REFORM OF CERTAIN ASPECTS OF THE TRUSTEES ACT

A Report of the
Law Reform Committee of the
Singapore Academy of Law

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EXECUTIVE SUMMARY

Six main issues were examined and our recommendations in relation to each of these are set out below.

1. General statutory duty of care

(a) We recommend that there should be an objective standard of care that applies to a range of prescribed functions carried out by trustees that should be set out in a Schedule to the Trustees Act;
(b) The statutory duty of care should apply even if the trustee exercises an express power that is conferred by the trust instrument;
(c) The statutory duty of care should apply only to the manner in which the trustee exercises a function or duty, and not to the decision whether that function or duty should be exercised;
(d) The standard of care imposed should have regard to the particular skills and position of the trustees.

2. Employment of nominees or custodians

(a) We recommend that trustees should be given the default power in the Trustees Act to keep trust property in the names of nominees or to leave property with custodians for safe-keeping;
(b) Trustees should only employ nominees or custodians who carry on the business of providing such services or where they are a body corporate that is controlled by the trustees;
(c) Trustees should be bound by the statutory duty of care both in the appointment and supervision of a nominee or custodian;
(d) Co-trustees should only be appointed as a nominee, on the same conditions as other nominees, only where the trustee is a trust company or where there are two or more trustees acting as joint nominees or joint custodians.

3. Widening trustee's powers to insure

(a) We recommend that trustees should be given a default power under the Trustees Act to insure trust property against risks of loss or damage due to any event;
(b) Trustees should be allowed to insure trust property up to the market value or full replacement value of the property concerned;
(c) Trustees should be allowed to pay the insurance premiums out of trust capital or income;
(d) Bare trustees should be given the similar default powers except where the beneficiaries otherwise unanimously direct, but the Trustees Act should also provide that this power does not affect the allocation of risk in the case of a bare trust under a contract for the sale of land;
(e) Trustees should not be duty bound to insure trust property but if they choose to do so, they should be subject to the statutory duty of care requiring them to act prudently in the selection of the insurer and the terms of the insurance.

4. Remuneration of professional trustees

(a) We recommend that trustees should be given the default power in the Trustees Act to provide reasonable remuneration to another trustee for services rendered to the trust in a professional capacity;
(b) The default power of remuneration should be available even if the services provided are capable of being provided by a lay trustee;
(c) Conversely, even a lay trustee should be able to seek remuneration if he acts in a professional capacity in rendering services to the trust;
(d) The remuneration should not be available if the trust instrument or other legislation has provided for it, such as in the case of the Public Trustee and trust companies;
(e) In considering whether and how much remuneration should be given, the other trustees should be required to examine the nature of any other gifts or benefits (not being remuneration) conferred by the trust instrument, as well as all other relevant circumstances;
(f) The default power should not apply in the case of trust companies, trustees of charitable trusts or a sole trustee;
(g) We also recommend consequential amendments to the Wills Act and the Probate and Administration Act which presently regards remuneration clauses in will trusts as legacies and in trust deeds as gifts.

5. Exemption clauses

(a) We recommend that no changes should be made to the Trustees Act at this time to control exclusion clauses given that
    (i) it is not clear what are the core obligations of trusteeship that should not be excludable;
    (ii) this may have negative effects on the development of Singapore as an asset management centre;
    (iii) the common law, and the proposed statutory duty of care, already recognises that professional trustees are held to a higher standard of care than lay trustees;
    (iv) exclusion clauses in the context of collective investment schemes, like unit trusts, are already controlled.
(b) We believe that a wait and see approach should be taken, and we should monitor both common law and statutory developments elsewhere before revisiting this issue at a future date.

6. Trust protectors

(a) We recommend that no changes should be made to the Trustees Act at this time to regulate the relationship between trust protectors and trustees given
    (i) the different roles played by the trust protector;
    (ii) the ability of the common law and equity to focus on the actual functions, rather than the form, of the protector in determining the incidence of legal liability;

(iii) the difficulties this may create in the context of collective investment schemes, like unit trusts, where the respective roles of manager and trustee have been developed to suit the needs of the financial markets.

(b) We believe that a wait and see approach should be taken, and we should monitor both common law and statutory developments elsewhere before revisiting this issue at a future date.

7. Summary of changes recommended

In summary, we recommend changes to the Trustees Act:

(a) to introduce an objective standard of care that is applicable to a number of prescribed functions carried out by trustees;

(b) to permit trustees to employ nominees and custodians, who are in the business of providing such services, to hold trust property;

(c) to allow trustees to insure trust property in a wider set of circumstances and to pay the premiums out of capital as well as trust income;

(d) to allow trustees to be remunerated for services rendered to the trust.

REFORM OF THE TRUSTEES ACT

Introduction

1. This discussion paper is written on the *assumption* that the Ministry of Law ("Minlaw") will soon introduce a Parliamentary Bill that will (a) remove from the Trustees Act (Cap. 337) the legal list of approved investments that trustees have to adhere to, and instead authorise them to make any investment as long as that is prudent, and (b) confer on them power to delegate their discretions to agents, when making investments on behalf of the trust. These changes are intended to embrace modern techniques of portfolio management, and to allow the wider use of professional fund managers (including its use through the purchase of unit trusts by trustees). They are also consistent with the Economic Review Committee's sub-committee on financial services which has indicated that trust legislation should be modernised in order to support the growth of the wealth management industry in Singapore, which is one of 4 strategic thrusts recommended by them.

2. Given these premises, this discussion paper surfaces 6 further issues for consideration in light of the changes that have been introduced in the UK Trustees Act 2000 as well as those proposed by the Report of the New Zealand Law Commission *Some Problems in the Law of Trusts* (April 2002). These are:

(a) whether the general statutory duty of care should be extended to other acts and omissions of trustees;
(b) whether trustees should be allowed to employ nominees and custodians to hold trust property;
(c) whether trustees should be given wider powers to insure the trust property;
(d) where they are professionals, whether trustees should be allowed to charge for their services rendered to the trust;
(e) whether there should be greater control of clauses exempting trustees from liability for breach of trust; and
(f) whether there should be statutory recognition and control of Trust Protectors

3. The first 4 issues involve default powers of trustees, where no express powers have been provided in the trust deed, and are similar in that sense to the default powers of investment and delegation.[1] As the proposed Bill has yet to be introduced by the Ministry of Law, it would be useful, if this were still possible, to consider whether these issues should also be dealt with at the same time. We note that the UK Law Commission in 1999 saw the power to employ nominees, in particular, as closely linked to trustees' investment and delegation powers. The UK Trustees Act 2000 (the relevant provisions of which are appended) in fact covers both the delegation to agents, and appointment of nominees and custodians together in Part IV of the Act. However, while the NZ Law Commission has also proposed to adopt wider powers of delegation, it is silent on the use of nominees or custodians.[2]

[1] Section 2(2) of the Trustees Act (Cap. 337).
[2] This may be because it is now permitted in New Zealand in the case of unit trusts by virtue of their Unit Trusts Amendment Act 1998.

