execute and deliver all deeds or other instruments as may be necessary or desirable to make good and sufficient title to any such trust Assets and it shall not be bound to secure the consent or approval of any person, official, authority, tribunal or Court whomsoever or whatsoever.

(c) To vote in person or by proxy, in Trustee's discretion, all stocks or other securities held by it.

(d) To exercise all rights incidental to the ownership of stocks, shares, bonds and other securities, and any other investments and property held as part of the Trust Fund, including voting all stocks, shares, and other securities and issuing proxies to others; to sell or exercise any subscription rights and, in connection with the exercise of subscription rights, to use trust moneys for such purpose; to consent to and join in any plan, reorganization, re-adjustment, merger, amalgamation or consolidation with respect to any corporation whose stock, shares, bonds or other securities at any time form part of the Trust Fund, and to exchange the securities held by Trustee or the securities issued in connection therewith; and to authorize the sale of the undertaking or Assets or any portion of the Assets or undertaking of any such corporation; and to enter into all or any agreements incidental thereto as Trustee may deem necessary.

(e) To pay all assessments, subscriptions and other sums of money as Trustee may deem expedient for the protection of Trustee's interest as holder of any stocks, bonds or other securities of any corporation or company.

(f) To exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities, or to take advantage of any right to subscribe for any additional stocks, bonds or other securities, and to make any and all necessary payments therefor.

(g) To execute and deliver all necessary assignments and conveyances required for the transfer of corporate stocks, bonds and all other securities, and all deeds of conveyance for real estate, sold and disposed of, without the order of any court, thereby relieving the purchaser from all liability in regard to the proper application of the purchase price so paid to Trustee.

(h) To make distributions and divisions in cash or in kind, or partly in cash and partly in kind, in Trustee's sole discretion.

(i) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favour of, or against this Trust, as Trustee shall deem best.

(j) To borrow money for such periods of time, from such persons or firms, including Trustee, and upon such terms and conditions as to rates, maturities, renewals and security that to Trustee seem advisable, and to pledge or mortgage such stocks, bonds and other portions of the capital of this Trust as may be required to secure such loans.

(k) To employ and pay at the expense of the income or capital of the Trust Fund any agent in any part of the world whether advocates, attorneys, solicitors, accountants, brokers, banks, trust companies or other advisors or agents without being responsible for the default of any agent if employed in good faith to transact any business or to do any act required to be transacted or done in the execution of the trusts hereof including the receipt and payment of moneys and the execution of documents and at any time employ on such terms and with such payment as they may think fit any individual firm or company in any part of the world as an investment adviser for the purpose of advising them as to the investment policy to be followed in the administration of the Trust Fund and if and so far as the Trustee follow the advice proffered by such investment adviser they shall not be responsible for the success or failure of the policy so pursued.

(l) To apply for and purchase, as an authorized investment of the Trust Fund, life insurance on the life of any person; to accept as assignees, for a consideration or as a donation to the Trust Fund, any life insurance policy or policies on the life of any person and/or benefits under any such policy or policies; and to use and apply any portion of the Trust Fund in the payment or prepayment of premiums upon, or for the purpose of maintaining in force, any such insurance wither applied for and purchased by the Trustee or accepted by them as assignees or donees. Any insurance so purchased by, donated to or otherwise acquired and held by the Trustee shall be deemed to be an authorized investment for the purposes of the Trust and whenever from time to time the Trustee pays or prepay any premium or premiums on any insurance they shall be deemed to have made an authorized investment. The proceeds of any such insurance and any amount payable as a result of the prepayment of premiums shall be payable and paid to the Trustee and, when received by it, shall constitute part of the capital of the Trust Fund. The Trustee is empowered to exercise any and all rights and powers howsoever available or arising with respect to any policy of insurance applied for, purchased by, donated to or otherwise acquired by the Trustee and to dispose of such policy in such manner, at such time, and for such price and upon such terms as they consider advisable.

(m) To keep the whole or any part of the Trust Fund within or without the jurisdiction of the Proper Law of this Settlement.

(n) To guarantee, with or without security, the performance of contracts and the performance of undertakings and obligations of any person, corporation, partnership, firm or association, including the payment of interest, principal and premium, if any, of or on bonds debentures or other securities, mortgages or liabilities of any such person, corporation, partnership, firm or association.

(o) Upon any distribution or division of the Trust Fund or of any part thereof to distribute or divide the same either wholly or in part in money or in other Assets of the Trust Fund and for the purposes of such distribution or division, and for any other purpose hereunder, to place such value on the Assets from time to time forming the whole or any part of the Trust Fund or of any share therein as they deem just and proper and any such valuation shall be absolutely final and binding upon all persons entitled hereunder; upon any such distribution or division to determine to whom or to what share specified Assets shall be given or allocated and to distribute or divide the same subject to the payment of such amounts as shall be necessary to adjust the shares of the various

beneficiaries; and upon such distribution should the Trustee in its sole discretion deem necessary, require entry by the Beneficiary into an agreement to indemnify the Trustee or any third party, with respect to any matter concerning the Trust property continuing after the time of the distribution. Without limiting the foregoing, the Trustee may prior to distribution require the agreement and indemnification of the beneficiaries to any agreements previously entered into with respect to any price adjustment agreement concerning shares held by the Trust, any indemnity or other agreement affecting the property and any agreement with respect to recapture of depreciation or payment of any other taxes due in relation to the Trust property.

(p) To lend the whole or any part of the Trust Fund to any person with or without security and either free of interest or on such terms as to payment of interest and generally as the Trustee shall in its absolute discretion think fit.

(q) To incorporate any company or companies in any place in the world at the expense of the Trust Fund with limited or unlimited liability for the purpose of (inter alia) acquiring the whole or any part of the Trust Fund. The consideration on the sale of the Trust Fund or any part thereof to any company incorporated pursuant to this sub-clause may consist wholly or partly of fully paid shares or stocks or debentures (secured or unsecured) of the company and may be credited as fully paid and may be allotted to or otherwise vested in the Trustee and shall be capital moneys in the Trustee's hands.

(r) To determine whether any sums received or disbursed are on account of capital or income or partly on account of one and partly on account of the other and in what proportions and the decision of the Trustee whether made in writing or implied from the act of the Trustee shall be conclusive and binding on all the Beneficiaries.

(s) To give and satisfy out of the Trust Fund an indemnity to any person or corporation who has previously been one of the Trustees or is about to retire as a Trustee hereof against any tax, duty or fiscal liability whatsoever which may be claimed against him in any part of the world by reason of such person or corporation having been one of the Trustees.

(t) To pay and satisfy out of the Trust Fund any due debts or obligations in relation to the Trust Fund.

(u) Every Trustee being a corporation may exercise or concur in exercising any discretion or power hereby conferred on the Trustee by a resolution of such corporation or by a resolution of its Board of Directors or governing body or may delegate the right and power to exercise or concur in exercising any such discretion or power to one or more of its officers or members of its Board of Directors appointed from time to time by its Board of Directors for that purpose.

(v) In addition to all other powers and discretions granted to or vested in Trustee by this agreement or by law, Trustee shall have the additional powers and discretions, to be exercised only in a fiduciary capacity and in the interest of the beneficiaries, to do all acts, institute all proceedings, and exercise all rights and privileges in the management of the Trust Fund as if the absolute owner thereof, that Trustee may deem necessary or proper for the conservation and protection of the Trust Fund until the interest that it represents is ultimately distributed.

TITLE TO ASSETS

10. All Assets from time to time constituting the Trust Fund shall be held by and registered in the name of the Trustee or in the name of its nominee or nominees or otherwise,

as the Trustee may deem expedient. The Trustee shall maintain the Assets of the Trust Fund separate from all other property in its possession whether held absolutely or in trust.

PAYMENT OF TAXES

11. The Trustee shall have the right to pay out of the income or capital of the Trust Fund, as it may from time to time in its absolute discretion determine, any taxes or other imposts payable by the Trustee or otherwise in connection with the Trust Fund or payable by any Beneficiary in respect of the Trust Fund or any part thereof, whether such taxes or imposts be levied in Canada or by any other jurisdiction whatsoever.

RESIGNATION, REMOVAL AND APPOINTMENT OF TRUSTEES

12. There shall be at least one Trustee in office at all times. The Trustee shall continue in the capacity of a Trustee hereof until any of the following events occurs namely, the resignation of the Trustee; or the refusal, unfitness, incapacity or incapability of the Trustee (for whatever reason including an adjudication of bankruptcy against the Trustee, or the liquidation of the Trustee) to act in the capacity of Trustee of this Trust.

    In the discretion of the Trustee(s) then in office, the number of Trustees may be increased at any time, but in any event the number of Trustees shall not exceed three persons, and at least one of the Trustees must be a company authorized under Proper Law to act as Trustee hereof.

    Should any vacancy or vacancies occur in the office of Trustee for any reason (including an increase in the number of Trustees) such vacancy or vacancies may be filled by instrument in writing signed by the Trustees then in office. Any new Trustee or Trustees so appointed need not be resident in the Commonwealth of Barbados, but no person resident outside the Commonwealth of Barbados may be appointed as one of the Trustees except by instrument in writing signed by all of the Trustees then in office, or by any sole Trustee who is voluntarily resigning. In the event of the death, incapacity, liquidation (other than a voluntary liquidation for purposes of amalgamation or reconstitution of a corporate Trustee), or the resignation of a sole Trustee without appointment of a successor, the court of the jurisdiction of the Proper Law shall appoint a successor.

    The resignation and removal of a Trustee, the appointment of an additional or replacement Trustee, the vesting of the Trust Fund or any specific part thereof, in the name of any replacement and additional Trustee, and any additional provisions respecting indemnity or otherwise, shall be in the manner prescribed under Proper Law.

    Any Trustee may resign on thirty days' notice to the other Trustee or Trustees, in the event there is more than one Trustee, or upon such shorter period of notice as the other Trustee or Trustees may deem acceptable. In the event that the resigning Trustee is the sole Trustee, the resigning Trustee shall first appoint a new Trustee or Trustees and vest the new Trust Fund in the name of the Trustee or Trustees as may be acceptable to the other Trustee or Trustees.

    Every person so appointed as a Trustee hereunder shall, as well before as after the Trust Fund becomes by law or by assurance or otherwise vested in him, have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a Trustee by this Agreement.

A certificate signed at any time by the Trustee stating who at that time are the persons serving in the office of Trustee, shall be accepted as conclusive evidence of that fact.

RENDERING OF ACCOUNTS AND AUDIT

13. The Trustee shall render an account of its administration of the Trust at such time as the Trustee may deem advisable and not less frequently than once per year, or at such other times, upon at least thirty days' notice, as any adult Beneficiary, or parent or guardian of a minor Beneficiary may request. Any adult Beneficiary, guardian or parent of a minor Beneficiary shall have the right to appoint auditors and have reviewed the actions and accounts of the Trustee. The Trustee and auditor shall provide full and complete access to all records in relation to the Trust to any person so entitled pursuant to the paragraph herein, including the authorized accountant, auditor or representative of said person.

    Upon at least thirty days notice to the Trustee by any adult Beneficiary, or guardian or parent of a minor Beneficiary, or such shorter period of notice as the Trustee may agree, the Trustee shall deliver a written status report with respect to any claims that have been made against the Trust.

MAJORITY OF TRUSTEES TO GOVERN

14. The Trustee or Trustees may adopt any rules and regulations which they may from time to time deem proper to govern its own procedure. At any time when there are more than two persons acting as the Trustees, all questions requiring action by the Trustees shall be determined by a majority of the Trustees for the time being in office, and the Trustees may act either by a resolution passed by a majority thereof at a meeting or by an instrument in writing signed by a majority thereof, and any such decision or act of a majority of the Trustees shall, for all purposes of this Agreement, be deemed the decision or act of the Trustees. Any deed or instrument of every nature or description executed by a majority of the Trustees for the time being in office shall be as valid, effectual and binding as if executed by all.

BANKING ARRANGEMENTS

15. Notwithstanding any other provisions of this Agreement, but without prejudice to paragraph 9 hereof, the following provisions shall govern the banking arrangement of the Trust hereby constituted:

    (a) the Trustee may appoint any bank or trust company to be its banker for the purposes of the Trust;

    (b) the Trustee from time to time in office, or at any time when there are two or more Trustees in office, any two of such Trustees, are authorized on behalf of the Trust:

        (i) to sign, endorse, make, draw, and/or accept any cheques, promissory notes, bills of exchange or other negotiable instruments, any orders for the payment of money, contracts for letters of credit or forward exchange and generally all instruments or documents for the purpose of binding or obligating the Trustee in any way in connection with the accounts and transactions of the Trust with the banker, whether or not an overdraft is thereby created, and instruments and documents so signed shall be binding upon the Trustee;

(ii) to receive from the banker and where applicable give receipts for, all statements of account, cheques and other debit vouchers, unpaid and unaccepted bills of exchange and other negotiable instruments and to delegate in writing to be filed with the banker such authority to one or more other persons; and

(c) any one of the Trustees is authorized on behalf of the Trustees to negotiate with, deposit with or transfer to the said banker (but for the credit of the Trust's account only) all or any cheques, promissory notes, bills of exchange or other negotiable instruments, and orders for the payment of money and for the said purpose to endorse all or any of the foregoing, and every signature shall be binding upon the Trustees.

AMENDMENT TO THE AGREEMENT

16. Any of the provisions of this Agreement other than the provisions of paragraphs 4, 5 and 8 may be amended at any time and from time to time by an instrument in writing signed by all of the Trustees then in office.

PROTECTION OF THE TRUSTEE

17. The Trustee hereby accept the trusts hereof and agree to be bound by the provisions hereof and to hold the Trust Fund upon the trusts hereof.

Every discretion or power hereby or by law conferred on the Trustee shall be an absolute and uncontrolled discretion or power and no Trustee shall be held liable for any loss or damage accruing as a result of the Trustee concurring or refusing or failing to concur in an exercise of any such discretion or power.

In the professed execution of the trusts and powers hereof no Trustee shall be liable for or for the consequences of any error of judgment or mistake whether of law or fact of itself or its advisors legal or otherwise or any answer to any enquiries or generally any breach of duty or trust whatsoever whether by way of commission or omission unless it shall prove to have been made, given, done or omitted in personal conscious bad faith. And all persons claiming any beneficial interest in, over or upon the Trust Fund or any part thereof shall be deemed to take with notice of and subject to the protection conferred on the Trustee.

ACCOUNTS AND COMPENSATION OF TRUSTEE

18. Any Trustee being a trust company or corporation shall act in accordance with its standard terms and conditions now and from time to time in force and shall be entitled to charge and be paid out of the Trust Fund and the income thereof remuneration in accordance with its scale of fees now and from time to time in force and may without accounting for any resultant profit act as banker, stockbroker, underwriter or other agent and perform any service on behalf of the Trust estate and on the same terms as would be made with a customer.

Any Trustee being a lawyer, chartered accountant, stockbroker, underwriter or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional and other charges for business transacted, time spent and acts done by him or any partner of his in connection with the trusts hereof including acts which a trustee not being in any profession or business could have done personally.

SOVEREIGN RISK

19. The Trustee shall be deemed to have transferred to such person or persons designated in writing by the Trustee (the 'Emergency Trustee'), all right title and interest to the Trust Fund, immediately prior to the occurrence of an Emergency Event, notwithstanding paragraph 13 of this Trust Agreement.

    On the occurrence of any Emergency Event, the Trustee shall thereafter cease to be Trustee and the Emergency Trustee shall constitute the Trustee for the time being of this Trust.

    Whenever the Trustee ceases to be Trustee of this Trust, by reason of occurrence of any Emergency Event, the Trustee shall as soon as is legally practicable execute all deeds, and do all things as shall be necessary in order to transfer legal title of the Trust Fund to the Emergency Trustee and perfect the title of the Emergency Trustee to the Trust Fund. Further the Trustee shall be bound to transfer to the Emergency Trustee all records and documents relating to the Trust.

    The Emergency Trustee shall be the attorney for the former Trustee for the purposes of signing, sealing and delivering and in any way executing such documents of transfer as may in the opinion of the Emergency Trustee be requisite or desirable for transferring the Assets comprising the Trust Fund from the former Trustee to the Emergency Trustee.

    The Trustee shall be entitled to be indemnified and to retain out of the Trust Fund all sums due from the Trust and all expenses and costs incurred in such transfer.

    Whenever the Trustee ceases to be Trustee of this Trust, by reason of occurrence of any Emergency Event, the Trustee shall be indemnified by the Emergency Trustee from and out of the Trust Fund against all liabilities incurred as a result of the bona fide actions or omissions of the Trustee with regard to the Trust Fund made in ignorance of the happening of an Emergency Event.

PROPER LAW AND FORUM FOR ADMINISTRATION OF THE TRUST

20. Subject to the power conferred by this clause and under any further declaration to be made hereunder, the Proper Law of this Trust shall be the laws of [_____], and the Trust shall be established in [_____] as a domestic trust pursuant to the Trustee Act but not limited thereto (and for further certainty not as an International Trust under the [_____] International Trusts Act) and the rights of all Beneficiaries and of the Trustee and the Settlor, and the construction and effect of each and every provision hereof shall be governed by the laws of [_____] and subject to the exclusive jurisdiction of the courts of [_____]. The designation of this Trust as a domestic [_____] Trust shall be in the manner prescribed under the Proper Law, including specifically the Trustees Act.

    The Trustee may, by deed, at any time or times and from time to time, change the Proper Law of this Trust, by declaring that this Trust shall from the date of such deed take effect in accordance with the law of some other state or territory in any part of the world not being any place under the law of which any of the trust powers and provisions herein declared and contained would not be enforceable or capable of being exercised and so taking effect.

    Where any declaration changing the Proper Law of the Trust shall be made, the Trustees shall be at liberty to make such consequential alterations or additions in or to the trust powers and provisions of this Trust as the Trustees may consider necessary or desirable to ensure that the trust powers and provisions of this Trust shall be valid and effective mutatis mutandis as if made under the law of Barbados.

Subject to the power conferred by this clause and under any further declaration to be made hereunder, the forum for the administration of the Trust shall be the jurisdiction of the Proper Law of the Trust.

The Trustee may, by deed, at any time or times and from time to time change the forum for the administration of the Trust to a jurisdiction different from the Proper Law of the Trust. The forum for the administration of the Trust shall as from the date of such declaration be the jurisdiction named in the deed.

NOTICE

21. All notices required or permitted to be given by the Trustee and by the Settlor under the terms of this Agreement shall be deemed to be sufficiently given if delivered at the addresses hereinafter set forth. Any notice given hereunder shall be deemed to be effective forthwith at the time of delivery or where notice is given by telex or telecopier, notice shall be deemed to be effective forthwith at the time of transmission of such telex or telecopy. For purposes of this Agreement, the addresses of the parties hereto shall be as follows:

(a) In the case of the Trustee:
By telecopier
with a copy sent by registered mail to:
XXX
[_____], W.I.
Attention: XXX
Telephone XXX
Telecopier XXX

(b) In the case of the Settlor:
By telecopier
with a copy sent by registered mail to:
(Name)
(Address)
U.S.A.
Telephone XXX
and a copy sent to:
XXX
Canada
Attention:
Telephone XXX
Telecopier XXX

Provided that any Trustee or Settlor may from time to time change its address as set out above by giving notice in accordance with the foregoing.

TRUSTEE MAY COMPETE WITH TRUST FUND

22. The Trustee and its affiliates may, from time to time, be engaged for their own account or on behalf of others (including as trustee, administrator or manager of other funds or portfolios) in investment and other activities identical or similar to or competitive with the

activities of the Trust or of the Trustee and their affiliates in connection with the Trust. Neither the Trustee nor any of its affiliates shall incur or be under any liability to the Trust, any Beneficiary or any other person for by reason of, or as a result of any such engagement or competition or the manner in which they may resolve any conflict of interest or duty arising therefrom.

CONFIDENTIALITY

23. Except under an order of a court which exercises jurisdiction over the Trust, the Trustee or the Trust Fund, or in order to comply with the mandatory provision of applicable law, or an administrative requirement issued under applicable law, the Trustee shall not (except on receipt of a written request from a Beneficiary for the disclosure of any document or information relating to or forming part of the accounts of this Trust) disclose to any person not legally entitled, any information or documents respecting this Trust.

COMPLIANCE

24. The Trustee shall ensure compliance with the provisions of the Proper Law, and shall do all things necessary to ensure to give binding legal effect to this Trust Agreement.

SEVERABILITY

25. If any provision of this Trust Agreement shall be held invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provision in any other jurisdiction or any other provision of this Trust Agreement in any jurisdiction.

    The Trustee may, by deed, at any time or times and from time to time change any of the severable aspects of this Trust, to a jurisdiction different from the Proper Law of the Trust.

RESTATED this (date) in the Commonwealth of Barbados by:

_____

XXX

Trustee

ANNEX 'A'

The Settlor does hereby settle in trust property comprised of $300.00 in United States Currency upon the direction that the Trustee do forthwith subscribe for shares in accordance with the attached subscription agreement.

APPENDIX 9

MODEL FOUNDATION CHARTER — COMMONWEALTH OF THE BAHAMAS FOUNDATION CHARTER

SCHEDULE MODEL FOUNDATION CHARTER

COMMONWEALTH OF THE BAHAMAS FOUNDATION CHARTER

Preliminary

1. (1) This deed shall provide for the formal establishment of a Foundation in the Commonwealth of The Bahamas ('The Bahamas') under the Foundations Act, 2004 ('the Act').

(2) The Foundation Charter will address all of the statutory requirements for creating a Bahamian foundation.

(3) Once the appropriate application, statement, list, statutory declaration and fee have been filed and accepted by the Registrar of Foundations in The Bahamas ('the Registrar'), the Registrar will issue a certificate of registration.

(4) The Charter will convey legal status to the foundation from the date of such certificate.

(5) The Charter will be subject to the overriding provisions of the Act and any statutory regulations.

Foundation Name

2. Upon proper application, registration and the issuance by the Registrar of a certificate, all in accordance with the provisions of the Act, this Foundation shall become a legal entity and shall be known as the _____ Foundation ('the Foundation').

Founder

3. (1) The Founder of the Foundation is _____ of _____.

(2) The aforementioned address shall be the address for service of documents on the Founder.

Registered Office

4. (1) The Registered Office of the Foundation is located in the Island of New Providence in The Bahamas at _____.

(2) The aforementioned address shall be the address in The Bahamas for service of documents on the Foundation.

Secretary

5. (1) The Secretary of the Foundation shall be of _____, Nassau, The Bahamas.

(2) _____ is duly licensed as a provider of financial and corporate services under the Financial and Corporate Services Providers Act, 2000, or as a trust company under the Banks and Trust Companies Regulation Act, 2000.

Duration of Foundation

6. The Foundation is established for an indefinite period.

Initial Endowment

7. (1) The initial endowment to the Foundation shall consist of the sum of Ten thousand dollars ($10,000.00), which has been transferred, without consideration, into the Foundation and which shall form the initial assets of the Foundation. The Founder hereby certifies that he is the owner of the endowment with good, valid and marketable title which is free and clear of all liens, charges, encumbrances and any third party claims of any nature whatsoever, and that all actions necessary to pass title to the Foundation have been effectively and properly carried out.

(2) Upon the vesting of assets in the Foundation, such assets shall become the sole property of the Foundation, shall no longer be the property of the Founder and shall not become the property of any Beneficiary unless distributed in accordance with the provisions of this Charter or the Articles (if any).

(3) The endowment of supplementary assets, in addition to the initial assets, is hereby authorized, provided, however, that any such further endowment or endowments, must be accepted by the unanimous approval of the Officers or the Foundation Council.

Objects

8. (1) The assets transferred by the Founder, and now being the assets of the Foundation, shall be managed, including being realized, applied, administered, invested and disbursed for the following purposes –

(a) to engage in any act, activity, purpose or object, which is not unlawful, immoral or contrary to any public policy in The Bahamas or prohibited under the terms of this Charter; and

(b) to make gifts of its income and/or capital as the Foundation's Officers may by unanimous resolution determine after the Foundation Council (if any) has approved such gifts.

(2) A purpose or object of the Foundation may but need not be charitable.

(3) The Foundation may not –

(a) carry on any activity otherwise prohibited in or from within The Bahamas; or

(b) carry on in or from within The Bahamas any activity in respect of which a license or authorization under any statute or regulation is required and no such license or authorization has been granted to the Foundation.

(4) The Foundation may in the course of the management of its assets do such things as are necessary for their proper administration, including but not limited to, buying and selling of such assets and engaging in any other acts, activities or investments that are not prohibited under any law for the time being in force in The Bahamas, but such acts and activities shall be ancillary or incidental to its main purpose or purposes.

General Foundation Powers

9. (1) The Foundation, acting through the Officers or any other governing body, shall have such powers as are permitted by law for the time being in force in The Bahamas, irrespective of Foundation benefit, and may perform all acts and engage in all activities necessary or conducive to the conduct or attainment of the objects of the Foundation.

(2) Except as otherwise provided in the Articles (if any) or the Act, the Officers of the Foundation shall act either by a simple majority of the Officers present at an ordinary meeting of the Officers or unanimously by the circulation of a written document duly signed by each Officer in lieu of a meeting.

(3) A party to a transaction with the Foundation is not bound to inquire as to whether the transaction is permitted under this Charter or the Articles (if any) or as to any limitation of the Officers to bind the Foundation.

Officers

10. (1) The Founder shall, before registration, and as a statutory requirement to achieve legal status for the Foundation, appoint one or more persons who shall satisfy the requirements and comply with the restrictions under the Act, to be Officers of the Foundation, one of whom shall be the Secretary. The Founder may appoint such other initial Officers before registration as the Founder may determine, including one or more assistants to any of the initial Officers so appointed. Subsequent appointments of Officers or the filling of vacancies shall be dealt with in accordance with the Articles (if any).

(2) The duties and terms of office of the Officers, including, but not limited to, the specification of matters concerning their removal, period of office, meetings and representative authority of the Officers may be established under the Articles (if any) of the Foundation. Failing that, then such duties and terms of office will be established at any time after registration by a resolution of the Foundation Council (if any) at its sole discretion.

(3) A document purporting to be a copy of a resolution of the Officers or any extract from the minutes of a meeting of the Officers which is certified as such in accordance with the Act shall be conclusive evidence in favour of all persons dealing with the Foundation upon the faith thereof that such resolution has been duly passed or, as the case may be, that such extract is a true and accurate record of a duly constituted meeting of the Officers.

Foundation Council

11. (1) The Founder may, by a memorandum in writing, before registration, appoint a person or committee of persons to serve as a Foundation Council to the Foundation. In the absence of the Founder's appointment of a Foundation Council, the Officers may appoint a Foundation Council.

(2) The duties and terms of office of the Foundation Council, including, but not limited to, the specification of matters concerning their removal, period of office, meetings, remuneration and representative authority of the Foundation Council, may be established under the Articles (if any) of the Foundation or failing that then such duties and terms may be established at any time after registration by a resolution of the Officers at their sole discretion.

Beneficiaries

12. (1) The initial and remaining Beneficiary or Beneficiaries, and any supplementary Beneficiary or Beneficiaries of this Foundation may be those persons as designated in the Articles

(if any). Failing that, the Officers shall by resolution, with the prior written consent of the Foundation Council, or failing the appointment of any Foundation Council, then the Officers at their sole discretion, may, select the initial and remaining Beneficiary or Beneficiaries, and may select any supplementary Beneficiary or Beneficiaries of the Foundation following registration.

(2) The rights and restrictions of the Beneficiaries may be those as stipulated within the Articles (if any) of the Foundation. Failing that, the Officers, with the prior written consent of any Foundation Council, or if there is no Foundation Council, then the Officers at their sole discretion will establish the rights of any Beneficiary or Beneficiary by resolution.

Reservation of Founder Rights and Obligations

13. (1) The rights of the Founder in respect of the formation of the Foundation shall not devolve upon his successors in title or assigns.

(2) Any person who shall endow assets to the Foundation after its registration shall not thereby acquire the powers of the Founder.

(3) If, for whatever reason, the Founder shall not have endowed the assets to the Foundation as provided for herein either before or after registration, then the Foundation may enforce that endowment against the Founder.

(4) The Founder reserves the following rights and powers prior to registration –

(a) to appoint the initial Officer(s) of the Foundation; and

(b) to appoint a Foundation Council,

and following registration, the Founder reserves the power to direct the investment activities of the Foundation.

Residence and Governing Law

14. The Foundation shall be resident and domiciled in The Bahamas. For so long as the Foundation is resident and domiciled in The Bahamas, the proper law of the Foundation is the law of The Commonwealth of The Bahamas and its validity, construction and all rights hereunder, are to be governed by the laws of The Commonwealth of The Bahamas.

Amendment of Charter

15. (1) The Foundation may at any time after registration change its name or amend or modify this Charter in any manner whatsoever, provided that such changes or amendments or modifications are consistent with the provisions of the Act and provided that the certain procedures set out in sub-paragraph (2) are adhered to.

(2) The procedure referred to in sub-paragraph (1) is as follows –

(a) the Founder or the Officers shall convene a meeting of the Founder (if remaining), the Officers, the Foundation Council (if any) or any other supervisory person, in accordance with the provisions for calling the Annual Meeting of Officers as stipulated under Section 35 of the Act; and

(b) the resolution for amendment or modification of this Charter shall be adopted only if agreed to by the Founder, if still alive, and by all the Officers and by the Founder Council (if any) or all other supervisory persons.

(3) In the event that the founder is no longer alive, the Foundation Council may resolve to make such amendments or modifications as are necessary in the circumstances to maintain the objects of the Foundation and shall submit the resolution to the Supreme Court of The Bahamas for approval.

(4) Where an amendment or modification of the Charter has been made an application may be made to the Court by the Founder, any single Officer, the Foundation Council (if any) or any other supervisory person or an auditor, to have the amendment or modification cancelled, provided that no such person shall have already voted in favor of the amendment or modification. Such an application must follow the procedures as stipulated under Section 50 (12) of the Act.

Revocation

16. The Foundation Charter may only be revoked by the Founder.

Articles

17. The making of Foundation Articles is permitted but shall not be required.

Seal

18. The Foundation will have a Seal, the safe custody of which shall be provided for by the Officers. The procedures as to the proper use of the Seal may be provided for under the Articles (if any) or, failing that, the Officers will by resolution establish such procedures and imprint of the Seal shall be kept at the Registered Office.

Notices

19. Any notice or document that must be served on the Foundation may be served either by hand delivery or by sending it through the post in a prepaid letter, or by fax or electronically, addressed to the Secretary of the Foundation at the Registered Office of the Foundation. In respect of the manner, effectiveness and time of service, the provisions of the Act shall apply.

IN WITNESS WHEREOF, the Founder has hereunto set his hand for the purpose of forming a Foundation under the laws of the Commonwealth of The Bahamas on this the_____ day of_____, 20_____.

_____

Signed, by the Founder in the presence of:–

_____

the Secretary or Notary Public

SCHEDULE A

Beneficiaries

SCHEDULE B

APPENDIX 10

OECD AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS

AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS

I. INTRODUCTION

1. The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information.

2. The Agreement was developed by the OECD Global Forum Working Group on Effective Exchange of Information ('the Working Group'). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.

3. The Agreement grew out of the work undertaken by the OECD to address harmful tax practices. See the 1998 OECD Report '*Harmful Tax Competition: An Emerging Global Issue*' (the '1998 Report'). The 1998 Report identified 'the lack of effective exchange of information' as one of the key criteria in determining harmful tax practices. The mandate of the Working Group was to develop a legal instrument that could be used to establish effective exchange of information. The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices.

4. This Agreement is not a binding instrument but contains two models for bilateral agreements drawn up in the light of the commitments undertaken by the OECD and the committed jurisdictions. In this context, it is important that financial centres throughout the world meet the standards of tax information exchange set out in this document. As many economies as possible should be encouraged to co-operate in this important endeavour. It is not in the interest of participating economies that the implementation of the standard contained in the Agreement should lead to the migration of business to economies that do not co-operate in the exchange of information. To avoid this result requires measures to defend the integrity of tax systems against the impact of a lack of co-operation in tax information exchange matters. The OECD members and committed jurisdictions have to engage in an ongoing dialogue to work towards implementation of the standard. An adequate framework will be jointly established by the OECD and the committed jurisdictions for this purpose particularly since such a framework would help to achieve a level playing field where no party is unfairly disadvantaged.

5. The Agreement is presented as both a multilateral instrument and a model for bilateral treaties or agreements. The multilateral instrument is not a 'multilateral' agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties. A Party to the multilateral Agreement would only be bound by the Agreement vis-à-vis the specific parties with which it agrees to be bound. Thus, a party wishing to be bound by the multilateral Agreement must specify in its instrument of ratification, approval or acceptance the party or parties vis-à-vis which it wishes to be so bound. The Agreement then enters into force, and creates rights and obligations, only as between those parties that have *mutually* identified each other in their instruments of ratification, approval or acceptance that have been deposited with the depositary of the Agreement. The bilateral version is intended to serve as a

model for bilateral exchange of information agreements. As such, modifications to the text may be agreed in bilateral agreements to implement the standard set in the model.

6. As mentioned above, the Agreement is intended to establish the standard of what constitutes effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. However, the purpose of the Agreement is not to prescribe a specific format for how this standard should be achieved. Thus, the Agreement in either of its forms is only one of several ways in which the standard can be implemented. Other instruments, including double taxation agreements, may also be used provided both parties agree to do so, given that other instruments are usually wider in scope.

7. For each Article in the Agreement there is a detailed commentary intended to illustrate or interpret its provisions. The relevance of the Commentary for the interpretation of the Agreement is determined by principles of international law. In the bilateral context, parties wishing to ensure that the Commentary is an authoritative interpretation might insert a specific reference to the Commentary in the text of the exchange instrument, for instance in the provision equivalent to Article 4, paragraph 2.

II. TEXT OF THE AGREEMENT

MULTILATERAL VERSION

The Parties to this Agreement, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

BILATERAL VERSION

The government of_____ and the government of_____, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

Article 1

Object and Scope of the Agreement

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.

Article 2

Jurisdiction

A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

Article 3

Taxes Covered

MULTILATERAL VERSION

1. This Agreement shall apply:

a) to the following taxes imposed by or on behalf of a Contracting Party:
   i) taxes on income or profits;
   ii) taxes on capital;
   iii) taxes on net wealth;
   iv) estate, inheritance or gift taxes;

b) to the taxes in categories referred to in subparagraph a) above, which are imposed by or on behalf of political subdivisions or local authorities of the Contracting Parties if listed in the instrument of ratification, acceptance or approval.

2. The Contracting Parties, in their instruments of ratification, acceptance or approval, may agree that the Agreement shall also apply to indirect taxes.

3. This Agreement shall also apply to any identical taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

BILATERAL VERSION

1. The taxes which are the subject of this Agreement are:

a) in country A,_____;
b) in country B, _____.

2. This Agreement shall also apply to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

Article 4

Definitions

MULTILATERAL VERSION

1. For the purposes of this Agreement, unless otherwise defined:

a) the term 'Contracting Party' means any party that has deposited an instrument of ratification, acceptance or approval with the depositary;

b) the term 'competent authority' means the authorities designated by a Contracting Party in its instrument of acceptance, ratification or approval;

c) the term 'person' includes an individual, a company and any other body of persons;

d) the term 'company' means any body corporate or any entity that is treated as a body corporate for tax purposes;

e) the term 'publicly traded company' means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold 'by the public' if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

f) the term 'principal class of shares' means the class or classes of shares representing a majority of the voting power and value of the company;

g) the term 'recognised stock exchange' means any stock exchange agreed upon by the competent authorities of the Contracting Parties;

h) the term 'collective investment fund or scheme' means any pooled investment vehicle, irrespective of legal form. The term 'public collective investment fund or scheme' means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed 'by the public' if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

i) the term 'tax' means any tax to which the Agreement applies;

j) the term 'applicant Party' means the Contracting Party requesting information;

k) the term 'requested Party' means the Contracting Party requested to provide information;

l) the term 'information gathering measures' means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;

m) the term 'information' means any fact, statement or record in any form whatever;

BILATERAL VERSION

a) the term 'Contracting Party' means country A or country B as the context requires;

b) the term 'competent authority' means

i) in the case of Country A, _____;

ii) in the case of Country B, _____;

n) the term 'depositary' means the Secretary-General of the Organisation for Economic Co-operation and Development; *This paragraph would not be necessary*

o) the term 'criminal tax matters' means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party;

p) the term 'criminal laws' means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes.

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 5

Exchange of Information Upon Request

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

b) information regarding the ownership of companies, partnerships, trusts, foundations, 'Anstalten' and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

(c) the tax purpose for which the information is sought;

(d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:

a) Confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request.

b) If the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

Article 6

Tax Examinations Abroad

MULTILATERAL VERSION

1. A Contracting Party may allow representatives of the competent authority of another Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.

BILATERAL VERSION

1. A Contracting Party may allow representatives of the competent authority of the other Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of a Contracting Party, the competent authority of another Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

2. At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

Article 7

Possibility of Declining a Request

1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.

2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

(a) produced for the purposes of seeking or providing legal advice or

(b) produced for the purposes of use in existing or contemplated legal proceedings.

4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).
5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or

any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

Article 8

Confidentiality

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

Article 9

Costs

Incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties.

Article 10

Implementation Legislation

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

Article 11

Language

This article may not be required.

Requests for assistance and answers thereto shall be drawn up in English, French or any other language agreed bilaterally between the competent authorities of the Contracting Parties under Article 13.

Article 12

Other international agreements or arrangements

This article may not be required

The possibilities of assistance provided by this Agreement do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting Parties which relate to co-operation in tax matters.

Article 13

Mutual Agreement Procedure

1. Where difficulties or doubts arise between two or more Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities of those Contracting Parties shall endeavour to resolve the matter by mutual agreement.

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of two or more Contracting Parties may mutually agree:

a) on the procedures to be used under Articles 5 and 6;

b) on the language to be used in making and responding to requests in accordance with Article 11.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5 and 6.

3. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of reaching agreement under this Article.

4. Any agreement between the competent authorities of two or more Contracting Parties shall be effective only between those Contracting Parties.

4. The paragraph would not be necessary.

5. The Contracting Parties may also agree on other forms of dispute resolution.

Article 14

The article would be unnecessary

Depositary's functions

1. The depositary shall notify all Contracting Parties of:

a. the deposit of any instrument of ratification, acceptance or approval of this Agreement;
b. any date of entry into force of this Agreement in accordance with the provisions of Article 15;
c. any notification of termination of this Agreement;
d. any other act or notification relating to this Agreement.

2. At the request of one or more of the competent authorities of the Contracting Parties, the depositary may convene a meeting of the competent authorities or their representatives, to discuss significant matters related to interpretation or implementation of the Agreement.

Article 15

Entry into Force

1. This Agreement is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be submitted to the depositary of this Agreement.

2. Each Contracting Party shall specify in its instrument of ratification, acceptance or approval vis-à-vis which other party it wishes to be bound by this Agreement. The Agreement shall enter into force only between Contracting Parties that specify each other in their respective instruments of ratification, acceptance or approval.

3. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

1. This Agreement is subject to ratification, acceptance or approval by the Contracting Parties, in accordance with their respective laws. Instruments of ratification, acceptance or approval shall be exchanged as soon as possible.

2. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

For each party depositing an instrument after such entry into force, the Agreement shall enter into force on the 30th day following the deposit of both instruments.

4. Unless an earlier date is agreed by the Contracting Parties, the provisions of this Agreement shall have effect

– with respect to criminal tax matters for taxable periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;
– with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

In cases addressed in the third sentence of paragraph 3, the Agreement shall take effect for all taxable periods beginning on or after the sixtieth day following entry into force, or where there is no taxable period for all charges to tax arising on or after the sixtieth day following entry into force.

3. The provisions of this Agreement shall have effect:

– with respect to criminal tax matters for taxable periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;
– with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

Article 16

Termination

1. Any Contracting Party may terminate this Agreement vis-à-vis any other Contracting Party by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party. A copy shall be provided to the depositary of the Agreement.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the depositary.

3. Any Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

Termination

1. Either Contracting Party may terminate the Agreement by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.

3. A Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

In witness whereof, the undersigned, being duly authorised thereto, have signed the Agreement.

III. COMMENTARY

Title and Preamble

1. The preamble sets out the general objective of the Agreement. The objective of the Agreement is to facilitate exchange of information between the parties to the Agreement. The multilateral and the bilateral versions of the preamble are identical except that the multilateral version refers to the signatories of the Agreement as 'Parties' and the bilateral version refers to the signatories as the 'Government of _____.' The formulation 'Government of _____' in the bilateral context is used for illustrative purposes only and countries are free to use other wording in accordance with their domestic requirements or practice.