4. We have examined these areas of trust law partly because they relate directly to the contents of the pending Bill, but also because these are areas which are perhaps in need of more urgent review. In the longer term, we may have to study a number of other areas of trust law identified by the NZ Law Commission. These concern trading trusts, challenging trustees' powers of appointment of trust property, trustees' obligation to offer information to the beneficiaries, and the conflict of laws rules as they pertain to trusts.

5. In summary, we recommend the changes to the Trustees Act:

(a) to introduce an objective standard of care that is applicable to a number of prescribed functions carried out by trustees;

(b) to permit trustees to employ nominees and custodians, who are in the business of providing such services, to hold trust property;

(c) to allow trustees to insure trust property in a wider set of circumstances and to pay the premiums out capital as well as trust income;

(d) to allow trustees to be remunerated for services rendered to the trust.

General statutory duty of care

6. Under the previous LRC report on Reform of the Trustees Act in 1999, the focus was on the trustees' standard of care in the context of decisions regarding *investments* and not in the broader context, such as in supervising agents and in entrusting custody of trust property to one or more co-trustees. As the UK Law Commission noted, at least up till 1926, trustees were required to exercise reasonable care in choosing an agent, and in supervising the agent. This was sometimes known as the "prudent man" test, which "a man of ordinary prudence would exercise in the management of his own private affairs".[3] The UK Trustees Act 1925, however, appeared to lower that standard of care. The equivalent provisions in our own Trustees Act, section 25(1), seems only to impose a "good faith" standard in the appointment of agents by trustees collectively, and is silent on supervision altogether, which suggests that there may not even be a duty of care in that context. Indeed, it appears that in those situations that are identified in the statutory provision itself,[4] an individual trustee will be liable for loss caused by an agent only through the trustee's own "wilful default" (section 32(1)).

7. A great deal of academic ingenuity has been used to support the argument that the UK Trustees Act 1925 did not alter the pre-1926 position, so that reasonable care still has to be taken both in the appointment and supervision of agents and co-trustees. However, cases such as *Re Vickery*[5] stand in the way of such arguments. It was held the UK Trustees Act 1925 had altered the common law position. Maugham J held that

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[3] *Learoyd v Whiteley* (1887) 12 App Cas 727 at 737, per Lord Watson. In contrast, for a trustee exercising powers of investment, he must take "such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." *Re Whiteley* (1996) 33 Ch D 347 at 355, per Lindley LJ.

[4] In the case where a trustee signs receipts for the sake of conformity; the wrongful acts or defaults of another trustee; the wrongful acts or defaults of a banker, broker or other agent with whom trust money or securities had been deposited; the insufficiency or deficiency of securities; or any other such loss.

[5] [1931] 1 Ch 572.

"good faith" in the equivalent of our section 25(1) ought to be given its ordinary subjective meaning, and "wilful default" means "either a consciousness of negligence or breach of duty, or a recklessness in the performance of a duty."[6] There is therefore a strong case that the Trustees Act should be amended to reflect the imposition of an objective standard of care in both the appointment and supervision of agent and co-trustees, particularly if we adopt the other proposals discussed below to extend the default powers of trustees. This could be along the lines of section 1 of the UK Trustees Act 2000 which reads:

> (1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular –
> (a) to any special knowledge or experience that he has or holds himself out as having, and
> (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that business or profession.

8. We also note that the provisions discussed above, *viz* section 25(1) and 32(1), relate specifically to the trustees' powers of delegation, and these are likely to be amended under the proposed Bill, or deleted altogether.[7] However, our recommendation is, following section 1 of the UK Trustees Act 2000, that there should be a uniform statutory standard of care which applies to a range of specified trustee functions such as those found in Schedule 1 to the UK Trustees Act 2000 (such as in making investments, delegation, employing nominees, insuring trust property).[8] This standard of care applies regardless of how the powers may be conferred, which would mean that the standard applies even where the trust instrument expressly confers the power and if the trust instrument does not otherwise expressly or impliedly specify a different standard of care. However, the general duty does not apply to the exercise of a trustee's discretion whether to exercise a specified power, but only to the manner in which that power is exercised.[9] Finally, section 1(1)(b) of UK Trustees Act 2000 also imposes a standard of care that has regard to the particular skills and position of the trustees, and to the surrounding circumstances. Professional trustees, in particular, would therefore be held to a higher standard than lay trustees.[10]

9. Summary of recommendations:

(a) We recommend that there should be an objective standard of care that applies to a range of prescribed functions carried out by trustees that should be set out in a Schedule to the Trustees Act;

(b) The statutory duty of care should apply even if the trustee exercises an express power that is conferred by the trust instrument;

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[6] Following *Re City Equitable Fire Insurance Co* [1925] Ch 407.

[7] The UK Trustees Act 2000 has removed the equivalent of sections 25 and 32 of our Trustees Act.

[8] This facilitates expansion of the duty of care into other areas, as the Schedule could be amended without having to go through the Parliament.

[9] See para 22 below for an example of this in the context of trustees' powers to insure trust property.

[10] See, eg, *Barclays v Barclays Trust Co (No 1)* [1980] 1 Ch 515.

(c) The statutory duty of care should apply only to the manner in which the trustee exercises a function or duty, and not to the decision whether that function or duty should be exercised;

(d) The standard of care imposed should have regard to the particular skills and position of the trustees.

Employment of nominees or custodians

10. Both the prudent investor standard, and the conferral of wider powers to delegate, may not resolve a further problem in the case where the trustee invests in a unit trust,[11] or leaves money with a discretionary fund manager where the customer agreement requires registration of the securities that are purchased to be in the name of the manager or its nominee. They also do not address the need in many modern applications of the law of trust to separate management from custodial functions. For instance, trust companies are not uncommonly appointed custodian trustees of private pension funds as well as of charitable funds. Where the trust deed establishing a charitable fund does not authorise leaving trust property in the name and custody of a custodian trustee or nominee, application has to be made to the court or arguably the Charity Commissioner to sanction the proposed course of action. Needless to say, this is inconvenient and costly because it has to be done on an ad hoc basis. The reason that sanction is necessary is because the personal nature of trusteeship requires that trustees get in the title to and retain personal control of trust assets, and leaving the securities in the names of nominees or with custodians where this is not expressly authorised may be a breach of trust.[12]

11. Three very narrow exceptions are provided by section 23(1) of our Trustees Act, which empowers trustees to deposit any document held by them with any banker or banking company, or any other company whose business includes the undertaking of the safe custody of documents; section 8(2) of the Trustees Act which permits bearer securities to be left in the custody of a bank; and section 12(1) of the Trustees Act, which permits trustees to pay trust moneys into a bank account pending investment. Another general law exception allows title deeds and trust documents to be left in the custody of a co-trustee[13] or in the custody of solicitors acting for the trustees provided this is in the course of and for the purposes of dealing in the trust property.[14] Yet another exception is provided by section 25(2) of the Trustees Act which allows trustees to appoint any person to collect, get in or manage movable or immovable property outside Singapore. It is not clear, however, that the powers of delegation, such as those found in section 32 of our Trustees Act, permit also the vesting of trust property in a nominee, or leaving property with a custodian. The specific exceptions that currently exist are not very helpful in dealing with both modern developments in securities and modern applications of the law of trust.

12. At its strictest, the existing law would mean that such trustees are in breach of trust even where they merely deposit securities in the Central Depository (Pte) Ltd

[11] This may not be a problem because the unit is purchased in the trustee's name, and that unit may be seen as distinct from the underlying securities purchased by the fund.

[12] See, eg, Hayton [1991] NLJ 210.

[13] Note that we do not have the equivalent of s 21 of the UK Trustees Act 1925, which has been removed by the UK Trustees Act 2000.

[14] *Field v Field* [1894] 1 Ch 425.

("CDP"). Under the present system, share certificates are issued by the company, and they are left with the CDP as custodian, which then creates a book-entry to reflect the interest of the trustee in the deposited securities (known as "immobilised" securities).[15] The problem would not arise if the securities were "dematerialised" so that they exist in book-entry form only, or if the power were expressly granted to the trustee to leave scrip securities with a nominee or custodian.

13. The no-nominee or custodian rule is founded on the inherent dangers of leaving trust property with third parties. But we should recall that these are just default powers, and many trust deeds to already provide for the use of nominees or custodians. The issue of who can serve as a nominee or custodian is distinct and separate, as even if there were default powers to use nominees or custodians, there would still be concern over the identities of such persons, given that they may well be unregulated entities. At the same time, it may be too restrictive to limit it to entities regulated under the Trust Companies Act (Cap. 336) and/or the Public Trustee. In the context of unit trusts and fund managers, the problem has been already ameliorated somewhat by the powers that are now conferred on the Monetary Authority of Singapore by the Securities and Futures Act 2001 (No 42 of 2001) to approve and inspect trustees of collective investments schemes, as well as its oversight (partly by the requirement of licensing) of the new regulated activity of providing custodial services for securities.[16] The further danger which the UK Law Commission recognised, that of the potential loss of shareholder rights (presumably because our Companies Act recognises only membership rights but not the rights of beneficial owners), was one which it did not see as sufficient to tip the balance against the convenience brought about by the ability to employ nominees.

14. The UK Law Commission felt that the correct balance was achieved via the requirement that the bodies that are employed had to be nominees or custodians *carrying on a business* as such. It rejected the more restrictive approach that the nominees or custodians had to be authorised to conduct investment business under the Financial Services Act 1986 (now Financial Services and Markets Act 2000) on the basis that this would not enable the use of nominees or custodians outside the regulatory regime covering financial services. Further, there might be problems of moral hazard, as it might cause trustees to overlook their fundamental duty to act with due care and skill in selecting the nominee or custodian,[17] and to simply select any person licensed under the FSA 1986 or FSMA 2000.

15. In addition, section 19 of the UK Trustees Act 2000 also provides that, in the alternative, where the body employed is a body corporate which is controlled by the trustees, or a body corporate recognised under section 9 of the Administration of

[15] One possible counter-argument would be that section 130D of the Companies Act (Cap. 50) provides that the person named as the depositor is regarded as the member of the company in respect of the amount of book-entry securities entered against his or her name in the Depository Register. But while the argument would satisfy the no-nominee rule, the share certificates are themselves left with a custodian who is a stranger to the trust. Trustees would still have to open direct accounts with the CDP to hold the securities, and would not be permitted to leave securities in the names of depository agents, which is the practice of about 4% of investors using the CDP.

[16] Which came into force on 1 October 2002.

[17] Which is now expressly provided in the UK Trustees Act 2000.

Justice Act 1985,[18] those bodies may also be employed by trustees as nominees or custodians. The UK Trustees Act 2000 also expressly provides that trustees have the power to pay reasonable remuneration to nominees and custodians. These nominees and custodians should themselves have the power to authorise further sub-delegation to a sub-nominee or sub-custodian where this is reasonably necessary.

16. The powers given to trustees to appoint and remunerate nominees and custodians are consistent with the powers to be given to trustees to delegate their discretions to agents under the pending Bill. As was pointed out above, the two are intertwined. As such, the trustees will have to keep under review the arrangements relating to the appointment of the nominee or custodian and the manner in which those arrangements are implemented, and they will also be subject to the general statutory standard of care in selecting the nominee/custodian and in determining the terms of its employment which we have recommended in para. 9 above. There is a difference, however, with the treatment of co-trustees, where delegation is also permissible, but there are greater concerns in their employment as nominees or custodians. For prudential reasons, their appointment as a nominee, if intended to be on the same conditions that apply to the employment of a nominee who is not a trustee, is only permissible where the trustee is a trust corporation or where there are two or more trustees acting as joint nominees or joint custodians.