Article 1 (Object and Scope of Agreement)

2. Article 1 defines the scope of the Agreement, which is the provision of assistance in tax matters through exchange of information that will assist the Contracting Parties to administer and enforce their tax laws.

3. The Agreement is limited to exchange of information that is foreseeably relevant to the administration and enforcement of the laws of the applicant Party concerning the taxes covered by the Agreement. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. Parties that choose to enter into bilateral agreements based on the Agreement may agree to an alternative formulation of this standard, provided that such alternative formulation is consistent with the scope of the Agreement.

4. The Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information. The standard of foreseeable relevance is also used in the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters.

5. The last sentence of Article 1 ensures that procedural rights existing in the requested Party will continue to apply to the extent they do not unduly prevent or delay effective exchange of information. Such rights may include, depending on the circumstances, a right of notification, a right to challenge the exchange of information following notification or rights to challenge information gathering measures taken by the requested Party. Such procedural rights and safeguards also include any rights secured to persons that may flow from relevant international agreements on human rights and the expression 'unduly prevent or delay' indicates that such rights may take precedence over the Agreement.

6. Article 1 strikes a balance between rights granted to persons in the requested Party and the need for effective exchange of information. Article 1 provides that rights and safeguards are not overridden simply because they could, in certain circumstances, operate to prevent or delay effective exchange of information. However, Article 1 obliges the requested Party to ensure that any such rights and safeguards are not applied in a manner that unduly prevents or delays effective exchange of information. For instance, a bona fide procedural safeguard in the requested Party may delay a response to an information request. However, such a delay should not be considered as 'unduly preventing or delaying' effective exchange of information unless the delay is such that it calls into question the usefulness of the information exchange agreement

for the applicant Party. Another example may concern notification requirements. A requested Party whose laws require prior notification is obliged to ensure that its notification requirements are not applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the party seeking the information. For instance, notification rules should permit exceptions from prior notification (*e.g.*, in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the applicant Party). To avoid future difficulties or misunderstandings in the implementation of an agreement, the Contracting Parties should consider discussing these issues in detail during negotiations and in the course of implementing the agreement in order to ensure that information requested under the agreement can be obtained as expeditiously as possible while ensuring adequate protection of taxpayers' rights.

Article 2 (Jurisdiction)

7. Article 2 addresses the jurisdictional scope of the Agreement. It clarifies that a requested Party is not obligated to provide information which is neither held by its authorities nor is in the possession or control of persons within its territorial jurisdiction. The requested Party's obligation to provide information is not, however, restricted by the residence or the nationality of the person to whom the information relates or by the residence or the nationality of the person in control or possession of the information requested. The term 'possession or control' should be construed broadly and the term 'authorities' should be interpreted to include all government agencies. Of course, a requested Party would nevertheless be under no obligation to provide information held by an 'authority' if the circumstances described in Article 7 (Possibility of Declining a Request) were met.

Article 3 (Taxes Covered)

Paragraph 1

8. Article 3 is intended to identify the taxes with respect to which the Contracting Parties agree to exchange information in accordance with the provisions of the Agreement. Article 3 appears in two versions: a multilateral version and a bilateral version. The multilateral Agreement applies to taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes. 'Taxes on income or profits' includes taxes on gains from the alienation of movable or immovable property. The multilateral Agreement, in sub-paragraph b), further permits the inclusion of taxes imposed by or on behalf of political sub-divisions or local authorities. Such taxes are covered by the Agreement only if they are listed in the instrument of ratification, approval or acceptance.

9. Bilateral agreements will cover, at a minimum, the same four categories of direct taxes (i.e., taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes) unless both parties agree to waive one or more of them. A Contracting Party may decide to omit any or all of the four categories of direct taxes from its list of taxes to be covered but it would nevertheless be obligated to respond to requests for information with respect to the taxes listed by the other Contracting Party (assuming the request otherwise satisfies the terms of the Agreement). The Contracting Parties may also agree to cover taxes other than the four categories of direct taxes. For example, Contracting Party A may list all four direct taxes and Contracting Party B may list only indirect taxes. Such an outcome is likely where the two Contracting Parties have substantially different tax regimes.

Paragraph 2

10. Paragraph 2 of the multilateral version provides that the Contracting Parties may agree to extend the Agreement to cover indirect taxes. This possible extension is consistent with Article 26 of the OECD Model Convention on Income and on Capital, which now covers 'taxes of every kind and description.' There is no equivalent to paragraph 2 in the bilateral version because the issue can be addressed under paragraph 1. Any agreement to extend the Agreement to cover indirect taxes should be notified to the depositary. Paragraph 2 of the bilateral version is discussed below together with paragraph 3 of the multilateral version.

Paragraph 3

11. Paragraph 3 of the multilateral version and paragraph 2 of the bilateral version address 'identical taxes', 'substantially similar taxes' and further contain a rule on the expansion or modification of the taxes covered by the Agreement. The Agreement applies automatically to all 'identical taxes'. The Agreement applies to 'substantially similar taxes' if the competent authorities so agree. Finally, the taxes covered by the Agreement can be expanded or modified if the Contracting Parties so agree.

12. The only difference between paragraph 3 of the multilateral version and paragraph 2 of the bilateral version is that the former refers to the date of entry into force whereas the later refers to the date of signature. The multilateral version refers to entry into force because in the multilateral context there might be no official signing of the Agreement between the Contracting Parties.

13. In the multilateral context the first sentence of paragraph 3 is of a declaratory nature only. The multilateral version lists the taxes by general type. Any tax imposed after the date of signature or entry into force of the Agreement that is of such a type is already covered by operation of paragraph 1. The same holds true in the bilateral context, if the Contracting Parties choose to identify the taxes by general type. Certain Contracting Parties, however, may wish to identify the taxes to which the Agreement applies by specific name (*e.g.*, the Income Tax Act of 1999). In these cases, the first sentence makes sure that the Agreement also applies to taxes that are identical to the taxes specifically identified.

14. The meaning of 'identical' should be construed very broadly. For instance, any replacement tax of an existing tax that does not change the nature of the tax should be considered an 'identical' tax. Contracting Parties seeking to avoid any uncertainty regarding the interpretation of 'identical' versus 'substantially similar' may wish to delete the second sentence and to include substantially similar taxes within the first sentence.

Article 4 (Definitions)

Paragraph 1

15. Article 4 contains the definitions of terms for purposes of the Agreement. Article 4, paragraph 1, sub-paragraph a) defines the term 'Contracting Party'. Sub-paragraph b) defines the term 'competent authority.' The definition recognises that in some Contracting Parties the execution of the Agreement may not fall exclusively within the competence of the highest tax authorities and that some matters may be reserved or may be delegated to other authorities. The definition enables each Contracting Party to designate one or more authorities as being

competent to execute the Agreement. While the definition provides the Contracting Parties with the possibility of designating more than one competent authority (for instance, where Contracting Parties agree to cover both direct and indirect taxes), it is customary practice to have only one competent authority per Contracting Party.

16. Sub-paragraph c) defines the meaning of 'person' for purposes of the Agreement. The definition of the term 'person' given in sub-paragraph c) is intended to be very broad. The definition explicitly mentions an individual, a company and any other body of persons. However, the use of the word 'includes' makes clear that the Agreement also covers any other organisational structures such as trusts, foundations, 'Anstalten,' partnerships as well as collective investment funds or schemes.

17. Foundations, 'Anstalten' and similar arrangements are covered by this Agreement irrespective of whether or not they are treated as an 'entity that is treated as a body corporate for tax purposes' under sub-paragraph d).

18. Trusts are also covered by this Agreement. Thus, competent authorities of the Contracting Parties must have the authority to obtain and provide information on trusts (such as the identity of settlors, beneficiaries or trustees) irrespective of the classification of trusts under their domestic laws.

19. The main example of a 'body of persons' is the partnership. In addition to partnerships, the term 'body of persons' also covers less commonly used organisational structures such as unincorporated associations.

20. In most cases, applying the definition should not raise significant issues of interpretation. However, when applying the definition to less commonly used organisational structures, interpretation may prove more difficult. In these cases, particular attention must be given to the context of the Agreement. *Cf. Article 4, paragraph 2*. The key operational article that uses the term 'person' is Article 5, paragraph 4, sub-paragraph b), which provides that a Contracting Party must have the authority to obtain and provide ownership information for all 'persons' within the constraints of Article 2. Too narrow an interpretation may jeopardise the object and purposes of the Agreement by potentially excluding certain entities or other organisational structures from this obligation simply as a result of certain corporate or other legal features. Therefore, the aim is to cover all possible organisational structures.

21. For instance an 'estate' is recognised as a distinct entity under the laws of certain countries. An 'estate' typically denotes property held under the provisions of a will by a fiduciary (and under the direction of a court) whose duty it is to preserve and protect such property for distribution to the beneficiaries. Similarly a legal system might recognise an organisational structure that is substantially similar to a trust or foundation but may refer to it by a different name. The standard of Article 4, paragraph 2 makes clear that where these arrangements exist under the applicable law they constitute 'persons' under the definition of sub-paragraph c).

22. Sub-paragraph d) provides the definition of company and is identical to Article 3, paragraph 1 sub-paragraph b) of the OECD Model Convention on Income and on Capital.

23. Sub-paragraphs e) through h) define 'publicly traded company' and 'collective investment fund or scheme.' Both terms are used in Article 5 paragraph 4, sub-paragraph b). Sub-paragraphs e) through g) contain the definition of publicly traded company and sub-paragraph h) addresses collective investment funds or schemes.

24. For reasons of simplicity the definitions do not require a minimum percentage of interests traded (*e.g.*, 5 percent of all outstanding shares of a publicly listed company) but somewhat

more broadly require that equity interests must be 'readily' available for sale, purchase or redemption. The fact that a collective investment fund or scheme may operate in the form of a publicly traded company should not raise any issues because the definitions for both publicly traded company and collective investment fund or scheme are essentially identical.

25. Sub-paragraph e) provides that a 'publicly traded company' is any company whose principal class of shares is listed on a recognised stock exchange and whose listed shares can be readily sold or purchased by the public. The term 'principal class of shares' is defined in sub-paragraph f). The definition ensures that companies that only list a minority interest do not qualify as publicly traded companies. A publicly traded company can only be a company that lists shares representing both a majority of the voting rights and a majority of the value of the company.

26. The term 'recognised stock exchange' is defined in sub-paragraph g) as any stock exchange agreed upon by the competent authorities. One criterion competent authorities might consider in this context is whether the listing rules, including the wider regulatory environment, of any given stock exchange contain sufficient safeguards against private limited companies posing as publicly listed companies. Competent authorities might further explore whether there are any regulatory or other requirements for the disclosure of substantial interests in any publicly listed company.

27. The term 'by the public' is defined in the second sentence of sub-paragraph e). The definition seeks to ensure that share ownership is not restricted to a limited group of investors. Examples of cases in which the purchase or sale of shares is restricted to a limited group of investors would include the following situations: shares can only be sold to existing shareholders, shares are only offered to members of a family or to related group companies, shares can only be bought by members of an investment club, a partnership or other association.

28. Restrictions on the free transferability of shares that are imposed by operation of law or by a regulatory authority or are conditional or contingent upon market related events are not restrictions that limit the purchase or sale of shares to a 'limited group of investors'. By way of example, a restriction on the free transferability of shares of a corporate entity that is triggered by attempts by a group of investors or non-investors to obtain control of a company is not a restriction that limits the purchase or sale of shares to a 'limited group of investors'.

29. The insertion of 'readily' reflects the fact that where shares do not change hands to any relevant degree the rationale for the special mention of publicly traded companies in Article 5, paragraph 4, sub-paragraph b) does not apply. Thus, for a publicly traded company to meet this standard, more than a negligible portion of its listed shares must actually be traded.

30. Sub-paragraph h) defines a collective investment fund or scheme as any pooled investment vehicle irrespective of legal form. The definition includes collective investment funds or schemes structured as companies, partnerships, trusts as well as purely contractual arrangements. Sub-paragraph h) then defines 'public collective investment funds or schemes' as any collective investment fund or scheme where the interests in the vehicle can be readily purchased, sold, or redeemed by the public. The terms 'readily' and 'by the public' have the same meaning that they have in connection with the definition of publicly traded companies.

31. Sub-paragraphs i, j) and k) are self-explanatory.

32. Sub-paragraph l) defines 'information gathering measures.' Each Contracting Party determines the form of such powers and the manner in which they are implemented under its internal law. Information gathering measures typically include requiring the presentation of records for examination, gaining direct access to records, making copies of such records and interviewing persons having knowledge, possession, control or custody of pertinent

information. Information gathering measures will typically focus on obtaining the requested information and will in most cases not themselves address the provision of the information to the applicant Party.

33. Sub-paragraph m) defines 'information'. The definition is very broad and includes any fact, statement or record in any form whatever. 'Record' includes (but is not limited to): an account, an agreement, a book, a chart, a table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a telegram and a voucher. The term 'record' is not limited to information maintained in paper form but includes information maintained in electronic form.

34. Sub-paragraph n) of the multilateral version provides that the depositary of the Agreement is the Secretary General of the OECD.

35. Sub-paragraph o) defines criminal tax matters. Criminal tax matters are defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the applicant Party. Criminal law provisions based on non-intentional conduct (*e.g.*, provisions that involve strict or absolute liability) do not constitute criminal tax matters for purposes of the Agreement. A tax matter involves 'intentional conduct' if the pertinent criminal law provision requires an element of intent. Sub-paragraph o) does not create an obligation on the part of the applicant Party to prove to the requested Party an element of intent in connection with the actual conduct under investigation.

36. Typical categories of conduct that constitute tax crimes include the wilful failure to file a tax return within the prescribed time period; wilful omission or concealment of sums subject to tax; making false or incomplete statements to the tax or other authorities of facts which obstruct the collection of tax; deliberate omissions of entries in books and records; deliberate inclusion of false or incorrect entries in books and records; interposition for the purposes of causing all or part of the wealth of another person to escape tax; or consenting or acquiescing to an offence. Tax crimes, like other crimes, are punished through fines, incarceration or both.

37. Sub-paragraph p) defines the term 'criminal laws' used in sub-paragraph o). It makes clear that criminal laws include criminal law provisions contained in a tax code or any other statute enacted by the applicant Party. It further clarifies that criminal laws are only such laws that are designated as such under domestic law and do not include provisions that might be deemed of a criminal nature for other purposes such as for purposes of applying relevant human rights or other international conventions.

Paragraph 2

38. This paragraph establishes a general rule of interpretation for terms used in the Agreement but not defined therein. The paragraph is similar to that contained in the OECD Model Convention on Income and on Capital. It provides that any term used, but not defined, in the Agreement will be given the meaning it has under the law of the Contracting Party applying the Agreement unless the context requires otherwise. Contracting Parties may agree to allow the competent authorities to use the Mutual Agreement Procedure provided for in Article 13 to agree the meaning of such an undefined term. However, the ability to do so may depend on constitutional or other limitations. In cases in which the laws of the Contracting Party applying the Agreement provide several meanings, any meaning given to the term under the applicable tax laws will prevail over any meaning that is given to the term under any other laws. The last part of the sentence is, of course, operational only where the Contracting Party applying the Agreement imposes taxes and therefore has 'applicable tax laws.'

Article 5 (Exchange of Information Upon Request)

Paragraph 1

39. Paragraph 1 provides the general rule that the competent authority of the requested Party must provide information upon request for the purposes referred to in Article 1. The paragraph makes clear that the Agreement only covers exchange of information upon request (*i.e.*, when the information requested relates to a particular examination, inquiry or investigation) and does not cover automatic or spontaneous exchange of information. However, Contracting Parties may wish to consider expanding their co-operation in matters of information exchange for tax purposes by covering automatic and spontaneous exchanges and simultaneous tax examinations.

40. The reference in the first sentence to Article 1 of the Agreement confirms that information must be exchanged for both civil and criminal tax matters. The second sentence of paragraph 1 makes clear that information in connection with criminal tax matters must be exchanged irrespective of whether or not the conduct being investigated would also constitute a crime under the laws of the requested Party.

Paragraph 2

41. Paragraph 2 is intended to clarify that, in responding to a request, a Contracting Party will have to take action to obtain the information requested and cannot rely solely on the information in the possession of its competent authority. Reference is made to information 'in its possession' rather than 'available in the tax files' because some Contracting Parties do not have tax files because they do not impose direct taxes.

42. Upon receipt of an information request the competent authority of the requested Party must first review whether it has all the information necessary to respond to a request. If the information in its own possession proves inadequate, it must take 'all relevant information gathering measures' to provide the applicant Party with the information requested. The term 'information gathering measures' is defined in Article 4, paragraph 1, sub-paragraph l). An information gathering measure is 'relevant' if it is capable of obtaining the information requested by the applicant Party. The requested Party determines which information gathering measures are relevant in a particular case.

43. Paragraph 2 further provides that information must be exchanged without regard to whether the requested Party needs the information for its own tax purposes. This rule is needed because a tax interest requirement might defeat effective exchange of information, for instance, in cases where the requested Party does not impose an income tax or the request relates to an entity not subject to taxation within the requested Party.

Paragraph 3

44. Paragraph 3 includes a provision intended to require the provision of information in a format specifically requested by a Contracting Party to satisfy its evidentiary or other legal requirements to the extent allowable under the laws of the requested Party. Such forms may include depositions of witnesses and authenticated copies of original records. Under paragraph 3, the requested Party may decline to provide the information in the specific form requested if such form is not allowable under its laws. A refusal to provide the information in the format requested does not affect the obligation to provide the information.

45. If requested by the applicant Party, authenticated copies of unedited original records should be provided to the applicant Party. However, a requested Party may need to edit information unrelated to the request if the provision of such information would be contrary to its laws. Furthermore, in some countries authentication of documents might require translation in a language other than the language of the original record. Where such issues may arise, Contracting Parties should consider discussing these issues in detail during discussions prior to the conclusion of this Agreement.

Paragraph 4

46. Paragraph 4, sub-paragraph a), by referring explicitly to persons that may enjoy certain privilege rights under domestic law, makes clear that such rights can not form the basis for declining a request unless otherwise provided in Article 7. For instance, the inclusion of a reference to bank information in paragraph 4, sub-paragraph a) rules out that bank secrecy could be considered a part of public policy (ordre public). Similarly, paragraph 4, sub-paragraph a) together with Article 7, paragraph 2 makes clear that information that does not otherwise constitute a trade, business, industrial, commercial or professional secret or trade process does not become such a secret simply because it is held by one of the persons mentioned.

47. Sub-paragraph a) should not be taken to suggest that a competent authority is obliged only to have the authority to obtain and provide information from the persons mentioned. Sub-paragraph a) does not limit the obligation imposed by Article 5, paragraph 1.

48. Sub-paragraph a) mentions information held by banks and other financial institutions. In accordance with the Report '*Improving Access to Bank Information for Tax Purposes*' (OECD 2000), access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. As stated in the report, the procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information. Typically, requested bank information includes account, financial, and transactional information as well as information on the identity or legal structure of account holders and parties to financial transactions.

49. Paragraph 4, sub-paragraph a) further mentions information held by persons acting in an agency or fiduciary capacity, including nominees and trustees. A person is generally said to act in a 'fiduciary capacity' when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part. The term 'agency' is very broad and includes all forms of corporate service providers (*e.g.*, company formation agents, trust companies, registered agents, lawyers).

50. Sub-paragraph b) requires that the competent authorities of the Contracting Parties must have the authority to obtain and provide ownership information. The purpose of the sub-paragraph is not to develop a common 'all purpose' definition of ownership among Contracting Parties, but to specify the types of information that a Contracting Party may legitimately expect to receive in response to a request for ownership information so that it may apply its own tax laws, including its domestic definition of beneficial ownership.

51. In connection with companies and partnerships, the legal and beneficial owner of the shares or partnership assets will usually be the same person. However, in some cases the legal ownership position may be subject to a nominee or similar arrangement. Where the legal owner acts on behalf of another person as a nominee or under a similar arrangement, such other person, rather than the legal owner, may be the beneficial owner. Thus the starting point

for the ownership analysis is legal ownership of shares or partnership interests and all Contracting Parties must be able to obtain and provide information on legal ownership. Partnership interests include all forms of partnership interests: general or limited or capital or profits. However, in certain cases, legal ownership may be no more than a starting point. For example, in any case where the legal owner acts on behalf of any other person as a nominee or under a similar arrangement, the Contracting Parties should have the authority to obtain and provide information about that other person who may be the beneficial owner in addition to information about the legal owner. An example of a nominee is a nominee shareholding arrangement where the legal title-holder that also appears as the shareholder of record acts as an agent for another person. Within the constraints of Article 2 of the Agreement, the requested Party must have the authority to provide information about the persons in an ownership chain.