17. Summary of Recommendations;

(a) We recommend that trustees should be given the default power in the Trustees Act to keep trust property in the names of nominees or to leave property with custodians for safe-keeping;

(b) Trustees should only employ nominees or custodians who carry on the business of providing such services or where they are a body corporate that is controlled by the trustees;

(c) Trustees should be bound by the statutory duty of care both in the appointment and supervision of a nominee or custodian;

(d) Co-trustees should only be appointed as a nominee, on the same conditions as other nominees, only where the trustee is a trust company or where there are two or more trustees acting as joint nominees or joint custodians.

<u>Widening trustees' powers to insure</u>

18. Under section 21(1) of our Trustees Act, trustees are only granted default power to insure trust property against any loss or damage *by fire* and to pay the insurance premiums out of trust income without the consent of the income beneficiaries. There are three difficulties here. First, the events for which trust property can be insured against are too narrow. Second, it does not envisage insurance covering the full replacement value of the trust property. Third, the requirement to pay premiums out of income may favour the capital beneficiaries at the expense of the income beneficiaries. In addition, because of section 21(2) of the Act, bare trustees are not able to utilise the default power to insure trust property. Arguably, trustees

[18] Which provides for recognised body corporates carrying on the business of providing professional services such as are provided by individuals practising as solicitors.

may also insure against loss or damage by fire in reliance on the general law power but in that case, the premiums will be borne by the capital.[19]

19. In contrast, the present position in New Zealand is much wider, in that a trustee is empowered to insure any of the trust property up to the full insurable value; to purchase replacement cover with the consent of the life tenant; and to insure "against any risk or liability against which it would be prudent for a person to insure if he was acting for himself".[20] Even so, the NZ Law Commission has proposed that the power be expanded further so that the insurance can cover the full replacement value of the property without the consent of the life tenant, and so that the trustee may apportion the cost of premiums between income and capital as it thinks fit. It agreed with the UK Law Commission that there should, however, be no general obligation to insure, as there are some suggestions that this is required at common law.[21]

20. The UK Law Commission in 1999 had recommended widening trustees' powers to insure that were already far more liberal than ours, particularly in the context of land, where the power was conferred by section 6 of the Trusts of Land and Appointment of Trustees Act 1996. Their concern was in removing any remaining uncertainties caused by the common law rule which required trustees to act in the best interests of present and future beneficiaries, and also some peculiar difficulties in section 19 of the UK Trustees Act 1925 which did not allow trustees of personal property to insure up to the market value or full replacement value of the property concerned.[22] Section 19 of the 1925 Act has now been replaced by section 34 of the UK Trustees Act 2000 which permits trustees to "(a) insure any property which is subject to the trust against risks of loss or damage due to any event, and (b) pay the premiums out of the trust funds." Bare trustees are also now given the same default power except where the beneficiaries unanimously direct the trustees not to insure the trust property (or not to insure it except on conditions as may be so specified).

21. The UK Law Commission noted that this would not mean that trustees are given the default power to take out insurance against their own liability for breach of trust; there is thus no power given to trustees to purchase fidelity insurance where this particular amendment is concerned, as the power is limited to insuring the trust property itself. Given the policy aim of promoting Singapore as a wealth management centre, however, we suggest that consideration be given to permitting trustees in Singapore to be given the default power to insure against their own liability for any negligence, default, breach of duty or breach of trust. This could be worded along the lines of section 172 of the Companies Act, which permits such insurance except where it arises out of conduct involving dishonesty or wilful breach of duty.[23]

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[19] Because the power to insure is incidental to the duty to preserve trust property.

[20] Section 24 of the NZ Trustees Act 1956.

[21] See eg *Re Betty* [1899] 1 Ch 821, 829, compare *Re McEachern* (1911) 103 LT 900.

[22] This provision was similar to section 21 of our Trustees Act, but the Trusts of Land and Appointment of Trustees Act 1996 removed the limitation to fire insurance while at the same time restricted the application of the provision to personal property.

[23] We note that the draft Companies (Amendment) Bill 2003, which was open for public consultation and feedback till 11 January 2003, seeks to amend section 172 pursuant to the recommendations of the Company Legislation and Regulatory Framework Committee, whose recommendations were accepted by the Government in October 2002.

22. Under the UK Act (and NZ has proposed to preserve this in section 24(3) of their Trustees Act 1956), no duty to insure is imposed on a trustee. However, once a decision to insure has been taken, the statutory duty of care applies to the selection of the insurer and to the terms of the insurance. We agree that there should not be an absolute statutory duty to insure trust property against some enumerated peril. Whether there is a duty to insure should be left to considerations of the general duty of care.[24] It may be that in some circumstances, where a trustee is given the power to insure, that duty of care cannot be discharged unless the trustee takes out insurance against loss or destruction of or damage to any trust property. If so, the trustee will be under a duty to insure the trust property; but not otherwise.[25] Should wider powers of insurance be given to trustees, then one consequential amendment, following section 34 of the UK Trustees Act 2000, that would be required is the removal of the phrase "whether by fire or otherwise" in section 22(1) of our Trustees Act. We should also expressly provide that, for the avoidance of doubt, the amendments as they pertain to bare trustees should not affect the allocation of risk of loss of property in the case of a contract for the sale of land, where because of the doctrine of conversion, the vendor becomes a bare trustee of the land for the purchaser before full completion.

23. Summary of Recommendations:

(a) We recommend that trustees should be given a default power under the Trustees Act to insure trust property against risks of loss or damage due to any event;

(b) Trustees should be allowed to insure trust property up to the market value or full replacement value of the property concerned;

(c) Trustees should be allowed to pay the insurance premiums out of trust capital or income;

(d) Bare trustees should be given the similar default powers except where the beneficiaries otherwise unanimously direct, but the Trustees Act should also provide that this power does not affect the allocation of risk in the case of a bare trust under a contract for the sale of land;

(e) Trustees should not be duty bound to insure trust property but if they choose to do so, they should be subject to the statutory duty of care requiring them to act prudently in the selection of the insurer and the terms of the insurance.

Remuneration for professional trustees

24. The general rule is that a trustee cannot be remunerated for his services, except where there is an express charging provision in the relevant trust instrument, or pursuant to a statutory provision such as section 43 of our Trustees Act, which permits the court to remunerate a trustee (other than a Public Trustee) for its services as the court thinks fit.[26] The court also has an inherent jurisdiction to grant

[24] This may exist at common law, and through parallel developments in equity: see *Bristol and West Building Society v Mothew* [1996] 4 All ER 698.

[25] This would be similar to the exercise of the power of appointment given to a trustee who, by virtue of the fact that a power is entrusted in a fiduciary, would be expected to actively consider whether the power should be exercised. It has, however, been observed that this is difficult to monitor given that trustees are entitled not to given reasons for their acts: *Re Londonderry's Settlement* [1965] Ch 918.

[26] See also section 18 of the Public Trustee Act (Cap. 260).

remuneration to ensure the "good administration of trusts": *Re Duke of Norfolk's Settlements Trusts*.[27] The general rule predicates the avoidance of conflict of interest and duty but accepts that if the trust deed provides for payment to trustees in consideration of performing the duties of his office, the trustee may pay himself that remuneration, not because he is entitled to it but because it is a gift to him which the courts will enforce.

25. Section 29 of the UK Trustee Act 2000 has now made it easier for a trustee to be remunerated for services rendered outside these situations, on the basis that professional trustees would not be willing to act without remuneration, and even lay trustees should be reasonably remunerated for work done in administering a trust. The provision is somewhat complicated, however, by the fact that the trust instrument may have also provided for a gift or other benefit, which the settlor or testator may or may not have intended as a form of remuneration for the trustee's services that should not be overridden by the default powers in the Act. Consequently, section 29(2) of the UK Trustees Act 2000 provides that a trustee who acts in a *professional capacity* but is not a trust corporation, trustee of a charitable trust, or a sole trustee, is entitled to receive reasonable remuneration *only if each other trustee has agreed in writing that he may be remunerated for those services*. In considering whether to authorise remuneration under the default power, the other trustees are expected to examine the nature of the gift or benefit conferred by the trust instrument (remuneration is however not permitted if the trust instrument or other legislation has expressly provided for it). This restriction does not apply to trust corporations, which the UK Law Commission recognised would not act without remuneration, whereas the provision cannot be used for the benefit of a trustee of a charitable trust or a sole trustee that is not a trust corporation.

26. The NZ Law Commission has, however decided against introducing such a provision as it encountered little enthusiasm for the provision during its consultation process, given that there is almost always a sufficient charging provision in the trust deed.[28] It did, however, recommend that there be enacted a provision (in their Administration Act 1969) modelled after section 28(4) of the UK Trustee Act 2000 to clarify that charging provisions in wills are not legacies but are treated as remuneration for services rendered. Adopting such an approach would require consequential amendments to clarify that remuneration given to trustees will not be treated as gifts for the purposes of section 10 of our Wills Act (Cap. 352), which renders gifts to attesting witnesses and their spouses to be void and the Second Schedule of our Probate and Administration Act (Cap 251), which governs the order in which the assets of a solvent estate are paid out.

27. On balance, given that we are considering default powers here, and many modern trust instruments do also provide express powers of investment (and yet it is felt that there is a need for wider default powers in that regard), there is no reason why our Trustees Act should not also contain the default power for trustees to be remunerated for professional services rendered to the trust. This is so particularly as there are increasing instances of professional trustees being appointed to replace lay

[27] [1982] Ch 61, 79.
[28] And possibly because it is also permitted by section 18 of the NZ Trustee Companies Act 1967.

trustees in older trusts where there are few, if any, express powers of remuneration. As in the case of section 29(4) of the UK Trustees Act 2000, this should apply even where those "services in question are capable of being provided by a lay trustee". These provisions would usually better reflect the intention of the settlers who lack the sophistication to modify restrictive default rules in the Act. It will also encourage the appointment of professionals as trustees which is the optimal approach given the increasing need for advice rendered to the trust.

28. We therefore support the imposition of a default charging clause which can be opted out of. We note that the Public Trustee[29] is already entitled to remuneration and that the executor or administrator may be allowed a commission of up to 5% of the value of the assets collected as provided by statute.[30] Our recommendation therefore applies to all other trustees. In this regard, we do not think a distinction should be drawn between professional and lay trustees. The employment of a trustee to provide legal or other professional services requires special treatment. We are not against trustees contracting with one of their number for payment for the provision of such services but in all cases, conflict of interest and duty must be avoided and the payment agreed upon must be reasonable, having regard to the circumstances, including the nature of the advice and the qualifications of the trustee who will provide the advice. We also recommend changing the present law which regards remuneration clauses in will trusts as legacies and in trust deeds as gifts. The result will be to reverse the law that a trustee directed to be paid an annuity for his services cannot claim also the commission payable for collection of rent on behalf of the trust.

29. Summary of Recommendations:

- **(a) We recommend that trustees should be given the default power in the Trustees Act to provide reasonable remuneration to another trustee for services rendered to the trust in a professional capacity;**
- **(b) The default power of remuneration should be available even if the services provided are capable of being provided by a lay trustee;**
- **(c) Conversely, even a lay trustee should be able to seek remuneration if he acts in a professional capacity in rendering services to the trust;**
- **(d) The remuneration should not be available if the trust instrument or other legislation has provided for it, such as in the case of the Public Trustee and trust companies;**
- **(e) In considering whether and how much remuneration should be given, the other trustees should be required to examine the nature of any other gifts or benefits (not being remuneration) conferred by the trust instrument, as well as all other relevant circumstances;**
- **(f) The default power should not apply in the case of trust companies, trustees of charitable trusts or a sole trustee;**
- **(g) We also recommend consequential amendments to the Wills Act and the Probate and Administration Act which presently regards remuneration clauses in will trusts as legacies and in trust deeds as gifts.**

[29] Section 18 Public Trustee Act (Cap 260). In the case of trust companies, see section 8(l) Trust Companies Act (Cap 336).

[30] Section 66 Probate and Administration Act (Cap 251).