52. In connection with trusts and foundations, sub-paragraph b) provides specifically the type of identity information the Contracting Parties should have the authority to obtain and provide. This is not limited to ownership information. The same rules should also be applied to persons that are substantially similar to trusts or foundations such as the 'Anstalt.' Therefore, a Contracting Party should have, for example, the authority to obtain and provide information on the identity of the settlor and the beneficiaries and persons who are in a position to direct how assets of the trust or foundation are to be dealt with.

53. Certain trusts, foundations, 'Anstalten' or similar arrangements, may not have any identified group of persons as beneficiaries but rather may support a general cause. Therefore, ownership information should be read to include only identifiable persons. The term 'foundation council' should be interpreted very broadly to include any person or body of persons managing the foundation as well as persons who are in a position to direct how assets of the trust or foundation are to be dealt with.

54. Most organisational structures will be classified as a company, a partnership, a trust, a foundation or a person similar to a trust or foundation. However, there might be entities or structures for which ownership information might be legitimately requested but that do not fall into any of these categories. For instance, a structure might, as a matter of law, be of a purely contractual nature. In these cases, the Contracting Parties should have the authority to obtain and provide information about any person with a right to share in the income or gain of the structure or in the proceeds from any sale or liquidation.

55. Sub-paragraph b) also provides that a requested Party must have the authority to obtain and provide ownership information for all persons in an ownership chain provided, as is set out in Article 2, the information is held by the authorities of the requested State or is in the possession or control of persons who are within the territorial jurisdiction of the requested Party. This language ensures that the applicant Party need not submit separate information requests for each level of a chain of companies or other persons. For instance, assume company A is a wholly-owned subsidiary of company B and both companies are incorporated under the laws of Party C, a Contracting Party of the Agreement. If Party D, also a Contracting Party, requests ownership information on company A and specifies in the request that it also seeks ownership information on any person in A's chain of ownership, Party C in its response to the request must provide ownership information for both company A and B.

56. The second sentence of sub-paragraph b) provides that in the case of publicly traded companies and public collective investment funds or schemes, the competent authorities need only provide ownership information that the requested Party can obtain without disproportionate difficulties. Information can be obtained only with 'disproportionate difficulties' if the identification of owners, while theoretically possible, would involve excessive costs or resources.

Because such difficulties might easily arise in connection with publicly traded companies and public collective investment funds or schemes where a true public market for ownership interests exists, it was felt that such a clarification was particularly warranted. At the same time it is recognised that where a true public market for ownership interests exists there is less of a risk that such vehicles will be used for tax evasion or other non-compliance with the tax law. The definitions of publicly traded companies and public collective investment funds or schemes are contained in Article 4, paragraph 1, sub-paragraphs e) through h).

Paragraph 5

57. Paragraph 5 lists the information that the applicant Party must provide to the requested Party in order to demonstrate the foreseeable relevance of the information requested to the administration or enforcement of the applicant Party's tax laws. While paragraph 5 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs a) through g) nevertheless need to be interpreted liberally in order not to frustrate effective exchange of information. The following paragraphs give some examples to illustrate the application of the requirements in certain situations.

58. Example 1 (sub-paragraph (a))

Where a Party is asking for account information but the identity of the accountholder(s) is unknown, subparagraph (a) may be satisfied by supplying the account number or similar identifying information.

59. Example 2 (sub-paragraph (d)) ('is held')

A taxpayer of Country A withdraws all funds from his bank account and is handed a large amount of cash. He visits one bank in both country B and C, and then returns to Country A without the cash. In connection with a subsequent investigation of the taxpayer, the competent authority of Country A sends a request to Country B and to Country C for information regarding bank accounts that may have been opened by the taxpayer at one or both of the banks he visited. Under such circumstances, the competent authority of Country A has grounds to believe that the information is held in Country B or is in the possession or control of a person subject to the jurisdiction of Country B. It also has grounds to believe the same with respect to Country C. Country B (or C) can not decline the request on the basis that Country A has failed to establish that the information 'is' in Country B (or C), because it is equally likely that the information is in the other country.

60. Example 3 (sub-paragraph (d))

A similar situation may arise where a person under investigation by Country X may or may not have fled Country Y and his bank account there may or may not have been closed. As long as country X is able to connect the person to Country Y, Country Y may not refuse the request on the ground that Country X does not have grounds for believing that the requested information 'is' held in Country Y. Country X may legitimately expect Country Y to make an inquiry into the matter, and if a bank account is found, to provide the requested information.

61. Sub-paragraph d) provides that the applicant Party shall inform the requested Party of the grounds for believing that the information is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party. The term 'held in the requested Party' includes information held by any government agency or authority of the requested Party.

62. Sub-paragraph f) needs to be read in conjunction with Article 7, paragraph 1. In particular, see paragraph 77 of the Commentary on Article 7. The statement required under sub-paragraph f) covers three elements: first, that the request is in conformity with the law and administrative practices of the applicant Party; second that the information requested would be obtainable under the laws or in the normal course of administration of the applicant Party if the information were within the jurisdiction of the applicant Party; and third that the information request is in conformity with the Agreement. The 'normal course of administrative practice' may include special investigations or special examinations of the business accounts kept by the taxpayer or other persons, provided that the tax authorities of the applicant Party would make similar investigations or examinations if the information were within their jurisdiction.

63. Sub-paragraph g) is explained by the fact that, depending on the tax system of the requested Party, a request for information may place an extra burden on the administrative machinery of the requested Party. Therefore, a request should only be contemplated if an applicant Party has no convenient means to obtain the information available within its own jurisdiction. In as far as other means are still available in the applicant Party, the statement prescribed in sub-paragraph g) should explain that these would give rise to disproportionate difficulties. In this last case an element of proportionality plays a role. It should be easier for the requested Party to obtain the information sought after, than for the applicant Party. For example, obtaining information from one supplier in the requested Party may lead to the same information as seeking information from a large number of buyers in the applicant Party.

64. It is in the applicant Party's own interest to provide as much information as possible in order to facilitate the prompt response by the requested Party. Hence, incomplete information requests should be rare. The requested Party may ask for additional information but a request for additional information should not delay a response to an information request that complies with the rules of paragraph 5. For possibilities of declining a request, see Article 7 and the accompanying Commentary.

Paragraph 6

65. Paragraph 6 sets out procedures for handling requests to ensure prompt responses. The 90 day period set out in subparagraph b) may be extended if required, for instance, by the volume of information requested or the need to authenticate numerous documents. If the competent authority of the requested Party is unable to provide the information within the 90 day period it should immediately notify the competent authority of the applicant Party. The notification should specify the reasons for not having provided the information within the 90 day period (or extended period). Reasons for not having provided the information include, a situation where a judicial or administrative process required to obtain the information has not yet been completed. The notification may usefully contain an estimate of the time still needed to comply with the request. Finally, paragraph 6 encourages the requested Party to react as promptly as possible and, for instance, where appropriate and practical, even before the time limits established under sub-paragraphs a) and b) have expired.

Article 6 (Tax Examinations Abroad)

Paragraph 1

66. Paragraph 1 provides that a Contracting Party may allow representatives of the applicant Party to enter the territory of the requested Party to interview individuals and to examine

records with the written consent of the persons concerned. The decision of whether to allow such examinations and if so on what terms, lies exclusively in the hands of the requested Party. For instance, the requested Party may determine that a representative of the requested Party is present at some or all such interviews or examinations. This provision enables officials of the applicant Party to participate directly in gathering information in the requested Party but only with the permission of the requested Party and the consent of the persons concerned. Officials of the applicant Party would have no authority to compel disclosure of any information in those circumstances. Given that many jurisdictions and smaller countries have limited resources with which to respond to requests, this provision can be a useful alternative to the use of their own resources to gather information. While retaining full control of the process, the requested Party is freed from the cost and resource implications that it may otherwise face. Country experience suggests that tax examinations abroad can benefit both the applicant and the requested Party. Taxpayers could be interested in such a procedure because, it might spare them the burden of having to make copies of voluminous records to respond to a request.

Paragraph 2

67. Paragraph 2 authorises, but does not require, the requested Party to permit the presence of foreign tax officials to be present during a tax examination initiated by the requested Party in its jurisdiction, for example, for purposes of obtaining the requested information. The decision of whether to allow the foreign representatives to be present lies exclusively within the hands of the competent authority of the requested Party. It is understood that this type of assistance should not be requested unless the competent authority of the applicant Party is convinced that the presence of its representatives at the examination in the requested Party will contribute to a considerable extent to the solution of a domestic tax case. Furthermore, requests for such assistance should not be made in minor cases. This does not necessarily imply that large amounts of tax have to be involved in the particular case. Other justifications for such a request may be the fact that the matter is of prime importance for the solution of other domestic tax cases or that the foreign examination is to be regarded as part of an examination on a large scale embracing domestic enterprises and residents.

68. The applicant Party should set out the motive for the request as thoroughly as possible. The request should include a clear description of the domestic tax case to which the request relates. It should also indicate the special reasons why the physical presence of a representative of the competent authority is important. If the competent authority of the applicant Party wishes the examination to be conducted in a specific manner or at a specified time, such wishes should be stated in the request.

69. The representatives of the competent authority of the applicant Party may be present only for the appropriate part of the tax examination. The authorities of the requested Party will ensure that this requirement is fulfilled by virtue of the exclusive authority they exercise in respect of the conduct of the examination.

Paragraph 3

70. Paragraph 3 sets out the procedures to be followed if a request under paragraph 2 has been granted. All decisions on how the examination is to be carried out will be taken by the authority or the official of the requested Party in charge of the examination.

Article 7 (Possibility of Declining a Request)

71. The purpose of this Article is to identify the situations in which a requested Party is *not* required to supply information in response to a request. If the conditions for any of the grounds for declining a request under Article 7 are met, the requested Party is given discretion to refuse to provide the information but it should carefully weigh the interests of the applicant Party with the pertinent reasons for declining the request. However, if the requested Party does provide the information the person concerned cannot allege an infraction of the rules on secrecy. In the event that the requested Party declines a request for information it shall inform the applicant Party of the grounds for its decision at the earliest opportunity.

Paragraph 1

72. The first sentence of paragraph 1 makes clear that a requested Party is not required to obtain and provide information that the applicant Party would not be able to obtain under similar circumstances under its own laws for purposes of the administration or enforcement of its own tax laws.

73. This rule is intended to prevent the applicant Party from circumventing its domestic law limitations by requesting information from the other Contracting Party thus making use of greater powers than it possesses under its own laws. For instance, most countries recognise under their domestic laws that information cannot be obtained from a person to the extent such person can claim the privilege against self-incrimination. A requested Party may, therefore, decline a request if the applicant Party would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances.

74. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

75. The second sentence of paragraph 1 provides that a requested Party may decline a request for information in cases where the request is not made in conformity with the Agreement.

76. Both the first and the second sentence of paragraph 1 raise the question of how the statements provided by the applicant Party under Article 5, paragraph 5, sub-paragraph f) relate to the grounds for declining a request under Article 7, paragraph 1. The provision of the respective statements should generally be sufficient to establish that no reasons for declining a request under Article 7, paragraph 1 exist. However, a requested Party that has received statements to this effect may still decline the request if it has grounds for believing that the statements are clearly inaccurate.

77. Where a requested Party, in reliance on such statements, provides information to the applicant Party it remains within the framework of this Agreement. A requested Party is under no obligation to research or verify the statements provided by the applicant Party. The responsibility for the accuracy of the statement lies with the applicant Party.

Paragraph 2

78. The first sentence of paragraph 2 provides that a Contracting Party is not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process.

79. Most information requests will not raise issues of trade, business or other secrets. For instance, information requested in connection with a person engaged only in passive investment activities is unlikely to contain any trade, business, industrial or commercial or professional secret because such person is not conducting any trade, business, industrial or commercial or professional activity.

80. Financial information, including books and records, does not generally constitute a trade, business or other secret. However, in certain limited cases the disclosure of financial information might reveal a trade business or other secret. For instance, a requested Party may decline a request for information on certain purchase records where the disclosure of such information would reveal the proprietary formula of a product.

81. Paragraph 2 has its main application where the provision of information in response to a request would reveal protected intellectual property created by the holder of the information or a third person. For instance, a bank might hold a pending patent application for safe keeping or a trade process might be described in a loan application. In these cases the requested Party may decline any portion of a request for information that would reveal information protected by patent, copyright or other intellectual property laws.

82. The second sentence of paragraph 2 makes clear that the Agreement overrides any domestic laws or practices that may treat information as a trade, business, industrial, commercial or professional secret or trade process merely because it is held by a person identified in Article 5, paragraph 4, sub-paragraph a) or merely because it is ownership information. Thus, in connection with information held by banks, financial institutions etc., the Agreement overrides domestic laws or practices that treat the information as a trade or other secret when in the hands of such person but would not afford such protection when in the hands of another person, for instance, the taxpayer under investigation. In connection with ownership information, the Agreement makes clear that information requests cannot be declined merely because domestic laws or practices may treat such ownership information as a trade or other secret.

83. Before invoking this provision, a requested Party should carefully weigh the interests of the person protected by its laws with the interests of the applicant Party. In its deliberations the requested Party should also take into account the confidentiality rules of Article 8.

Paragraph 3

84. A Contracting Party may decline a request if the information requested is protected by the attorney-client privilege as defined in paragraph 3. However, where the equivalent privilege under the domestic law of the requested Party is narrower than the definition contained in paragraph 3 *(e.g.*, the law of the requested Party does not recognise a privilege in tax matters, or it does not recognise a privilege in criminal tax matters) a requested Party may not decline a request unless it can base its refusal to provide the information on Article 7, paragraph 1.

85. Under paragraph 3 the attorney-client privilege attaches to any information that constitutes (1) 'confidential communication,' between (2) 'a client and an attorney, solicitor or other admitted legal representative,' if such communication (3) 'is produced for the purposes of

seeking or providing legal advice' or (4) is 'produced for the purposes of use in existing or contemplated legal proceedings.'

86. Communication is 'confidential' if the client can reasonably have expected the communication to be kept secret. For instance, communications made in the presence of third parties that are neither staff nor otherwise agents of the attorney are not confidential communications. Similarly, communications made to the attorney by the client with the instruction to share them with such third parties are not confidential communications.

87. The communications must be between a client and an attorney, solicitor or other admitted legal representative. Thus, the attorney-client privilege applies only if the attorney, solicitor or other legal representative is admitted to practice law. Communications with persons of legal training but not admitted to practice law are not protected under the attorney-client privilege rules.

88. Communications between a client and an attorney, solicitor or other admitted legal representative are only privileged if, and to the extent that, the attorney, solicitor or other legal representative acts in his or her capacity as an attorney, solicitor or other legal representative. For instance, to the extent that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent the company in its business affairs, he can not claim the attorney-client privilege with respect to any information resulting from and relating to any such activity.

89. Sub-paragraph a) requires that the communications be 'produced for the purposes of seeking or providing legal advice.' The attorney-client privilege covers communications by both client and attorney provided the communications are produced for purposes of either seeking or providing legal advice. Because the communication must be produced for the purposes of seeking or providing legal advice, the privilege does not attach to documents or records delivered to an attorney in an attempt to protect such documents or records from disclosure. Also, information on the identity of a person, such as a director or beneficial owner of a company, is typically not covered by the privilege.

90. Sub-paragraph b) addresses the case where the attorney does not act in an advisory function but has been engaged to act as a representative in legal proceedings, both at the administrative and the judicial level. Sub-paragraph b) requires that the communications must be produced for the purposes of use in existing or contemplated legal proceedings. It covers communications both by the client and the attorney provided the communications have been produced for use in existing or contemplated legal proceedings.

Paragraph 4

91. Paragraph 4 stipulates that Contracting Parties do not have to supply information the disclosure of which would be contrary to public policy (ordre public). 'Public policy' and its French equivalent 'ordre public' refer to information which concerns the vital interests of the Party itself. This exception can only be invoked in extreme cases. For instance, a case of public policy would arise if a tax investigation in the applicant Party were motivated by political or racial persecution. Reasons of public policy might also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested Party. Thus, issues of public policy should rarely arise in the context of requests for information that otherwise fall within the scope of this Agreement.

Paragraph 5

92. Paragraph 5 clarifies that an information request must not be refused on the basis that the tax claim to which it relates is disputed.

Paragraph 6

93. In the exceptional circumstances in which this issue may arise, paragraph 6 allows the requested Party to decline a request where the information requested by the applicant Party would be used to administer or enforce tax laws of the applicant Party, or any requirements connected therewith, which discriminate against nationals of the requested Party. Paragraph 6 is intended to ensure that the Agreement does not result in discrimination between nationals of the requested Party and identically placed nationals of the applicant Party. Nationals are not identically placed where an applicant state national is a resident of that state while a requested state national is not. Thus, paragraph 6 does not apply to cases where tax rules differ only on the basis of residence. The person's nationality as such should not lay the taxpayer open to any inequality of treatment. This applies both to procedural matters (differences between the safeguards or remedies available to the taxpayer, for example) and to substantive matters, such as the rate of tax applicable.

Article 8 (Confidentiality)

94. Ensuring that adequate protection is provided to information received from another Contracting Party is essential to any exchange of information instrument relating to tax matters. Exchange of information for tax matters must always be coupled with stringent safeguards to ensure that the information is used only for the purposes specified in Article 1 of the Agreement. Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. Mutual assistance between competent authorities is only feasible if each is assured that the other will treat with proper confidence the information which it obtains in the course of their co-operation. The Contracting Parties must have such safeguards in place. Some Contracting Parties may prefer to use the term 'secret', rather than the term 'confidential' in this Article. The terms are considered synonymous and interchangeable for purposes of this Article and Contracting Parties are free to use either term.

95. The first sentence provides that any information received pursuant to this Agreement by a Contracting Party must be treated as confidential. Information may be received by both the applicant Party and the requested Party (*see*, Article 5 paragraph 5).

96. The information may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement. This means that the information may also be communicated to the taxpayer, his proxy or to a witness. The Agreement only permits but does not require disclosure of the information to the taxpayer. In fact, there may be cases in which information is given in confidence to the requested Party and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. The competent authorities concerned should discuss such cases with a view to finding a mutually acceptable mechanism for addressing them. The competent authorities of the applicant Party need no authorisation, consent or other form of approval for the provision of the information received to any of the persons or authorities identified. The references to 'public court proceedings' and to 'judicial decisions' in this paragraph extend to include proceedings and decisions which,

while not formally being 'judicial', are of a similar character. An example would be an administrative tribunal reaching decisions on tax matters that may be binding or may be appealed to a court or a further tribunal.

97. The third sentence precludes disclosure by the applicant Party of the information to a third Party unless express written consent is given by the Contracting Party that supplied the information. The request for consent to pass on the information to a third party is not to be considered as a normal request for information for the purposes of this Agreement.

Article 9 (Costs)

98. Article 9 allows the Contracting Parties to agree upon rules regarding the costs of obtaining and providing information in response to a request. In general, costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested State would normally be expected to be borne by the requested State when such costs are incurred for purposes of responding to a request for information. Such costs would normally cover routine tasks such as obtaining and providing copies of documents.

99. Flexibility is likely to be required in determining the incidence of costs to take into account factors such as the likely flow of information requests between the Contracting Parties, whether both Parties have income tax administrations, the capacity of each Party to obtain and provide information, and the volume of information involved. A variety of methods may be used to allocate costs between the Contracting Parties. For example, a determination of which Party will bear the costs could be agreed to on a case by case base. Alternatively, the competent authorities may wish to establish a scale of fees for the processing of requests that would take into account the amount of work involved in responding to a request. The Agreement allows for the Contracting Parties or the competent authorities, if so delegated, to agree upon the rules, because it is difficult to take into account the particular circumstances of each Party.

Article 10 (Implementing Legislation)

100. Article 10 establishes the requirement for Contracting Parties to enact any legislation necessary to comply with the terms of the Agreement. Article 10 obliges the Contracting Parties to enact any necessary legislation with effect as of the date specified in Article 15. Implicitly, Article 10 also obliges Contracting Parties to refrain from introducing any new legislation contrary to their obligations under this Agreement.