Exemption clauses

30. Modern trust deeds, outside those in the capital markets that are negotiated between the various parties setting up the trust, usually contain clauses protecting trustees from liability for breach of trust. The difficulty with such clauses is that they may attempt to protect trustees from even extremely egregious breaches or breaches of what one would consider the core obligations of trusteeship. That core is, however, still yet undefined. In *Armitage v Nurse*,[31] Millett LJ (as he then was) in English Court of Appeal said that he did not accept "that these core obligations include the duties of skill and care, prudence and diligence" yet his Lordship acknowledged that some exclusion clauses have been drafted too widely, particularly in the case of professional trustees who try to exclude liability for their own gross negligence. However, that case itself only drew a distinction between fraudulent and non-fraudulent breaches of trust, and exclusion clauses could protect a trustee against the latter, even where gross negligence is involved, so long as the line is not crossed into fraud.

31. Section 60 of our Trustees Act presently states that:

> 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, on or after 1st September 1929, *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 the breach, then the court may relieve him either wholly or partly from personal liability for the same.

32. The provision is fairly similar in drafting to section 391 of the Companies Act, which relieves directors of liability in almost the same circumstances. In the context of section 727 of the UK Companies Act 1985, which is the equivalent UK provision, the Department of Trade and Industry has pointed out that there is presently some doubt about whether directors may be excused from negligence liability.[32] It, however, recommended that directors should be able to avail themselves of the provision even while negligent if they "ought fairly to be excused". The suggestion was that the reference to "reasonably" in section 727 be removed. In the *Final Report*,[33] the DTI noted that the proposal proved "wholly uncontroversial" during the consultation process, and it appears that section 727 will be amended accordingly.

33. The NZ Law Commission has, however, now proposed to add further subsections to section 73 of their Trustees Act, which is very similar to our section 60, to narrow the circumstances where relief can be granted to the trustee:

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[31] [1998] Ch 241.

[32] See paras 3.76-3.77 of *Modern Company Law for the Competitive Economy – Developing the Framework* (March 2000).

[33] (July 2001) at page 133. We note that the draft Companies (Amendment) Bill 2003, which was open for public consultation and feedback till 11 January 2003, seeks to replace section 391 with a provision similar to section 727 of the UK Companies Act, pursuant to the recommendations of the Company Legislation and Regulatory Framework Committee, whose recommendations were accepted by the Government in October 2002.

(2) A provision of a trust instrument purporting to exonerate a trustee who acts as such for reward from liability for failure to exercise the degree of care, diligence and skill required by law, shall have no effect.

(3) Subject to section 49 (relating to advisory trustees) and section 50 (relating to custodian trustees) a provision in the instrument creating a trust limiting the degree of care, diligence and skill required of a trustee, shall, in the case of a trustee who acts as such for reward, be of no effect.

34. In effect, professional trustees will not be able to obtain relief from negligence liability, nor are they able to craft a provision in such a way that such liability does not arise. We are not comfortable with introducing such a provision in Singapore at this time for two reasons. First, there may be negative effects on the stated goal of making Singapore an asset management centre, with its ancillary depository and custodial services. While the NZ Law Commission believed that professional trustees were able to insure against such liability, we are not certain of the optimal loss allocation from a societal perspective at this juncture. In fact, the NZ Law Commission acknowledged that any such new subsection should come into effect only a year from Royal Assent so that professional trustees are able to obtain insurance or resign. Second, we believe that the law as it stands already recognises that professional trustees will be held to a higher standard of care (and this will be made explicit in the proposed new sections in the Trustees Act dealing with the general standard of care). Consequently, as the NZ Law Commission itself noted, section 60 already recognises that professional trustees may not be able to obtain relief from liability in the same circumstances as lay trustees.[34] Where trustees of collective investment schemes are concerned, section 292(1) of the Securities and Futures Act already renders void any provision in the trust deed that has the "effect of exempting a trustee under the trust deed from, or indemnifying a trustee against, liability for breach of trust where the trustee fails to exercise the degree of care and diligence required of a trustee". This partly explain why the deeds found in capital markets practice, certainly where unit trusts are concerned, only contain limited exclusion clauses.

35. Summary of Recommendations:

(a) We recommend that no changes should be made to the Trustees Act at this time to control exclusion clauses given the concerns above, in particular;

(i) it is not clear what are the core obligations of trusteeship that should not be excludable;

(ii) this may have negative effects on the development of Singapore as an asset management centre;

(iii) the common law, and the proposed statutory duty of care, already recognises that professional trustees are held to a higher standard of care than lay trustees;

(iv) exclusion clauses in the context of collective investment schemes, like unit trusts, are already controlled.

[34] See *Barclays v Barclays Trust Co (No 1)* [1980] 1 Ch 515 at 534 per Brightman J.

(b) We believe that a wait and see approach should be taken, and we should monitor both common law and statutory developments elsewhere before revisiting this issue at a future date.

Trust Protectors

36. In the last 10 years, trusts, especially off-shore trusts, have increasingly been overseen by a Protector. This person or entity is neither a trustee or beneficiary, and its status is unclear in many jurisdictions. It is sometimes dressed up in other forms, and may be termed a Board of Advisers or even an Investment Committee to the trust, which may be made up of those perceived by the settlor to be the more responsible or mature beneficiaries under the trust. Its function is usually to see to the fact that the settlor's wishes are carried out properly by the trustee. Typically, the Protector was given the power to appoint or remove a trustee.

37. Today, however it is common to find trust deeds giving the Protector the power to veto the trustee's decision, add to or delete from, the class of beneficiaries, and perhaps even substitute its own decision as to how to distribute the trust assets to discretionary beneficiaries. The danger from the point of legal certainty is that the trustee's role may be seen by a court to have been usurped by the Protector, as that could mean that the Protector is seen itself to have assumed the duties and responsibility of trusteeship, or that the trustee is simply a custodian agent of the settlers or the trust. This would have serious consequences in terms of the allocation of legal liability.

38. The NZ Law Commission believes that statutory intervention is appropriate to delimit the respective roles of the trustee and Protector, though it had in a preliminary paper believed that the existing law was sufficient to cope with this. Its earlier view was that a Protector with limited powers may be seen to be a donee of a mere power. This might cover the situation where the Protector is given the power to control the trustee's discretion in distributing income or capital, the power to remove or replace the trustee, and to add or delete beneficiaries. But if the idea is for the Protector to also oversee the kind of investments that are made, more powers may have to be granted to the Protector to steer, and not just to monitor, the trustee's management of the trust, and this may result in the Protector being seen as a trustee.