Article 11 (Language)

101. Article 11 provides the competent authorities of the Contracting Parties with the flexibility to agree on the language(s) that will be used in making and responding to requests, with English and French as options where no other language is chosen. This article may not be necessary in the bilateral context.

Article 12 (Other International Agreements or Arrangements)

102. Article 12 is intended to ensure that the applicant Party is able to use the international instrument it deems most appropriate for obtaining the necessary information. This article may not be required in the bilateral context.

Article 13 (Mutual Agreement Procedure)

Paragraph 1

103. This Article institutes a mutual agreement procedure for resolving difficulties arising out of the implementation or interpretation of the Agreement. Under this provision, the competent authorities, within their powers under domestic law, can complete or clarify the meaning of a term in order to obviate any difficulty.
104. Mutual agreements resolving general difficulties of interpretation or application are binding on administrations as long as the competent authorities do not agree to modify or rescind the mutual agreement.

Paragraph 2

105. Paragraph 2 identifies other specific types of agreements that may be reached between competent authorities, in addition to those referred to in paragraph 1.

Paragraph 3

106. Paragraph 3 determines how the competent authorities may consult for the purposes of reaching a mutual agreement. It provides that the competent authorities may communicate with each other directly. Thus, it would not be necessary to go through diplomatic channels. The competent authorities may communicate with each other by letter, facsimile transmission, telephone, direct meetings, or any other convenient means for purposes of reaching a mutual agreement.

Paragraph 4

107. Paragraph 4 of the multilateral version clarifies that agreements reached between the competent authorities of two or more Contracting Parties would not in any way bind the competent authorities of Contracting Parties that were not parties to the particular agreement. The result is self-evident in the bilateral context and no corresponding provision has been included.

Paragraph 5

108. Paragraph 5 provides that the Contracting Parties may agree to other forms of dispute resolution. For instance, Contracting Parties may stipulate that under certain circumstances, e.g., the failure of resolving a matter through a mutual agreement procedure, a matter may be referred to arbitration.

Article 14 (Depositary's Functions)

109. Article 14 of the multilateral version discusses the functions of the depositary. There is no corresponding provision in the bilateral context.

Article 15 (Entry into Force)

Paragraph 1

110. Paragraph 1 of the bilateral version contains standard language used in bilateral treaties. The provision is similar to Article 29, paragraph 1 of the OECD Model Convention on Income and on Capital.

Paragraph 2

111. Paragraph 2 of the multilateral version provides that the Agreement will enter into force only between those Contracting Parties that have mutually stated their intention to be bound vis-à-vis the other Contracting Party. There is no corresponding provision in the bilateral context.

Paragraph 3

112. Paragraph 3 differentiates between exchange of information in criminal tax matters and exchange of information in all other tax matters. With regard to criminal tax matters the Agreement will enter into force on January 1, 2004. Of course, where Contracting Parties already have in place a mechanism (*e.g.*, a mutual legal assistance treaty) that allows information exchange on criminal tax matters consistent with the standard described in this Agreement, the January 1, 2004 date would not be relevant. See Article 12 of the Agreement and paragraph 5 of the introduction. With regard to all other matters the Agreement will enter into force on January 1, 2006. The multilateral version also provides a special rule for parties that subsequently want to make use of the Agreement. In such a case the Agreement will come into force on the 30th day after deposit of both instruments. Consistent with paragraph 2, the Agreement enters into force only between two Contracting Parties that mutually indicate their desire to be bound vis-à-vis another Contracting Party. Thus, both parties must deposit an instrument unless one of the parties has already indicated its desire to be bound vis-à-vis the other party in an earlier instrument. The 30-day period commences when both instruments have been deposited.

Paragraph 4

113. Paragraph 4 contains the rules on the effective dates of the Agreement. The rules are identical for both the multilateral and the bilateral version. Contracting Parties are free to agree on an earlier effective date.

114. The rules of paragraph 4 do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date. A requested Party, however, is not in violation of this Agreement if it is unable to obtain information predating the effective date of the Agreement on the grounds that the information was not required to be maintained at the time and is not available at the time of the request.

Article 16 (Termination)

115. Paragraphs 1 and 2 address issues concerning termination. The fact that the multilateral version speaks of 'termination' rather than denunciation reflects the nature of the multilateral version as more of a bundle of identical bilateral treaties rather than a 'true' multilateral agreement.

116. Paragraph 3 ensures that the obligations created under Article 8 survive the termination of the Agreement.

APPENDIX 11

ANGUILLA FOUNDATION ACT, 2008

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I Assent

Governor

ANGUILLA

No. 10/2008

ANGUILLA FOUNDATION ACT, 2008

[Gazetted 30 June, 2008] [Commencement: Section 75]

An Act to provide for the establishment, operation and regulation of foundations and for incidental and connected purposes.

ENACTED by the Legislature of Anguilla

PART 1
Preliminary

Interpretation

1. In this Act, unless the context otherwise requires—

"beneficiary" means a person designated as such pursuant to the provisions of the declaration of establishment or by-laws of a foundation or by any amendment thereto;

"by-laws" means the by-laws of the foundation adopted in accordance with the provisions of section 8;

"Commission" means the Financial Services Commission established under section 2 of the Financial Services Commission Act;

"declaration of establishment" means—

(a) in relation to a foundation established in Anguilla, a declaration of establishment or a testamentary declaration of establishment in accordance with the provisions of section 3(2) and any amendments to any such declaration; or

(b) in relation to an overseas foundation continuing in Anguilla, its articles of continuance and any amendments to such articles;

"deposited foundation" means a foundation in respect of which the relevant documents have been deposited pursuant to section 14;

"dollar" or "$" means a dollar in the currency of the United States of America;

"foundation" means a foundation established under this Act or continued into Anguilla under Part 7;

"Foundation Council", in relation to a foundation, means the person or the body of persons having the responsibility pursuant to the declaration of establishment of the foundation or section 20 of carrying out the objectives and purposes of the foundation;

"Foundation Council member", in relation to a foundation, means a person who is a member of the Foundation Council of the foundation;

"founder" means—

(a) any person who signs the declaration of establishment establishing a foundation, acting either for himself or on behalf of another; or

(b) in the case of an overseas foundation continued into Anguilla, the person who signed the declaration of establishment, articles or any document equivalent to the declaration of establishment or articles in the jurisdiction of the overseas foundation, acting either for himself or on behalf of another;

"guardian", in relation to a foundation, means the person or persons appointed as the guardian of the foundation pursuant to section 31;

"incompetent" means a person in respect of whom a custodian or curator has been appointed by any court having jurisdiction, whether in Anguilla or elsewhere, in matters concerning mental disorder;

"inspector" means an inspector appointed by an order made under section 62;

"legal entity" means a foundation, corporation, limited partnership, business, trust, limited liability company or any other juridical person;

"minor" means an individual who is less than 18 years of age;

"official seal" means an official seal prepared pursuant to section 55;

"overseas foundation" means a foundation established in a jurisdiction other than Anguilla;

"property endowment", in relation to a foundation, means the assets for the time being of the foundation;

"Register" means the Register of Foundations kept by the Registrar in compliance with section 13(1);

"registered address", in relation to a registered agent, means the address of the registered agent;

"registered agent", in relation to a foundation, means the registered agent of the foundation for the time being holding such office pursuant to sections 17 and 18;

"registered foundation" means a foundation registered under section 13;

"Registrar" means the Registrar of Foundations declared pursuant to section 54;

"regulated person" means a person holding a relevant licence;

"relevant licence" means a licence issued under—

(a) the Company Management Act; or

(b) the Trust Companies and Offshore Banking Act;

"relevant person", in relation to a foundation, means—

(a) the registered agent of the foundation;

(b) a former registered agent of the foundation;

(c) a subsidiary or holding company of the registered agent, or of a former registered agent, of the foundation;

(d) the Secretary of the foundation; or

(e) a Foundation Council member who is resident in Anguilla and is a regulated person;

"residuary assets", in relation to a foundation, means the assets of the foundation remaining after its dissolution;

"Secretary" means the person appointed to be the secretary of a foundation pursuant to section 29.

Applicable law

2. Every foundation shall be governed by the provisions of this Act as well as the declaration of establishment of that foundation and its by-laws.

PART 2
Establishment of Foundation

Establishment of foundation

3. (1) One or more natural or legal persons may establish a foundation in accordance with the provisions of this Act.

(2) A foundation may be established by—

(a) a declaration of establishment made in writing and signed by one or more founders during their lifetime; or

(b) a testamentary declaration of establishment made by a single founder, comprised in a will as defined in the Wills Act and complying with all formalities required by that Act and probated in the High Court.

(3) An initial property endowment, expressed in any currency of legal tender, not being of less value than $10,000, shall—

(a) be placed under the control of the intended registered agent on or before the date of registration of the foundation pursuant to section 13 or the deposit of the foundation's documents pursuant to section 14; and

(b) become the property of the foundation upon such registration or, as the case may be, such deposit.

(4) For the purposes of this section, there shall be no requirement for separate articles of a foundation but, subject to section 4 and to the terms of the declaration of establishment of the foundation, provision not required by this Act to be included in the declaration of establishment may be included in separate articles of the foundation.

(5) Where a foundation established pursuant to paragraph (2)(b) cannot be registered or its documents deposited within a reasonable period of time after the death of the testator, any interested person may apply to the High Court for the appointment of a temporary receiver of the initial property endowment referred to in subsection (3), who shall be responsible—

(a) for applying to the Registrar for the entry of the foundation on the Register, pursuant to section 13, or depositing the declaration of establishment with the Registrar pursuant to section 14, when probate of the will has been granted;

(b) for carrying out the declaration of establishment and administering the property endowment until the Foundation Council is appointed; and

(c) if necessary, for appointing the Foundation Council.

(6) The temporary receiver—

(a) shall be entitled to reimbursement for his proper charges and expenses, which shall be determined by the High Court; and

(b) may be removed by the High Court as soon as the foundation acquires legal personality.

Requirements of declaration of establishment

4. (1) A declaration of establishment shall include the particulars specified in subsection (2).

(2) The particulars referred to in subsection (1) are as follows—

(a) the name of the foundation;

(b) the initial property endowment referred to in section 3(3) accompanied by a certified confirmation, by the person designated as the registered agent of the foundation, that such initial endowment of property is readily available to the foundation and will be vested in or under its legal control immediately upon the foundation's acquisition of legal personality pursuant to section 15;

(c) the name and address of the founder or founders, but, if at any time the founder's rights are assigned, any assignee of the founder's rights shall be deemed to be a founder for the purposes of section 16;

(d) the full names and addresses of the Foundation Council members;

(e) the name and address of the registered agent;

(f) the name and address of the Secretary, if any;

(g) the name and address of the guardian, if any;

(h) the purposes of the foundation;

(i) provisions, if any, for the designation of beneficiaries;

(j) the names and addresses of any designated beneficiaries;

(k) provisions, if any, for the exercise of powers otherwise than by the Foundation Council;

(l) the method of appointing and changing Foundation Council members;

(m) provisions concerning the making of by-laws and their amendment;

(n) provisions concerning any power to amend the declaration of establishment of the foundation;

(o) provisions concerning the application of the foundation's property endowment in the event of the dissolution of the foundation;

(p) provisions concerning the term of the foundation and whether such term shall be for a definite or indefinite period of time.

(3) Subject to the provisions of this Act, the declaration of establishment of a foundation may, in addition to the particulars specified in subsection (2)—

(a) provide for the appointment, removal and term of office of the auditor, if any;

(b) provide for the appointment and removal of its guardian for the maintenance of the objectives and purposes of the foundation;

(c) specify the duties, functions, powers and rights (including rights to remuneration) of its guardian, if appointed;

(d) provide for the appointment of persons to act by power of attorney or otherwise to carry out particular duties on behalf of the foundation;

(e) provide for the transfer to the foundation of supplementary assets in addition to the initial assets;

(f) specify any named beneficiary; and

(g) make any other lawful provision that the founder or founders may deem appropriate.

Purposes of foundation

5. (1) Subject to subsection (2) and the terms of its declaration of establishment, a foundation may be established for any purposes which are capable of fulfilment and are not unlawful, immoral or contrary to public policy.

(2) The purposes for which a foundation may be formed shall not include—

(a) the carrying out of any activity prohibited from being carried on, in or from within Anguilla; and

(b) any financial services business, unless and until such licence as may be required to conduct such financial services business has been granted.

(3) A foundation may, in the course of the management of its assets, do all such things as are necessary for the proper administration of its assets including, but not limited to, buying and selling of such assets and engaging in any other acts or activities which are not prohibited under any law of Anguilla.

(4) In this section, the expression "financial services business" shall have the meaning assigned to it in the Financial Services Commission Act.

Language of declaration of establishment

6. The declaration of establishment of a foundation and any amendment thereto may be written in any language but, where such declaration is not written in the English language, it must include a certified translation into the English language.

Amendment of declaration of establishment

7. (1) Any amendment to the declaration of establishment of a foundation, when permitted, shall be made in accordance with the provisions of subsection (2).

(2) The declaration of establishment of a foundation established pursuant to section 3(2)(a) may, subject to the terms of that declaration of establishment, be amended or revoked in writing—

(a) in the case of a foundation established by one founder, by the founder during his lifetime; or

(b) in the case of a foundation established by 2 or more founders, by the founders jointly during their joint lifetimes;

if such right is personal to the founder or, as the case may be, the founders and is non-assignable.

By-laws

8. (1) A foundation established under this Act may adopt by-laws, and such by-laws may include regulations—

(a) concerning distributions or applications of property endowment;

(b) naming beneficiaries, defining classes of beneficiaries or providing for additional beneficiaries of the foundation;

(c) providing for the identification of the residual beneficiary on a dissolution of the foundation;

(d) providing guidelines, policies and procedures for the Foundation Council; or

(e) providing for any other lawful matter compatible with the purposes ofthe Foundation.

(2) Any such by-laws shall be in writing and shall be signed by at least one Foundation Council member.

(3) The Foundation Council of a foundation may, subject to the terms of the declaration of establishment of the foundation, amend or replace the by-laws of the foundation.

Foundation name

9. (1) The name of a foundation—

(a) must end with—

(i) the word "Foundation" or its abbreviation "Fdn.", or

(ii) the foreign language equivalent of the word "Foundation" or its recognised abbreviation in that language;

(b) may contain the name of a founder or Foundation Council member;

(c) must not be the same as or similar to the name of any other legal entity registered or deposited under the laws of Anguilla or reserved under this or any other Act, unless such other legal entity consents in writing to the use of that name; and

(d) must not be a name prohibited by regulations made by under this Act or by any other law in force in Anguilla.

(2) Notwithstanding subsection (1) and subject to the approval by the Registrar, one or more words, or an abbreviation thereof that, in the opinion of the Registrar, denote in a jurisdiction other than Anguilla the existence of an entity having the characteristics of a foundation, may be used in place of the word or words or abbreviation specified in that subsection.

(3) Where any word or its abbreviation approved by the Registrar under subsection (2) is used in the name of a foundation, such word or abbreviation shall be placed in such position within the name of the foundation as the Registrar may direct.

Reservation of name

10. (1) The exclusive right to the use of a name may be reserved by—

(a) any person intending to establish a foundation under that name;

(b) any foundation that proposes to change its name to that name; or

(c) any overseas foundation, by whatever name called, intending to continue under this Act as a foundation having that name.

(2) The reservation of a specified name shall be made by filing with the Registrar an application executed by the applicant in the prescribed form specifying the name to be reserved.

(3) If the Registrar approves the name and determines that it is available for use by such foundation, the Registrar shall reserve the name for the exclusive use of the applicant for a period of 120 days.

(4) A name reserved under subsection (3) may, by application made under subsection (2), be reserved for successive periods of 120 days.

(5) The prescribed fee shall be paid—

(a) upon the filing of an application to reserve a name under subsection (2); and

(b) upon the filing of each application to renew the reservation of a name under subsection (4).

Change of name

11. (1) Subject to the terms of its declaration of establishment and to the provisions of section 9, a foundation may, by resolution of its Foundation Council, amend its declaration of establishment to change its name at any time.

(2) Where a foundation is established or continued, or changes its name to a name that—

(a) is reserved for another entity under section 10;

(b) does not comply with section 9; or

(c) is, in the opinion of the Registrar, for any other reason objectionable;

the Registrar may, by serving a written notice on the foundation, direct it to change its name within such period of time as he may stipulate.

(3) If a foundation which has been served a notice pursuant to subsection (2) does not change its name to a name that complies with section 9 within such time as the Registrar specifies in that notice, the Registrar—

(a) may assign a new name to the foundation; and

(b) shall enter such assigned name in the Register or, as the case may be, in the schedule of deposited foundations maintained under this Act.

(4) Where the name of a foundation has been changed, pursuant to this section, the Registrar must—

(a) in the case of a registered foundation, issue a certificate of registration on change of name to the foundation; and

(b) in the case of a deposited foundation, issue a certificate of deposit on change of name to the foundation;

specifying the new name and the reason for the change of name.

(5) After the issue to a foundation of a certificate of registration on change of name under paragraph (4)(a) or a certificate of deposit on change of name under paragraph (4)(b), any other foundation (except one already registered under the former name) that uses the former name of the foundation commits an offence and is liable to such penalty as may be prescribed by regulations.

Assets

12. Where a person contributes assets as property endowment of a foundation, such assets shall—

(a) irrevocably become assets of the foundation upon the vesting of such assets in the foundation; and

(b) cease to be assets of the contributor.

Registration of foundation

13. (1) The Registrar shall maintain a Register of Foundations.

(2) Unless section 14(1) applies to a foundation, the registered agent of the foundation shall apply to the Registrar to enter the name of the foundation on the Register.

(3) For the purpose of registering a foundation under this Act, the declaration of establishment of the foundation shall be delivered to the Registrar together with the prescribed fees.

(4) If the Registrar is satisfied that all the requirements of this Act in respect of the registration of a foundation have been complied with, he shall register on the Register the declaration of establishment delivered to him.

(5) Upon the registration of the declaration of establishment, the Registrar shall—

(a) allocate to the foundation a registration number in accordance with section 56(1);

(b) issue to the registered agent a certificate of registration in respect of the foundation stating—

(i) the date of registration of the foundation,

(ii) the name of the foundation, and

(iii) the registration number of the foundation; and

(c) issue to the registered agent an extract of the declaration of establishment of the foundation stating—

(i) the full names and addresses of the Foundation Council members,

(ii) the name and address of that registered agent,

(iii) the purposes of the foundation, and

(iv) the initial property endowment of the foundation.

(6) Each certificate of registration shall be signed and sealed by the Registrar.

(7) The certificate of registration shall be conclusive evidence of the registration of the foundation.

Deposit of foundation documents

14. (1) The Foundation Council may decide not to register a foundation, not being a foundation that has a commercial purpose, and in any such case the declaration of establishment of the foundation must be deposited by the registered agent with the Registrar together with the prescribed fees, and the Registrar shall record such declaration of establishment in a schedule of deposited foundations.

(2) If, upon such deposit, the Registrar is satisfied that all the requirements of this Act in respect of the deposit of the declaration of establishment of the foundation have been complied with, the Registrar shall—

(a) allocate a deposit number to the foundation in accordance with section 56(2); and

(b) issue to the registered agent a certificate of deposit stating—

(i) the date of deposit of the declaration of establishment of the foundation,

(ii) the name and deposit number of the foundation, and

(iii) the name and address of the registered agent.

(3) In such case, the Registrar shall only disclose information on the foundation—

(a) as provided for in section 59;

(b) upon an order of the High Court; or

(c) upon a written request from the Commission or any other body duly authorised under any other enactment.

(4) For the avoidance of doubt, any foundation to which subsection (1) does not apply, including any foundation that has a commercial purpose, must be registered pursuant to section 13(2).

Acquisition of legal personality of foundation

15. (1) A foundation shall, from the date of its registration pursuant to section 13 or, as the case may be, the date of acceptance of its deposit pursuant to section 14, have the status of a separate and independent legal person in its own right.

(2) A foundation shall be invalid and unenforceable—

(a) if it is not registered pursuant to section 13 or deposited pursuant to section 14;

(b) in the case of a registered foundation, if it has been struck off the Register; or

(c) in the case of a deposited foundation, if it has been struck off the schedule of deposited foundations pursuant to section 46 or 49.