39. That the law has already been sufficiently flexible can be seen in its acceptance of the unit trust, where it is arguable that the fund manager is really more the trustee (and this has been recognised by section 3(2)(c) of the NZ Unit Trusts Act 1960), and where the trustee is really just a custodian. In the context of the *Quistclose* trust, which was seen as some kind of secondary trust resulting from the failure of a primary purpose trust, the House of Lords in *Twinsectra v Yardley*[35] has recently characterised it as no more than a simple express or resulting trust for the lender. Even prior to this, Gummow J. in *Re Australian Elizabethan Theatre Trust*[36] had already pointed out the "flexibility of the institution of the express trust and the range of equitable institutions which fall short of but have some of the

[35] [2002] 2 AC 164, noted Yeo & Tjio (2003) 119 LQR 8.
[36] (1991) 102 A.L.R. 681 at p. 693.

characteristics of a trust" (at p. 693). There is thus no urgent need to recharacterise institutions that are merely variants of existing structures that we are familiar with.

40. However, the NZ Law Commission has now recommended a new section that sets out the role of the Protector, and also the fact that a trustee cannot escape liability by simply obeying the instructions of the Protector, and should apply to court for directions when it feels that those instructions conflicts with the terms of the trust, or a rule of law, or exposes him to any liability.

41. We do not feel that such a provision is necessary for the following reasons. First, NZ Trustees Act 1956 currently provides for the existence of an "advisory trustee", which trustees can choose to consult, but are not obliged to follow (unlike the directions of a Protector). The NZ Law Commission felt that necessary amendments were already required to make it clear that following the advice of an advisory trustee did not protect the trustee from liability, and the Protector provisions simply mirror those provisions. Second, it is not clear how such a provision will impact on the relationship between the fund manager and trustee in a unit trust situation. The definition of a Protector seems to be wide enough encompass a fund manager, and trustees will be put in a difficult position if it were expected to closely monitor the investment decisions of the fund manager to see if it conforms with its investment mandate. This will create some difficulties in the marketplace where the respective roles of the parties have been developed to suit its practices, and the legal difficulties, eg with whether the fund manager may be in fact a trustee, and not just a fiduciary, have largely been ignored. To introduce a further legal concept into the trust relationship will only serve to confuse the picture, and to destabilise an established practice. Finally, the issue is not confined to trust protectors alone. Settlors are increasingly retaining a larger role in the administration of a trust, and may sometimes be seen to have usurped the functions of a trustee. The issue is a difficult one, and should be dealt with holistically, taking into account the core meaning of the institution of the trust, and the respective roles of the parties within it. The issue cannot be resolved in this present paper, but awaits the next set of reform of trust law that is discussed at para. 4 above.

42. Summary of Recommendations:

(a) We recommend that no changes should be made to the Trustees Act at this time to regulate the relationship between trust protectors and trustees given the concerns above, in particular;

(i) the different roles played by the trust protector;

(ii) the ability of the common law and equity to focus on the actual functions, rather than the form, of the protector in determining the incidence of legal liability;

(iii) the difficulties this may create in the context of collective investment schemes, like unit trusts, where the respective roles of manager and trustee have been developed to suit the needs of the financial markets.

(b) We believe that a wait and see approach should be taken, and we should monitor both common law and statutory developments elsewhere before revisiting this issue at a future date.

Conclusion

43. We believe that it is necessary at this stage to provide trustees with the default power to appoint nominees and custodians to hold trust property in order to supplement the wider investment powers and powers of delegation in the proposed Bill. Without it, the proposed Bill will still not allow trusts to fully benefit from the portfolio diversification that comes with the use of fund managers and the purchase of unit trusts. Trustees should also be conferred wider default powers to insure trust property, and also to be remunerated for their services. The necessary safeguard against the abuse of these wider powers is the introduction (or re-introduction) of a general objective standard of care that applies to the exercise of these defined powers. However, we do not feel that the time is right to introduce further provisions in the Trustees Act restricting the efficacy of exclusionary clauses or defining the role of Trust Protectors.

Prepared by the Sub-Committee appointed by the Law Reform Committee of the Singapore Academy of Law to look into reform of certain aspects of the Trustees Act

Members of the Sub-Committee
Associate Professor Hans Tjio
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31 March 2003

APPENDIX: RELEVANT PROVISIONS FROM THE UK TRUSTEES ACT 2000, AND PROPOSED AMENDMENTS TO NZ TRUSTEES ACT 1956

GENERAL STATUTORY DUTY OF CARE

UK Trustees Act 2000, section 1 and 2

The duty of care.

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

(a) to any special knowledge or experience that he has or holds himself out as having, and

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

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

Application of duty of care.

2. Schedule 1 makes provision about when the duty of care applies to a trustee.

UK Trustees Act 2000, Schedule 1

APPLICATION OF DUTY OF CARE

Investment

1. The duty of care applies to a trustee-

(a) when exercising the general power of investment or any other power of investment, however conferred;
(b) when carrying out a duty to which he is subject under section 4 or 5 (duties relating to the exercise of a power of investment or to the review of investments).

Acquisition of land

2. The duty of care applies to a trustee-

(a) when exercising the power under section 8 to acquire land;
(b) when exercising any other power to acquire land, however conferred;
(c) when exercising any power in relation to land acquired under a power mentioned in sub-paragraph (a) or (b).

Agents, nominees and custodians

3. - (1) The duty of care applies to a trustee-

(a) when entering into arrangements under which a person is authorised under section 11 to exercise functions as an agent;
(b) when entering into arrangements under which a person is appointed under section 16 to act as a nominee;
(c) when entering into arrangements under which a person is appointed under section 17 or 18 to act as a custodian;
(d) when entering into arrangements under which, under any other power, however conferred, a person is authorised to exercise functions as an agent or is appointed to act as a nominee or custodian;
(e) when carrying out his duties under section 22 (review of agent, nominee or custodian, etc.).

(2) For the purposes of sub-paragraph (1), entering into arrangements under which a person is authorised to exercise functions or is appointed to act as a nominee or custodian includes, in particular-

(a) selecting the person who is to act,
(b) determining any terms on which he is to act, and
(c) if the person is being authorised to exercise asset management functions, the preparation of a policy statement under section 15.