Notice of change of registered or deposited particulars

16. (1) Where the declaration of establishment of a foundation is amended or a change occurs in any of the particulars specified in section 4(2)—

(a) the foundation shall, within 14 days of the amendment or occurrence of such change or within 14 days of becoming aware of such amendment or occurrence, file or deposit with the Registrar a notice, signed by the registered agent, containing details of the amendment or change, together with the prescribed fees; and

(b) the Registrar shall—

(i) in the case of a registered foundation, retain such notice and file it in the Register, and

(ii) in the case of a deposited foundation, retain such notice, cancel the certificate of deposit and issue to the registered agent a new certificate of deposit indicating such amendment or change.

(2) Where such amendment constitutes a change of name of a registered foundation, the Registrar must issue a new certificate of registration indicating the change of name.

(3) Any amendment of the declaration of establishment of a foundation and any change in the particulars specified in section 4(2) shall come into effect—

(a) in the case of a registered foundation, from the date when notice of the such amendment or change has been filed in the Register; and

(b) in the case of a deposited foundation, from the date on which the Registrar issues to the registered agent the new certificate of deposit indicating such amendment or change.

(4) Any interested person or the Registrar may apply to the High Court for an order to require a foundation to comply with subsection (1), and the High Court may so order and make any further order it thinks fit.

PART 3
The Bodies of the Foundation

Registered agent

17. (1) Every foundation shall, at all times, have a registered agent in Anguilla.

(2) The registered agent must be a regulated person.

(3) The first registered agent of every foundation shall be as specified in the declaration of establishment of that foundation.

(4) A foundation may change its registered agent by filing a notice for that purpose in the prescribed form with the Registrar.

(5) The change of the registered agent takes effect upon the notice being registered or deposited by the Registrar.

(6) If the registered agent ceases to be a regulated person, the foundation shall, within 14 days of becoming aware of that fact, change its registered agent to a person who is a regulated person.

(7) If, pursuant to a notice given under section 18, a person ceases to act as the registered agent of a foundation, the foundation shall appoint a new registered agent immediately upon the effective date of the first mentioned registered agent ceasing to so act.

(8) If a person ceases to act as the registered agent of a foundation for any other reason, the foundation shall, within 14 days of becoming aware that the person concerned has ceased to act as its registered agent, change that registered agent to another person who is a regulated person.

(9) A foundation that contravenes subsections (6), (7) or (8) commits an offence and is liable to such penalty as may be prescribed by regulations.

(10) Subject to subsection (11), a person who, not being a regulated person, acts as the registered agent of a foundation, commits an offence and is liable to such penalty as may be prescribed by regulations.

(11) If a person who acts as the registered agent of a foundation ceases to hold a relevant licence, he does not commit an offence under subsection (10) if, upon ceasing to hold such licence, he forthwith notifies the foundation that he is no longer a regulated person and that the foundation must change its registered agent in accordance with subsection (6).

Registered agent ceasing to act for foundation

18. (1) If the registered agent of a foundation intends to cease to act as its registered agent, he must give not less than 30 days written notice of his intention to do so in accordance with subsection (2).

(2) A notice given under subsection (1) must be sent to any Foundation Council member at the address of the Foundation Council member last known to the registered agent.

Foundation Council

19. (1) A foundation shall, at all times, have a Foundation Council, whose duties and responsibilities shall be set out in the declaration of establishment of the foundation or in its by-laws.

(2) The Foundation Council may comprise one or more persons, whether corporate entities or individuals.

(3) No person shall be a Foundation Council member of a foundation if the person is—

(a) a minor; or

(b) an incompetent; or

(c) the guardian of the foundation; or

(d) disqualified from being—

(i) a Foundation Council member of a foundation under this Act, or

(ii) a director of a company under any law of Anguilla.

Duties and obligations of Foundation Council

20. (1) The Foundation Council of a foundation shall have the responsibility of carrying out the objectives and purposes of the foundation.

(2) Subject to the terms of the declaration of establishment of the foundation or its by-laws and without prejudice to the generality of subsection (1), the Foundation Council shall have the following general obligations and duties—

(a) to direct the administration of the assets of the foundation;

(b) to exercise the powers of the foundation, directly or indirectly, through the employees and agents of the foundation;

(c) to enter into any transactions, contracts or lawful business that may be suitable or necessary to fulfil the purposes of the foundation;

(d) to provide information relating to the property endowment to the beneficiaries of the foundation and the guardian, if any;

(e) to make distributions or applications of all or any part of the property endowment or the income of the foundation; and

(f) to do all such other acts as may be provided for by this Act.

Duty of care of Foundation Council members

21. (1) A Foundation Council member shall, in the exercise and discharge of his powers and duties—

(a) act honestly and in good faith with a view to the interests of the foundation, its beneficiaries or its purposes; and

(b) exercise the care, diligence and skill which a reasonably prudent person would exercise in comparable circumstances.

(2) Subject to the provisions of this Act and notwithstanding any provision to the contrary in the declaration of establishment or by-laws of a foundation or in any agreement entered into by the foundation, a Foundation Council member who commits or concurs in committing a breach of the duties imposed by subsection (1) (hereafter referred to in this section and in sections 22 and 23 as a "breach") is liable for—

(a) any loss or depreciation in value of the property endowment resulting from the breach; and

(b) any profit that would have accrued to the property endowment had there been no breach.

(3) A Foundation Council member may not set off a profit accruing from one breach against a loss or depreciation in value resulting from another breach.

(4) A Foundation Council member is not liable for a breach committed by another person prior to his appointment or for a breach committed by another Foundation Council member unless—

(a) he becomes or ought to have become aware of such breach; and

(b) he actively concurs in or conceals such breach, or fails within a reasonable time to take proper steps to protect or restore the property endowment or to prevent the continuance of the breach.

(5) Where 2 or more Foundation Council members are liable for a breach, they are liable jointly and severally.

(6) A Foundation Council member who becomes aware of a breach shall take all reasonable steps to remedy the breach or cause the breach to be remedied.

Indemnification

22. (1) Subject to subsection (2) and to the terms of its declaration of establishment or its by-laws, a foundation may indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred, in connection with legal, administrative or investigative proceedings, any person who—

(a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a Foundation Council member or guardian of the foundation; or

(b) is or was, at the request of the foundation, serving as a Foundation Council member, guardian or liquidator of, or in any other capacity is or was acting for, another foundation.

(2) Subsection (1) only applies to a person referred to in that subsection if the person acted honestly and in good faith with a view to the interests of the foundation and, in the case of criminal proceedings, the person had no reasonable cause to believe that his conduct was unlawful.

(3) The decision of the Foundation Council, with the written concurrence of the guardian, if any, as to whether the person—

(a) acted honestly and in good faith and with a view to the interests of the foundation; or

(b) had no reasonable cause to believe that his conduct was unlawful;

is, in the absence of fraud, sufficient for the purposes of this section unless a question of law is involved.

(4) The termination of any proceedings by any judgment, order, settlement, conviction or the entering of a *nolle prosequi* does not, of itself, create a presumption that a person—

(a) did not act honestly and in good faith with a view to the interests of the foundation; or

(b) had reasonable cause to believe that his conduct was unlawful.

(5) If any person referred to in subsection (1) has been successful in defence of any proceedings referred to in that subsection, the foundation shall indemnify such person in respect of such proceedings as therein mentioned.

(6) The High Court may relieve a Foundation Council member of liability, in whole or in part, for a breach where it appears to the High Court that the Foundation Council member has acted honestly and reasonably and ought fairly to be excused for the breach or for omitting to obtain the directions of the High Court in the matter in which the breach arose.

Limitation of liability

23. (1) The declaration of establishment of a foundation or its by-laws may provide that the Foundation Council or the Foundation Council members of the foundation may only exercise certain powers by obtaining prior authorisation of its guardian, if any.

(2) Where such authorisation for the exercise of a power has been duly obtained from the guardian of the foundation, a Foundation Council member of that foundation is not liable for—

(a) any loss or depreciation of the property of the foundation; or

(b) any damages or prejudice caused to the foundation;

resulting from the exercise of the power, unless the exercise of that power is a breach within the meaning of section 21(2).

Capacity of Foundation Council to bind foundation

24. (1) Any person dealing with a foundation in good faith may assume that the Foundation Council of the foundation has the power to bind the foundation or to authorise others to do so.

(2) Subject to subsection (3), subsection (1) shall not affect the right of the foundation or its guardian, if any, or any Foundation Council member of the foundation to bring proceedings to restrain the doing of an act which is beyond the powers of the Foundation Council.

(3) Subsection (1) shall not affect any liability of a Foundation Council member or any other person who has acted beyond his powers.

Information concerning foundation

25. (1) The Foundation Council of a foundation shall, so far as is reasonable and within a reasonable time from the date of receipt of a request in writing to that effect, provide full and accurate information as to the nature and amount of the assets of the foundation and the conduct of their administration—

(a) subject to the terms of the declaration of establishment of the foundation and its by-laws—

(i) to the founder of the foundation,

(ii) to the guardian of the foundation, if any, and

(iii) to any beneficiary of the foundation; or

(b) pursuant to an order of the High Court.

(2) Subject to the provisions of this Act, the terms of the declaration of establishment of a foundation and its by-laws and any order of the High Court, neither the Foundation Council nor the guardian of the foundation shall be required to produce and make available to any person any document which—

(a) discloses their deliberations as to the manner in which they have exercised or have not exercised a power or discretion or performed a duty conferred or imposed on them or on the guardian; or

(b) relates to, or discloses the reason for, any particular exercise or non-exercise of the power or discretion or performance or non-performance of any duty or the material on which such reason was or might have been based.

Meetings of Foundation Council

26. (1) Subject to the terms of the declaration of establishment or by-laws of a foundation, the Foundation Council of the foundation shall meet at such times and in such manner and places within or outside Anguilla as it may determine.

(2) A Foundation Council member of the foundation shall be deemed to be present at a meeting of the Foundation Council if he participates in the meeting by telephone or any other electronic means and all the Foundation Council members participating in the meeting are able to hear each other.

(3) Decisions of the Foundation Council may be taken by way of written resolutions signed by all the Foundation Council members.

Removal and appointment of Foundation Council members

27. The removal and appointment of new or additional Foundation Council members of a foundation shall be effected in accordance with the terms of the declaration of establishment and by-laws of the foundation, but the full names and address of any Foundation Council member appointed shall be notified to the registered agent within 14 days of his appointment and every Foundation Council member shall have a duty to notify the registered agent of any change of his address within 14 days of the occurrence of such change and the provisions of section 16 shall apply.

Judicial removal of Foundation Council members

28. (1) Where the declaration of establishment of a foundation or its by-laws do not provide for the right to remove members of the Foundation Council of the foundation and the causes for such removal, the founder, any beneficiary, the guardian, or any Foundation Council member of the foundation may apply to the High Court for the removal of one or more Foundation Council members, for any of the following causes—

(a) when the interest of any such Foundation Council member is incompatible with the interests of the beneficiaries of the foundation or the founder or with the objectives and purposes of the foundation;

(b) if the administration of the assets of the foundation lacks the diligence of a reasonably prudent person;

(c) if any such Foundation Council member is charged with and convicted of an indictable offence;

(d) for incapacity or inability to carry out the objectives of the foundation, from the time such cause arises; or

(e) for the insolvency of, or in the event of bankruptcy proceedings against, any Foundation Council member.

(2) Without prejudice to paragraph (1)(c), where a Foundation Council member of a foundation is charged with an indictable offence, the High Court may, while the criminal proceedings in respect of that offence are in progress, suspend such Foundation Council member.

(3) Subject to the provisions of this Act, the High Court may appoint a person to replace the Foundation Council member suspended or removed.

Secretary

29. (1) Every foundation shall, unless its Foundation Council includes at least one person who is permanently resident in Anguilla and is a regulated person, have a Secretary who—

(a) must be a person residing in Anguilla;

(a) must be a regulated person; and

(c) may be the registered agent of the foundation.

(2) No foundation shall have as its Secretary a person who is the sole Foundation Council member.

(3) The Secretary of a foundation shall be responsible to the Foundation Council of the foundation for the implementation of the decisions and policies of the Foundation Council in compliance with the laws of Anguilla and for due compliance with the provisions of this Act.

Register of Foundation Council and Secretary

30. Each foundation shall keep, at its registered address, a register in which shall be recorded and maintained the identification particulars of its Foundation Council members and of its Secretary, if any.

PART 4
The Guardian

Appointment of guardian

31. (1) The declaration of establishment of a foundation may provide for the appointment of a person to be the guardian of the foundation.

(2) Where more than one person is appointed as the guardian of a foundation, such persons shall act jointly unless the declaration of establishment or by-laws of the foundation provide otherwise.

(3) Subject to the terms of the declaration of establishment or by-laws of a foundation, the guardian of the foundation shall be appointed in the following manner—

(a) if appointed on the establishment of the foundation, by the founder;

(b) if appointed after the establishment of the foundation, by the founder or such other person as may be empowered by the founder in the declaration of establishment or by-laws;

(c) by an outgoing guardian on his resignation; or

(d) if any case other than a case specified in paragraph (a), (b) or (c), by the Foundation Council.

(4) A guardian of a foundation duly appointed under the terms of the declaration of establishment or the by-laws of the foundation and this section shall cease to be a guardian in the event of—

(a) his or its resignation;
(b) his or its removal in accordance with the terms of such declaration of establishment or by-laws;
(c) if the guardian is an individual, his death, incapacity or bankruptcy;
(d) if the guardian is a legal entity, its winding up or dissolution; or
(d) the dissolution of the foundation.

Duties and powers of guardian

32. The guardian of a foundation shall have such powers, rights and duties as may be specified in the declaration of establishment and by-laws of the foundation and in this Act.

PART 5
Disputed Rights

Exclusion of foreign law

33. (1) No foundation governed by the laws of Anguilla, and no transfer of property to a foundation which is valid under the laws of Anguilla, shall be void, voidable, liable to be set aside or defective in any manner by reference to the law of a foreign jurisdiction.

(2) The capacity of a founder of a foundation or any other person who transfers property to a foundation shall not be questioned, nor shall any beneficiary or other person be subjected to any liability or deprived of any right by reason that—

(a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a foundation; or
(b) the transfer of property to the foundation, or any terms of its declaration of establishment or its by-laws—
  (i) avoids or defeats rights, claims or interests conferred by any law of a foreign jurisdiction on any person by reason of a personal relationship to the founder or a subsequent transfer or by way of heirship rights, or
  (ii) contravenes any rule of law or judicial or administrative order or action of a foreign jurisdiction intended to recognise, protect, enforce or give effect to any rights, claims or interests referred to in sub-paragraph (i).

Restriction against alienation

34. (1) Notwithstanding any rule of law or equity to the contrary, no beneficiary, object or purpose of a foundation shall have any right in specie against the property endowment of the foundation irrespective of the nature of any right to enforce the due administration of the foundation, and, subject to the terms of its declaration of establishment or by-laws, any assets of the foundation available for distribution to a beneficiary shall not be—

(a) capable of being alienated or passed by bankruptcy, insolvency or liquidation; or
(b) liable to be seized, sold, attached, or otherwise taken in execution by process of law.

(2) Where any of the assets of the foundation is subjected to a restriction against alienation, the right to derive income from that property shall not be alienable for as long as that restriction remains in force.

(3) Any restriction applicable pursuant to this section may at any time be removed in accordance with any provisions in the declaration of establishment or by-laws for such removal.

Enforcement of terms

35. (1) Notwithstanding the provisions of section 34(1), any beneficiary of a foundation may enforce the due administration of the foundation in accordance with the terms of its declaration of establishment and by-laws, and any claim for such purpose shall constitute a claim *in personam*.

(2) For the avoidance of doubt, a claim referred to in subsection (1) shall not constitute a claim *in rem*.

Forfeiture of benefits

36. The declaration of establishment or by-laws of a foundation may provide that any beneficiary of the foundation shall forfeit any benefit or right under it in the event that he challenges—

(a) the establishment of the foundation;

(b) the transfer of any assets to the foundation; or

(c) its declaration of establishment or by-laws or any provision of such declaration or by-laws.

PART 6
Accounts and Records

Accounts and records

37. (1) A foundation shall keep or cause to be kept—

(a) such accounts and records as its Foundation Council considers necessary or desirable in order to reflect the financial position of the foundation;

(b) a copy of its declaration of establishment and by-laws and any amendment or change to its declaration of establishment or by-laws;

(c) minutes of all meetings of its Foundation Council and copies of all resolutions consented to by its Foundation Council.

(2) The Secretary of the foundation or, if there is no Secretary, its registered agent, shall keep or cause to be kept a register in which is recorded the identification particulars of the Foundation Council members, guardian and beneficiaries and auditors, where applicable, and any persons having power of attorney granted by the foundation.

(3) The accounts, records, minutes, resolutions, copy documents and register required by this section (hereafter referred to in this section as the "books") shall—

(a) be kept at the registered address of the foundation or, subject to subsection (4), at such other place as the Foundation Council of the foundation may designate; and

(b) at all reasonable times, be open to inspection by the registered agent and the Foundation Council members of the foundation and, where applicable, its Secretary, guardian or auditor.

(4) If the books are kept at a place other than the registered address, whether within or outside Anguilla, the registered agent of the foundation shall—

(a) be notified of the location of such place where such books are kept within 14 days after the designation of such location; and

(b) upon request, be furnished with such books or, as the case may be, notarially certified copies of such books, within a reasonable time for the purpose of inspection by the registered agent and the Foundation Council members of the foundation and, where applicable, its Secretary, guardian or auditor.

(5) Where the accounting records of a foundation are kept outside Anguilla, the foundation must ensure that it keeps at its registered address—

(a) accounts and returns adequate to enable the Foundation Council members to ascertain, on a quarterly basis, the financial position of the foundation with reasonable accuracy; and

(b) without prejudice to subsection (4), a written record of the place or places outside Anguilla where its accounting records are kept.

(6) Every record required to be kept under this section shall be preserved for a period of not less than 6 years after the end of the period to which it relates.

(7) A foundation that contravenes subsection (5) or (6) commits an offence and is liable to such penalty as may be prescribed by regulations.

PART 7
Continuance of Foundations

Continuance in Anguilla

38. (1) An overseas foundation may apply to the Registrar for a certificate of continuance under this Act.

(2) An application under subsection (1) must be made in the prescribed form as specified by the Registrar.

(3) Articles of continuance may, without so stating, effect any amendment to the organisational instruments of an overseas foundation which applies for continuance under this section if the amendment—

(a) is authorised in accordance with the law applicable to the overseas foundation before continuance under this Act; and

(b) is an amendment that a foundation established under this Act is entitled to make.

Articles of continuance

39. (1) Articles of continuance of an overseas foundation and any amendment thereto may be written in any language but, where such articles or amendment is not written in the English language, they must be accompanied by a certified translation into the English language.

(2) Articles of continuance of an overseas foundation shall—

(a) declare the intention of the overseas foundation, pursuant to a resolution in writing of its governing body, to continue its legal existence in Anguilla as a foundation;

(b) state the name of the overseas foundation and the name under which it is being continued;

(c) state the jurisdiction in which the overseas foundation is established and, if different, the jurisdiction in which it was originally formed;

(d) state the date on which the overseas foundation was formed;

(e) state whether the overseas foundation will be registered or its documents deposited;

(f) state such other provisions as are required to be included in the declaration of establishment of a foundation under this Act; and

(g) be duly signed by all the members of the governing body or Foundation Council of the overseas foundation.

Certificate of continuance

40. (1) Upon receipt of the application and articles of continuance, the Registrar shall issue a certificate of continuance if he is satisfied that the application and articles of continuance are in compliance with the requirements of sections 38 and 39.

(2) On the date shown in the certificate of continuance—

(a) the overseas foundation becomes a foundation to which this Act applies as if that foundation had been established under this Act; and

(b) the articles of continuance shall be deemed to be the declaration of establishment of the foundation which is continued under this Act.

Preservation of foundation

41. When an overseas foundation is continued as a foundation under this Act—

(a) the property of the overseas foundation continues to be the property of the foundation;

(b) the foundation continues to be liable for the obligations of the overseas foundation;

(c) any existing cause of action, claim or liability to prosecute is unaffected;

(d) any civil, criminal or administrative action or proceedings pending by or against the overseas foundation may be continued by or against the foundation; and

(e) any conviction against, or any ruling, order or judgment against or in favour of, the overseas foundation is enforceable by or against the foundation.

Continuance in foreign jurisdiction

42. (1) Subject to its declaration of establishment and by-laws, a foundation may, pursuant to a resolution of its Foundation Council or as otherwise provided, apply to the appropriate official or public body of a foreign jurisdiction to be continued as an entity in the foreign jurisdiction as if it had been established under the laws of that foreign jurisdiction, in the manner provided by such laws.

(2) Subject to the provisions of this Act, a foundation that continues as an entity under the laws of a foreign jurisdiction does not cease to be a foundation unless the laws of the foreign jurisdiction permit such continuation and the foundation has complied with such laws.

Conditions applicable to continuance in foreign jurisdiction

43. Where a foundation is continued as an entity under the laws of a foreign jurisdiction—

(a) the property of the foundation continues to be the property of such entity;

(b) such entity continues to be liable for the obligations of the foundation;

(c) any existing cause of action, claim or liability to prosecution in respect of the foundation is unaffected;

(d) any civil, criminal or administrative action or proceeding pending by or against the foundation can be continued by or against such entity; and

(e) any conviction against or ruling, order or judgment against, or in favour of, the foundation is enforceable by or against such entity.

Discontinuance and effect

44. (1) Every foundation departing Anguilla must file a certificate of departure containing the prescribed information in the prescribed form with the Registrar.

(2) A foundation which—

(a) has filed a certificate of departure under subsection (1); and

(b) has been continued under the law of a foreign jurisdiction;

may apply to the Registrar for a certificate of discontinuance.

(3) An application under subsection (2) must be accompanied by evidence, acceptable to the Registrar, that the foundation has been continued under the laws of a foreign jurisdiction.

(4) If the Registrar is satisfied that—

(a) all fees payable under this Act have been paid;

(b) all returns and notices required to be filed under this Act or regulations made under this Act have been filed; and

(c) the requirements of this section have been complied with;

the Registrar must issue to the foundation a certificate of discontinuance in the prescribed form and strike it off the Register or, as the case may be, the schedule of deposited foundations.

(5) The Registrar must, in the case of a registered foundation, publish a notice of the discontinuance and striking off in the *Gazette*.

(6) Subject to subsection 42(2), from the date of the certificate of discontinuance, the foundation ceases to be a foundation domiciled in Anguilla.

PART 8
Irrevocability and Dissolution

Foundation to be irrevocable

45. Subject to section 7(2), a foundation established under this Act or continued in Anguilla shall be irrevocable and any transfer of assets made to a foundation under this Act as an addition to its property endowment shall be irrevocable by whosoever made such transfer.

Dissolution

46. (1) A foundation shall be dissolved where—

(a) the foundation has been established for a definite period and that period has expired;

(b) any term of its declaration of establishment or by-laws or of this Act so requires;

(c) its Foundation Council has so resolved; or

(d) the High Court orders its dissolution.

(2) The Registrar shall, immediately after the completion of the dissolution of a foundation pursuant to this section—

(a) strike the foundation off the Register or, as the case may be, the schedule of deposited foundations; and

(b) in the case of a registered foundation, publish a notice of the striking off and dissolution in the *Gazette*.

Voluntary dissolution

47. (1) Before a foundation is dissolved pursuant to section 46(1)(a), (b) or (c), a statement of intent to dissolve the foundation must be filed with the Registrar in the prescribed form.

(2) If the Registrar is satisfied that the relevant requirements of this Part have been complied with, the Registrar shall, upon receipt of a statement of intent to dissolve the foundation, issue a certificate of intent to dissolve the foundation.

(3) When a certificate of intent to dissolve the foundation is issued by the Registrar, the foundation shall cease transacting business except to the extent necessary for its dissolution, but its legal personality continues until the Registrar issues a certificate of dissolution of the foundation.

(4) After the issue of a certificate of intent to dissolve a foundation, the foundation shall—

(a) immediately cause notice of its intent to dissolve to be sent to each of its known creditors;

(b) proceed to—

(i) collect its property,

(ii) dispose of its properties that are not to be distributed in kind,

(iii) discharge all its obligations, and

(iv) do all other acts required to liquidate its assets; and

(c) after giving the notice required under paragraph (a) and adequately providing for the payment or discharge of all its obligations, distribute any residuary assets in accordance with section 52.

Dissolution by High Court

48. (1) The High Court may order the dissolution of a foundation upon the application of the Registrar or the guardian, a beneficiary, a Foundation Council member or a creditor of the foundation if the High Court is satisfied that—

(a) the declaration of establishment or any by-law of the foundation or any term of this Act entitles the applicant to demand dissolution of the foundation after the occurrence of a specified event and that event has occurred;

(b) the objectives of the foundation have been fulfilled or have become incapable of being fulfilled and it is just and equitable that the foundation be dissolved;

(c) the foundation is insolvent or unable to pay its debts; or

(d) it is in the public interest to order the dissolution of the foundation.

(2) Where the High Court orders the dissolution of a foundation under this section, the High Court shall appoint a person to supervise the dissolution of the foundation and may, from time to time, direct the manner in which the dissolution is to be conducted.

(3) Where a foundation is dissolved pursuant to the provisions of subsection (1), its residuary assets, if any, shall be distributed in accordance with section 52.

Striking off

49. (1) If a foundation fails—

(a) to pay the prescribed annual fees within the time specified by this Act;

(b) to maintain a registered agent pursuant to section 17; or

(c) to file with the Registrar any return, notice or document required to be filed under this Act or regulations made under this Act;

the Registrar may strike it off the Register or, as the case may be, the schedule of deposited foundations.

(2) Where the Registrar intends to strike—

(a) a registered foundation off the Register; or

(b) a deposited foundation off the schedule of deposited foundations;

the Registrar shall give the foundation notice of his intention and a reasonable opportunity to show cause why the foundation should not be struck off the Register or, as the case may be, the schedule of deposited foundations.

(3) After the expiration of time mentioned in the notice, being not less than 90 days, the Registrar may, unless the foundation shows cause to the contrary, strike the foundation off the Register or, as the case may be, the schedule of deposited foundations.

(4) Without prejudice to sections 46, 47 and 48, a foundation is dissolved when it is struck off the Register or the schedule of deposited foundations under subsection (3) and the Registrar shall publish a notice of its striking off and dissolution in the *Gazette*, but the striking off and dissolution of the foundation shall take effect from the date of publication of the notice in the *Gazette*.

(5) Where a foundation is struck off the Register or the schedule of deposited foundations under this section, the provisions of sections 48(2) and 48(3) shall apply as if the High Court had ordered the dissolution of the foundation.

Appeal

50. (1) Any person who is aggrieved by the striking or proposed striking of a foundation off the Register or the schedule of deposited foundations under section 49 may, within 90 days from the date of publication of the notice in the *Gazette*, appeal to the High Court against the decision of the Registrar.

(2) Notice of an appeal to the High Court under subsection (1) must be served on the Registrar who shall be entitled to appear and be heard at the hearing of the appeal.

(3) Where any person who is aggrieved by the striking or proposed striking of a foundation off the Register or the schedule of deposited foundations files an appeal under subsection (1), the Registrar may suspend the operation of the striking off, upon such terms as he considers appropriate, pending the determination of the appeal.

Restoration of name to Register or to schedule of deposited foundations

51. (1) Where a foundation has been struck off the Register or the schedule of deposited foundations, the Registrar may, upon receipt of an application in the prescribed form to restore a foundation to the Register or the schedule of deposited foundations and upon receipt of payment of the prescribed fee and any outstanding fees, restore the foundation to the Register or the schedule of deposited foundations, as the case may be, and issue a certificate in a form adapted to the circumstances.

(2) An application to restore a foundation to the Register or the schedule of deposited foundations under subsection (1) must be made within 20 years of the date of publication of the notice in the *Gazette* under section 49(3).

(3) The foundation or a creditor, beneficiary or liquidator of the foundation may, within 90 days from the date of the refusal of the Registrar to restore the foundation to the Register or the schedule of deposited foundations, appeal to the High Court against that refusal and, the High Court may, if it is satisfied that it is just for the foundation to be restored to the Register or, as the case may be, the schedule of deposited foundations, direct the Registrar to do so upon such terms and conditions as the High Court may consider appropriate.

(4) Notice of an appeal to the High Court under subsection (3) must be served on the Registrar who shall be entitled to appear and be heard at the hearing of the appeal.

Distribution of residuary assets

52. (1) Subject to subsection (2), the residuary assets of a foundation shall be the property of the person who, according to the declaration of establishment or by-laws of the foundation, is entitled to receive the residuary assets.

(2) Where—

(a) there is no person entitled to receive the residuary assets as provided in subsection (1); or

(b) the person entitled to receive such assets refuses to accept its transfer;

and there is no relevant provision in the declaration of establishment or by-laws respecting the distribution of such assets, the residuary assets shall vest in the Crown.

PART 9
Exemption from Taxes

Exemption from taxes

53. (1) For the purposes of this Act, a foundation shall be entitled to the exemptions specified in subsection (2) if—

(a) the founder or any person who has contributed assets to the foundation otherwise than for full consideration is not resident in Anguilla;

(b) none of the beneficiaries of the foundation is resident in Anguilla; and

(c) the property endowment does not include any land situated in Anguilla or the shares of any company beneficially owning any land situated in Anguilla other than property—

(i) for use as an office for the purpose of the administration of the foundation, or

(ii) where books and records of the foundation are prepared or maintained.

(2) Subject to this Act, any foundation to which subsection (1) applies shall not be subject to any income tax, withholding tax, asset tax, gift tax, profits tax, capital gains tax, distributions tax, inheritance tax, estate duty or any other like tax based upon or measured by assets or income originating outside of Anguilla or in connection with matters of administration that may occur in Anguilla.

(3) Notwithstanding any provisions of the Stamp Act, but subject to subsection (4), an instrument relating to a transfer of property to or by a foundation to which subsection (1) applies is exempt from the payment of stamp duty.

(4) Subsection (3) does not apply to an instrument relating to a transfer of property situated in Anguilla, including any interest in land in Anguilla or in shares in a company incorporated under the Companies Act.

PART 10
Registrar

Registrar and other officers

54. (1) The Registrar of Companies shall be the Registrar of Foundations.

(2) Any functions of the Registrar under this Act may, to the extent authorised by him, be exercised by any officer on his staff.

Official seal

55. The Registrar shall procure that an official seal be prepared for use by the Registrar in the authentication or other issue of documents required under this Act.

Official registration and deposit number

56. (1) The Registrar shall allocate—

(a) to every registered foundation a number, which shall be the registration number of that registered foundation; and

(b) to every deposited foundation a number, which shall be the deposit number of that deposited foundation.

(2) The registration numbers of registered foundations shall be in such form, consisting of one or more sequences of figures or letters or any combination thereof, but distinct from the sequence or sequences applicable to deposited foundations, as the Registrar may, from time to time, determine.

(3) The deposit numbers of deposited foundations shall be in such form, consisting of one or more sequences of figures or letters or any combination thereof, but distinct from the sequence or sequences applicable to registered foundations, as the Registrar may, from time to time, determine.

Form of documents to be delivered to the Registrar

57. (1) Where this Act requires a document or any information to be delivered to the Registrar, and the form of the document or information has not been prescribed, it shall be sufficient compliance with the requirement if—

(a) in the case of a document, it is delivered in a form which is acceptable to the Registrar and is accompanied by the prescribed fee; or

(b) in the case of information contained in a material other than a document, it is delivered in a manner acceptable to the Registrar and is accompanied by the prescribed fee.

(2) In this section, the reference to "a document or any information to be delivered" shall be construed to include any notice to be served or given.

Certificate of good standing in case of registered foundations

58. The Registrar shall, on request by the registered agent of a foundation and on receipt of payment of the prescribed fee, certify that the registered foundation is of good standing, if the Registrar is satisfied that—

(a) the name of the foundation is on the Register;

(b) the foundation has filed with the Registrar all documents required by this Act to be filed; and

(c) the foundation has paid all fees and penalties required by this Act to be paid.

Official confirmation in case of deposited foundations

59. The Registrar shall, on request by the registered agent of a deposited foundation and on receipt of payment of the prescribed fee, certify that the details of a confirmation prepared by the registered agent and delivered to the Registrar are true and correct if the Registrar is satisfied that this is the case according to the deposited declaration of establishment of the foundation and any further evidence produced by the registered agent, if necessary.

Inspection of documents kept by the Registrar

60. (1) Subject to the provisions of this Act, no inspection or production of documents kept by the Registrar under this Act shall be permitted other than by the registered agent, except that

any of the Foundation Council members of a foundation may, by notice in writing to the Registrar, authorise the person named in the notice—

(a) to inspect, or obtain a copy of, a document of the foundation delivered to the Registrar under this Act; or

(b) to require a certificate of registration of the foundation or a copy or part, certified or otherwise, of any other document referred to in paragraph (a);

and a certificate given under paragraph (b) shall be signed by the Registrar and sealed with the official seal.

(2) A copy of or an extract from a record kept by the Registrar, certified in writing by the Registrar to be an accurate copy or extract, shall, in all legal proceedings, be admissible in evidence as of equal validity with the original record and as evidence of any fact stated in the copy or extract of which direct evidence would be admissible.

Enforcement of duty to deliver documents or notices to the Registrar

61. (1) Where a foundation—

(a) fails to comply with a requirement to deliver to the Registrar any document or to give notice to the Registrar of any matter; and

(b) does not make good such failure within 14 days after the service of a notice on the foundation requiring it so to do;

the High Court may, on an application made to it by a Foundation Council member or the guardian of the foundation or by the Registrar, make an order directing the foundation to make good the failure within a time specified in the order.

(2) The order of the High Court may provide that all or any part of the costs of and incidental to the application shall be—

(a) borne by the foundation or by any Foundation Council member or members responsible for such failure; or

(b) apportioned between the foundation and any Foundation Council member or members so responsible.

(3) Nothing in this section shall prejudice the application of any provision imposing penalties on the foundation or its Foundation Council in respect of a failure mentioned in subsection (1).

PART 11
Investigation of Foundations

Investigation order

62. (1) A founder, beneficiary or guardian of a foundation, or the Registrar may, without notice or upon such notice as the Court may require, apply to the Court for an order directing that an investigation be made of the foundation or any foundation or company affiliated with it.

(2) If, upon an application under subsection (1), it appears to the Court that—

(a) the affairs of the foundation or any of its affiliates are being or have been carried on with intent to defraud any person;

(b) the foundation or any of its affiliates was established for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or

(c) persons concerned with the establishment, business or affairs of the foundation or any of its affiliates have in connection therewith acted fraudulently or dishonestly; or

(d) it is in the public interest that an investigation of the foundation or any of its affiliates be made;

the Court may make any order it thinks fit with respect to an investigation of the foundation or any of its affiliates by an inspector.

(3) If a founder, beneficiary or guardian makes an application under subsection (1), he shall give the Registrar reasonable notice of it, and the Registrar is entitled to appear and be heard at the hearing of the application.

Contents of order and copies of reports

63. (1) An order made under section 62(2) shall include an order to investigate and an order appointing an inspector, who may be the Registrar, and fixing his remuneration and may include an order—

(a) replacing the inspector;

(b) an order determining the notice to be given to any interested person, or dispensing with notice to any person;

(c) an order authorising an inspector to enter any premises in which the Court is satisfied there might be relevant information, and to examine anything, and to make copies of any documents or records, found on the premises;

(d) an order requiring any person to produce documents or records to the inspector;

(e) an order authorising an inspector to conduct a hearing, administer oaths or affirmations and examine any person upon oath or affirmation, and prescribing rules for the conduct of the hearing;

(f) an order requiring any person to attend a hearing conducted by an inspector and to give evidence upon oath or affirmation;

(g) an order giving directions to an inspector or any interested person on any matter arising in the investigation;

(h) an order requiring an inspector to make an interim or final report to the Court;

(i) an order determining whether a report of an inspector should be published, and, if so, ordering the Registrar to publish the report in whole or in part, or to send copies to any person the Court designates; and

(j) an order requiring an inspector to discontinue an investigation.

(2) An inspector shall file with the Registrar a copy of every report made by the inspector under this section.

(3) A report received by the Registrar under subsection (2) must not be disclosed to any person other than in accordance with an order of the Court made under paragraph (1)(i).

Inspector's powers

64. An inspector—

(a) has the powers set out in the order appointing him; and

(b) shall upon request produce to an interested person a copy of the order.

Hearing *in camera*

65. (1) An application under this Part and any subsequent proceedings, including applications for directions in respect of any matter arising in the investigation, must be heard *in camera* unless the Court orders otherwise.

(2) A person whose conduct is being investigated or who is being examined at a hearing conducted by an inspector under this Part may appear or be heard at the hearing.

(3) No person shall publish anything relating to any proceedings under this Part except with the authorisation of the Court.

Incriminating evidence

66. No person is excused from attending and giving evidence and producing documents and records to an inspector appointed by the Court under this Part by reason only that the evidence tends to incriminate that person or subject him to any proceeding or penalty, but the evidence may not be used or received against him in any proceeding thereafter instituted against him, other than a prosecution for perjury in giving the evidence.

Absolute privilege

67. An oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

PART 12
Miscellaneous Matters

Compliance inspections

68. (1) The Commission may, for the purpose specified in subsection (2)—

(a) inspect the accounts and records of a relevant person, whether in or outside Anguilla, including the systems and controls of the relevant person;

(b) inspect the assets of a relevant person, including cash, belonging to or in the possession or control of the relevant person; and

(c) examine and make copies of documents belonging to or in the possession or control of a relevant person;

that, in the opinion of the Commission, relate to a foundation established under this Act.

(2) A compliance inspection may be undertaken, in the case of a person specified in paragraphs (1)(a), (b) and (c), for the purpose of monitoring and assessing such person's compliance

with his obligations under the Money Laundering Reporting Authority Act, Anti-Money Laundering Regulations and any other Acts, Regulations, Guidelines or Codes relating to money laundering or the financing of terrorism.

(3) The powers and duties conferred or imposed on the Commission by this section are in addition to, and not in derogation of, any other powers and duties conferred or imposed on the Commission by any other Act.

Registration and annual fees

69. (1) Every foundation, whether registered or deposited, must pay a fee upon registration or deposit and the annual fee and any applicable penalties as may be prescribed by regulations.

(2) The Foundation Council members of a foundation shall be personally liable—

(a) to pay any outstanding fees in respect of the foundation; and

(b) to such penalties as may be prescribed by regulations in respect of any failure or default mentioned in section 49(1).

Legal professional privilege

70. Where any proceedings are instituted under this Act, nothing in this Act is to be taken to require a person to disclose any information which the person is entitled to refuse to disclose on grounds of legal professional privilege.

Powers of the High Court

71. (1) Subject to the provisions of section 73, the High Court has jurisdiction in respect of any matters concerning any foundation established under this Act.

(2) A Foundation Council member, guardian or registered agent of a foundation may apply to the High Court for directions as to how he should or might act in any of the affairs of the foundation, and the High Court may make such order as it thinks fit.

(3) If a person does not comply with an order of the High Court under this Act requiring him to do any thing, the High Court may, on such terms and conditions as it thinks fit, order that the thing be done by another person nominated for the purpose by the High Court at the expense of the person in default or otherwise, as the High Court directs, and a thing so done has effect in all respects as if done by the person in default.

(4) The High Court may order the costs and expenses of, and incidental to, an application to the High Court under this Act to be paid from the property endowment of the foundation or in such manner and by such persons as it thinks fit.

Arbitration tribunal

72. (1) The declaration of establishment or by-laws of a foundation may—

(a) provide that any controversy arising in respect of the foundation shall be resolved by arbitration;

(b) make provision for the arbitration procedure that should be followed; and

(c) stipulate that, to the extent specified, the arbitration tribunal shall interpret such declaration of establishment and by-laws according to their terms and to the principles of civil law, without regard to the principles of common law and equity otherwise applicable thereto.

(2) Subject to any specific provisions in the declaration of establishment or by-laws of a foundation, any reference in this Act to "High Court" shall be construed to include a reference to the arbitration tribunal within or outside Anguilla provided for in the declaration of establishment and by-laws of the foundation.

Service of process, etc. on foundation

73. (1) Any summons, notice, order, document, process, information or written statement required to be served on a foundation may be served—

(a) by leaving it, or by sending it by registered mail addressed to the foundation, at its registered address; or

(b) by leaving it with, or by sending it by registered mail to, the registered agent of the foundation.

(2) Service of any summons, notice, order, document, process, information or written statement to be served on a foundation may be proved by showing that the summons, notice, order, document, process, information or written statement—

(a) was mailed in sufficient time as to admit to it being delivered, in the normal course of delivery, within the period prescribed for service; and

(b) was correctly addressed and the postage was prepaid.

Regulations

74. (1) The Governor in Council may, on the advice of the Commission, make regulations providing for any matter contemplated by this Act or as may be necessary or convenient for carrying out or giving effect to this Act and its administration.

(2) Without limiting the generality of subsection (1), the Governor in Council may, on the advice of the Commission, make regulations—

(a) prescribing anything required or permitted to be prescribed by this Act;

(b) exempting any person from any provision of this Act;

(c) prescribing annual returns to be made;

(d) prescribing forms to be used;

(e) prescribing the format for any filings to be made under this Act;

(f) prescribing or amending the fees payable under this Act;

(g) prescribing or amending the penalties for offences committed under this Act;

(h) prescribing standards of foundation governance to which foundations shall be subject.

Citation and commencement

75. This Act may be cited as the Anguilla Foundation Act, 2008 and shall come into force on such day as the Governor may, by notice published in the *Gazette*, appoint.

Speaker

Passed by the House of Assembly this 13th day of June, 2008

Clerk of the House of Assembly

APPENDIX 12

REVISED REGULATIONS OF ANGUILLA: [ ]

ANGUILLA FOUNDATION ACT R.S.A.c. [ ]

ANGUILLA FOUNDATION REGULATIONS

Note: These Regulations are enabled under section 74 of the Anguilla Foundation Act, R.S.A.c. [ ].

TABLE OF CONTENTS

Definitions

1. In these Regulations—

"Act" means the Anguilla Foundation Act;

"$" means the unit of currency of the United States of America.

Forms

2. The forms set out in Schedule 1 are prescribed for use in the matters to which they relate.

Fees

3. (1) The fee required to be paid under the Act for a filing or other service set out in Column 1 of Part 1 of Schedule 2 is the amount set out in Column 2 thereof.

(2) A penalty is payable in the amount and in the circumstances set out in Part 2 of Schedule 2.

Citation

4. These Regulations may be cited as the Anguilla Foundation Regulations, Revised Regulations of Anguilla [ ].

SCHEDULE 1

(Section 2)

FORMS

FORM 1
Anguilla
ANGUILLA FOUNDATION ACT
(Sections 9 and 10)
REQUEST FOR NAME SEARCH AND NAME RESERVATION OR RESERVATION FOR A SUCCESSIVE PERIOD

---

1. Who is the intended registered agent of the foundation?

   Name of contact person:
   Registered Agent:

---

2. Proposed name or names in order of preference:

   1. ..... **2.** .....

   3. ..... **4.** .....

   5. ..... **6.** .....

---

3. Main activities the foundation proposes to carry on:

   - □ Holding and managing assets for family purposes
   - □ Holding and managing assets for business purposes
   - □ Commercial activities
   - □ Philanthropic/charitable activities
   - □ Other (please specify)

---

4. Derivation of Name [i.e. any connecting factor from which proposed name is derived]:

---

5. First available name to be reserved:

   Yes □ No □

---

6. Purpose of Name Request: (please √ appropriate box)

- □ Declaration of Establishment
- □ Continuing foundation
  - present name:
  - present jurisdiction:
- □ Change of name
  - present name:
  - foundation registration or deposit number:

---

8. Note any relevant information (e.g. names of affiliated entities, consents required and available from other entities):

---

9. Person making the request

Name:
Address:
Telephone:
Fax No.:
E-mail:
If the person making the request is a regulated person, state name and licencee only:

Name:
Licencee

---

10. Signature of person making the request

.....[Date].....[Signature]

FOR REGISTRY USE ONLY
Date Filed:
Received By:
□ Yes, Name No. ..... appears to be available and is reserved for you for 120 days until .....
□ Yes, Reservation of Name No. ..... has been extended for a first/second/third successive period of 120 days until .....
□ No, Name No. ..... is not available. Please see reasons below:

- □ Prohibited
- □ Same as or too similar to attached names
- □ Obscene or on public grounds objectionable
- □ Other

FORM 2
Anguilla
ANGUILLA FOUNDATION ACT
(Sections 13 and 14)
REGISTRATION OF FOUNDATION
or
DEPOSIT OF DECLARATION OF ESTABLISHMENT

1. Name of Foundation:

2. The Declaration of Establishment accompanies this application, together with the prescribed fee.

   [Application is made for the registration of the Foundation].

   [The Foundation Council has decided not to register the Foundation, not being a foundation that has a commercial purpose. The Declaration of Establishment is hereby deposited with the Registrar, together with the prescribed fee, to be recorded in the schedule of deposited foundations.

   (DELETE WHICHEVER IS INAPPLICABLE)

3. Initial property endowment: US$_____

   Registered Agent's Certificate:

   I/We.....of ....., as the intended Registered Agent of the above foundation, CERTIFY that the initial property endowment is readily available and I/we HEREBY UNDERTAKE that it will be vested in or under the legal control of the Foundation immediately upon the Foundation's acquisition of legal personality pursuant to section 15 of the Act.

4. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Registered Agent Code No:
Date Filed:
Received By:

FORM 3
Anguilla
ANGUILLA FOUNDATION ACT
(Section 69)
NOTIFICATION OF PAYMENT OF ANNUAL FEE

1. Name of Foundation:

2. Foundation registration or deposit Number:

3. It is hereby certified that no change in the particulars specified in section 4(2) of the Act has occurred that has not been notified to the Registrar in accordance with the provisions of the Act and these Regulations.

4. The prescribed fee accompanies this notification.

5. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Registered Agent Code No:
Date Filed:
Received By:

FORM 4
Anguilla
ANGUILLA FOUNDATION ACT
(Section 16)

NOTIFICATION OF AMENDMENT OF DECLARATION OF ESTABLISHMENT OR CHANGE IN PARTICULARS SPECIFIED IN SECTION 4(2) OF THE ACT

1. Name of Foundation:

2. Foundation registration or deposit Number:

3. Nature and date of amendment of Declaration of Establishment or change in particulars specified in section 4(2) of the Act:

4. The Declaration of Establishment has been amended as follows:

   Date of amendment:

5. The particulars specified in section 4(2) of the Act have changed as Follows:

   Date of change:

6. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Registered Agent Code No:
Date Filed:
Received By:

□ Yes, the amendment to the declaration of establishment is permitted.
□ No, the amendment to the declaration of establishment is not permitted:
  □ Unlawful.
  □ Immoral.
  □ Contrary to Public Policy.
  □ Other (specify):

FORM 5
Anguilla
ANGUILLA FOUNDATION ACT
(Sections 38 and 40)

APPLICATION BY FOREIGN FOUNDATION FOR CERTIFICATE OF CONTINUANCE

1. Name of foreign foundation:

2. Foundation registration number in foreign country (if any):

3. Foundation registered office (or equivalent) in foreign country (if any):

   Address: .....

   Mailing Address: .....

   E-mail:

4. Foundation Registered Agent (or equivalent) in foreign country (if any):

   Full name: .....

   Address: .....

   Mailing Address: .....

   E-mail:

   Nationality: .....

5. Continued foundation Registered Office:

   Address: .....

   Mailing Address: .....

6. Continued Foundation Registered Agent:

   Full name: .....

   Address: .....

   Mailing Address: .....

   E-mail:

   Nationality: .....

7. Articles of Continuance, together with the prescribed fee, accompany this application.
[Application is made for the registration of the Foundation]
[The Foundation's documents are to be deposited, the Foundation not being a foundation that has a commercial purpose]

(DELETE WHICHEVER IS INAPPLICABLE)

---

8. Registered Agent's Certificate:

I/We.....of ....., as the intended Registered Agent of the above foundation, CERTIFY that a property endowment of not less than $10,000 (or its equivalent in value) is [currently vested in or under the legal control of the Foundation] / [is readily available] and I/we HEREBY UNDERTAKE that it will be vested in or under the legal control of the Foundation upon the issue of the foundation's certificate of continuance.

---

9. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Continuing Foundation Registration No:
Continuing Foundation Deposit No:
Continuing Foundation Registered Agent Code No:
Date Filed:
Received By:

□ Yes, the application for continuance is granted.
□ No, the application for continuance is not permitted :
  □ Unlawful.
  □ Immoral.
  □ Contrary to Public Policy.
  □ Other (specify):

FORM 6
Anguilla
ANGUILLA FOUNDATIONS ANGUILLA FOUNDATION ACT
(Section 44)
CERTIFICATE OF DEPARTURE FROM ANGUILLA

---

1. Name of Foundation: ("the Foundation")

---

2. Foundation registration or deposit number:

---

3. Registered Office:

   Address:

   Mailing Address:

---

4. Registered Agent:

   Name:

   Address:

   Mailing Address:

   E-mail:

---

5. A Certificate of Discontinuance is applied for.

---

6. I/We .....of, ..., as registered agent of the Foundation, CERTIFY that:

   (a) The Foundation departed from Anguilla to continue in_____[jurisdiction] with effect from _____[day]_____[month]_____[year];

   (b) The Foundation has been continued in_____[jurisdiction], as evidenced by the following certified copy or original documents that accompany this Certificate:

   (i)
   (ii)
   (iii)
   (iv)
   (v)

   (c) The Foundation's Registered Office in the new jurisdiction is:

   Address:

   Mailing Address:

---

7. The Foundation's Registered Agent in the new jurisdiction (if any) is:

   Name:

   Address:

   Mailing Address:

   E-mail:

---

9. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Foundation Registered Agent Code No:
Date Filed:
Received By:

- □ All fees paid and up to date
- □ All notices complied with
- □ All returns complied with
- □ Foundations Act section 44 and Regulations complied with. Certificate of discontinuance issued.
  - □ Yes,
  - □ No:
    - □ Unpaid fees
    - □ Notices not complied with.
    - □ Returns not complied with.
    - □ Foundations Act section 44 not complied with.
    - □ Foundations Regulations not complied with.

FORM 7
Anguilla
ANGUILLA FOUNDATION ACT
(Section 47)
STATEMENT OF INTENT TO DISSOLVE FOUNDATION

1. Name of Foundation:

2. Foundation Registration/Deposit No:

3. Foundation Registered Office:

   Address:

   Mailing Address:

4. Foundation Registered Agent:

   Name:

   Address:

   Mailing Address:

   E-mail:

5. Date of intended voluntary dissolution:

6. Reason for dissolution:
   - □ End of definite period for which Foundation was established
   - □ Requirement of its Declaration of Establishment
   - □ Requirement of its By-laws
   - □ Requirement of the Act
   - □ Resolution of the Foundation Council
   - □ Other (please specify)

7. Statement of intent to dissolve made pursuant to section 47(1) of the Act:

   It is intended, pursuant to section [46(1)(a)] / [46(1)(b)] / [46(1)(c)] of the Act, to dissolve the Foundation with effect from the.....day of..... This statement of intent is made in accordance with section 47 of the Act.

8. A certificate of intent to dissolve the Foundation is requested.

9. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Foundation Registered Agent Code No:
Date Received:
Received By:
Certificate of Intent to Dissolve Foundation Issued:

FORM 8
Anguilla
ANGUILLA FOUNDATIONS ANGUILLA FOUNDATION ACT
(Section 51)

APPLICATION FOR RESTORATION OF FOUNDATION TO THE REGISTER OR TO THE SCHEDULE OF DEPOSITED FOUNDATIONS

---

1. Name of Foundation:

---

2. Foundation Registration/Deposit No:

---

3. Foundation Registered Office:

   Address:

   Mailing Address:

---

4. Foundation Registered Agent:

   Name:

   Address:

   Mailing Address:

   E-mail:

---

5. Date of striking off:

---

6. Reason for striking off:
   - □ End of fixed period of foundation
   - □ Declaration / Bye-laws/Foundations Act
   - □ Foundation Council Resolution
   - □ Order of the High Court of Anguilla
   - □ Failure to pay prescribed annual fees
   - □ Failure to comply with required notices
   - □ Failure to comply with required returns
   - □ Failure to maintain a registered agent pursuant to section 17 of the Act
   - □ Other (please specify)

---

7. Interest of applicant in the foundation

---

8. It is hereby requested that that the Foundation be restored [to the Register] / [to the Schedule of Deposited Foundations] pursuant to section 51.

.....[Date].....[Name].....[Signature]

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Foundation Registered Agent Code No:
Date Filed:
Received By:
- □ Prescribed Fee Paid
- □ All Foundation Documents Required Filed
- □ All Outstanding Fees and Penalties Paid

Restored to Register:

FORM 9
Anguilla
ANGUILLA FOUNDATIONS ANGUILLA FOUNDATION ACT
(Section 58)
REQUEST FOR CERTIFICATE OF GOOD STANDING

1. Name of Foundation:

2. Foundation Registration No:

3. Foundation Registered Office:
   Name:
   Address:
   Mailing address:

4. Foundation Registered Agent:
   Name:
   Address:
   Mailing Address:
   E-mail:

5. It is hereby requested that that the Registrar provide a certificate of good standing pursuant to section 58.

6. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Registered Agent Code No:
Date Filed:
Received By:
□ Prescribed Fee Paid
□ Name of Foundation on the Register
□ All Foundation Documents Required Filed
□ All Outstanding Fees and Penalties Paid
□ **Certificate of good standing issued**

FORM 10
Anguilla
ANGUILLA FOUNDATIONS ANGUILLA FOUNDATION ACT
(Section 59)

REQUEST FOR CERTIFICATE OF ACCURACY
OF DETAILS OF CONFIRMATION PREPARED BY REGISTERED AGENT

1. Name of Foundation:

2. Foundation Deposit No:

3. Foundation Registered Office:

   Name:

   Address:

   Mailing address:

4. Foundation Registered Agent:

   Name:

   Address:

   Mailing Address:

   E-mail:

5. It is hereby requested that that the Registrar provide a certificate that the details of the accompanying confirmation prepared by the registered agent and delivered herewith to the Registrar are true and correct, pursuant to section 59.

6. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

FOR REGISTRY USE ONLY
Foundation Deposit No:
Foundation Registered Agent Code No:
Date Filed:
Received By:

- ☐ Prescribed Fee Paid
- ☐ Name of Foundation on the Register
- ☐ All Foundation Documents Required Filed
- ☐ All Outstanding Fees and Penalties Paid
- ☐ **Certificate of Accuracy**

FORM 11
Anguilla
ANGUILLA FOUNDATIONS ANGUILLA FOUNDATION ACT
(Section 60)

AUTHORISATION BY FOUNDATION COUNCIL MEMBER FOR INSPECTION OR COPY OF DOCUMENTS OR A CERTIFICATE OF REGISTRATION

---

1. Name of Foundation:

---

2. Foundation Registration/Deposit No:

---

3. Foundation Registered Office:

   Name:

   Address:

   Mailing address:

---

4. Foundation Registered Agent:

   Name:

   Address:

   Mailing Address:

   E-mail:

---

5. It is hereby requested that that the Registrar permit

   Name:

   Address:

   Mailing Address:

   E-mail:

   (a) [to inspect the following document/documents or category of documents of the foundation:

   .....]

   and/or

   (b) [to require a copy or part, certified or otherwise, of the following document/documents or category of documents of the foundation:

   .....]

and/or

(c) [to require a certificate of registration of the foundation]

(DELETE WHICHEVER IS INAPPLICABLE)

---

9. Signature of Registered Agent.

Name:	Signature:	Address:	Date:

OR

Signature of Foundation Council Member:

Date: Name: Signature

FOR REGISTRY USE ONLY
Foundation Registration No:
Foundation Deposit No:
Foundation Registered Agent Code No:
Date Filed:
Received By:

□ Prescribed Fee Paid
□ Inspection Authorised
□ Requested Copy Documents provided

SCHEDULE 2

(Section 3)

FEES AND PENALTIES

PART 1

FEES

Section	Filing or Other Service	US$
1.	Request for a name search	15
2.	Request for a name reservation for 120 (one hundred and twenty) days	50
	Request for a name reservation for first or subsequent successive period of 120 (one hundred and twenty) days	170
3.	Registration or deposit of Declaration of Establishment where:	
	(a) the initial property endowment is more than $10,000 but not more than $50,000 or	500
	(b) the initial property endowment exceeds $50,000	700
4.	Registration or deposit of notification of amendment of the Declaration of Establishment	150
5.	Registration or deposit of notification of change of the registered agent	50
6.	Registration or deposit of notification of change of the registered office	50
7.	Registration or deposit of notification of changes to the particulars specified in section 4(2) or 4(3) of the Act	50
8.	Application by a foreign foundation for a Certificate of Continuance in Anguilla	250
9.	Registration or deposit of Certificate of Departure from Anguilla	400
10.	On being served a notice of dissolution or striking off by the Registrar	100
11.	Registration or deposit of a statement of intent to dissolve	100
12.	Application for restoration of foundation to the Register or to the Schedule of Deposited Foundations:	
	(a) if the application is made within 6 months immediately following the striking off	1,500
	(b) if the application is made later than 6 months immediately following the striking off	2,000
13.	Request of a certificate of good standing	150
14.	Request for a certificate of accuracy of details of confirmation prepared by registered agent	100
15.	Authorisation by foundation council member for inspection or copy of documents or a certificate of registration	100
16.	For a certified copy of a document	$2.00 per page
17.	For an uncertified copy of a document	$1.50 per page
18.	Annual fee for registered or deposited foundation (payable not later than the last day of the calendar quarter in which the foundation was established or continued under this Act)	500

PART 2
Penalties

Definition

1. In this Part of this Schedule the expression "Base Amount" shall mean the amount for the time being of the ammal fee under section 18 of Part 1 of this Schedule.

Use of former name of a foundation

2. A foundation that contravenes subsection (5) of section 11 of the Act shall be liable to pay a penalty of an amount equal to 10% of the Base Amount for every month or part of a month during which such contravention continues, provided that the Registrar shall have discretion to remit all or part of such penalty if he considers that extenuating circumstances justify his so doing.

Accounts and records

3. A foundation that commits an offence under subsection (7) of section 37 of the Act shall be liable to pay a penalty of an amount equal to 100% of the Base Amount.

Breach of provisions concerning registered agent

4. A foundation that contravenes subsections (6), (7) or (8) of section 17 of the Act may, at the discretion of the Registrar having regard to any extenuating circumstances, be required to pay a penalty of up to 100% of the Base amount.

5. A person who, not being a regulated person, acts as the registered agent of a foundation, shall, subject to the provisions of subsection (11) of section 17 of the Act, be required to pay a penalty of 100% of the Base Amount.

Annual fee paid after due date

6. A foundation that fails to pay the annual fee under section 18 of Part 1 of this Schedule by the due date shall, in addition to the annual fee, pay a penalty of an amount equal to 10% of the Base Amount.

7. A foundation that, having failed to pay the annual fee by the due date, fails to pay the annual fee and the penalty due under section 6 of this Part of this Schedule before the expiration of 3 months from the due date shall, in addition to the annual fee and the said penalty, be liable to pay a further penalty of an amount equal to 25% of the Base amount.

8. A foundation that, having failed to pay the annual fee by the due date, fails to pay the annual fee and the penalties due under sections 6 and 7 of this Part of this Schedule before the expiration of 6 months from the due date shall, in addition to the annual fee and the said penalties, be liable to pay a further penalty of an amount equal to 50% of the Base Amount.

9. A foundation that, having failed to pay the annual fee by the due date, fails to pay the annual fee and the penalties due under sections 6, 7 and 8 of this Part of this Schedule before the expiration of 12 months from the due date shall, in addition to any annual fees outstanding and the said penalties, be liable to pay a further penalty of an amount equal to 100% of the Base Amount.

10. A foundation that, having been struck off the Register or off the schedule of deposited foundations pursuant to section 49 of the Act, applies for restoration pursuant to section 51 of the Act, shall, in addition to all annual fees and penalties outstanding, be liable to pay a further penalty of an amount equal to 100% of the Base amount in respect of every year or part of a year that has expired since the expiration of 12 months from the due date as mentioned in section 9 of this Part of this Schedule.

Failure to file any return, notice or document

11. A foundation that fails to file with the Registrar any return, notification or document required to be filed under the Act or regulations made under the Act (other than Form 3 of Schedule 1) shall be liable to pay a penalty of an initial amount equal to 25% of the Base amount plus an amount equal to 10% of the Base Amount for the second and every subsequent month or part of a month during which such failure continues.

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