Compounding of liabilities

4. The duty of care applies to a trustee-

(a) when exercising the power under section 15 of the Trustee Act 1925 to do any of the things referred to in that section;
(b) when exercising any corresponding power, however conferred.

Insurance

5. The duty of care applies to a trustee-

(a) when exercising the power under section 19 of the Trustee Act 1925 to insure property;
(b) when exercising any corresponding power, however conferred.

Reversionary interests, valuations and audit

6. The duty of care applies to a trustee-

(a) when exercising the power under section 22(1) or (3) of the Trustee Act 1925 to do any of the things referred to there;
(b) when exercising any corresponding power, however conferred.

Exclusion of duty of care

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

EMPLOYMENT OF NOMINEES OR CUSTODIANS

UK Trustees Act 2000, sections 16-20

Power to appoint nominees.

16. - (1) Subject to the provisions of this Part, the trustees of a trust may-

(a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land), and

(b) take such steps as are necessary to secure that those assets are vested in a person so appointed.

(2) An appointment under this section must be in or evidenced in writing.

(3) This section does not apply to any trust having a custodian trustee or in relation to any assets vested in the official custodian for charities.

Power to appoint custodians.

17. - (1) Subject to the provisions of this Part, the trustees of a trust may appoint a person to act as a custodian in relation to such of the assets of the trust as they may determine.

(2) For the purposes of this Act a person is a custodian in relation to assets if he undertakes the safe custody of the assets or of any documents or records concerning the assets.

(3) An appointment under this section must be in or evidenced in writing.

(4) This section does not apply to any trust having a custodian trustee or in relation to any assets vested in the official custodian for charities.

Investment in bearer securities.

18. - (1) If trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities.

(2) Subsection (1) does not apply if the trust instrument or any enactment or provision of subordinate legislation contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian.

(3) An appointment under this section must be in or evidenced in writing.

(4) This section does not apply to any trust having a custodian trustee or in relation to any securities vested in the official custodian for charities.

Persons who may be appointed as nominees or custodians.

19. - (1) A person may not be appointed under section 16, 17 or 18 as a nominee or custodian unless one of the relevant conditions is satisfied.

(2) The relevant conditions are that-

(a) the person carries on a business which consists of or includes acting as a nominee or custodian;
(b) the person is a body corporate which is controlled by the trustees;
(c) the person is a body corporate recognised under section 9 of the Administration of Justice Act 1985.

(3) The question whether a body corporate is controlled by trustees is to be determined in accordance with section 840 of the Income and Corporation Taxes Act 1988.

(4) The trustees of a charitable trust which is not an exempt charity must act in accordance with any guidance given by the Charity Commissioners concerning the selection of a person for appointment as a nominee or custodian under section 16, 17 or 18.

(5) Subject to subsections (1) and (4), the persons whom the trustees may under section 16, 17 or 18 appoint as a nominee or custodian include-

(a) one of their number, if that one is a trust corporation, or
(b) two (or more) of their number, if they are to act as joint nominees or joint custodians.

(6) The trustees may under section 16 appoint a person to act as their nominee even though he is also-

(a) appointed to act as their custodian (whether under section 17 or 18 or any other power), or
(b) authorised to exercise functions as their agent (whether under section 11 or any other power).

(7) Likewise, the trustees may under section 17 or 18 appoint a person to act as their custodian even though he is also-

(a) appointed to act as their nominee (whether under section 16 or any other power), or
(b) authorised to exercise functions as their agent (whether under section 11 or any other power).

Terms of appointment of nominees and custodians.

20. - (1) Subject to subsection (2) and sections 29 to 32, the trustees may under section 16, 17 or 18 appoint a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not under section 16, 17 or 18 appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are-

(a) a term permitting the nominee or custodian to appoint a substitute;
(b) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary;
(c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

WIDENING TRUSTEES' POWERS TO INSURE

UK Trustees Act 2000 section 34

"Power to insure.

19. - (1) A trustee may-

(a) insure any property which is subject to the trust against risks of loss or damage due to any event, and

(b) pay the premiums out of the trust funds.

(2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries-

(a) that any property specified in the direction is not to be insured;

(b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.

(3) Property is held on a bare trust if it is held on trust for-

(a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust, or

(b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.

(4) If a direction under subsection (2) of this section is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 11 of the Trustee Act 2000 (power to employ agents).

(5) In this section "trust funds" means any income or capital funds of the trust."

(2) In section 20(1) of the Trustee Act 1925 (application of insurance money) omit "whether by fire or otherwise".

(3) The amendments made by this section apply in relation to trusts whether created before or after its commencement.

Proposed NZ Trustees Act 1956 section 24(1), (2) and (2A)

(1) A trustee may insure any property which is subject to the trust against risks of loss or damage due to any event and upon such terms (including terms requiring replacement by the insurer) as he thinks fits and may also insure against any risk or liability against which it would be prudent for a person to insure if he were acting for himself.

(2) Subject to the express provisions of the instrument creating the trust the trustee may apportion the cost of premiums between income and capital as he thinks fit.

(2A) Nothing in this section authorises a trustee to apply any asset of the trust in payment of a premium under a policy of insurance indemnifying the trustee against the trustee's personal liability for breach of the trustee's obligations as trustee.

Preservation of NZ Trustees Act section 24(3)

(3) Nothing in this section shall impose any obligation on a trustee to insure.

REMUNERATION FOR PROFESSIONAL TRUSTEES

UK Trustees Act 2000 section 28-33

Trustee's entitlement to payment under trust instrument.

28. - (1) Except to the extent (if any) to which the trust instrument makes inconsistent provision, subsections (2) to (4) apply to a trustee if-

(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust, and
(b) the trustee is a trust corporation or is acting in a professional capacity.

(2) The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.

(3) Subsection (2) applies to a trustee of a charitable trust who is not a trust corporation only-

(a) if he is not a sole trustee, and
(b) to the extent that a majority of the other trustees have agreed that it should apply to him.

(4) Any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of-

(a) section 15 of the Wills Act 1837 (gifts to an attesting witness to be void), and
(b) section 34(3) of the Administration of Estates Act 1925 (order in which estate to be paid out).

(5) For the purposes of this Part, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with-

(a) the management or administration of trusts generally or a particular kind of trust, or
(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.

(6) For the purposes of this Part, a person acts as a lay

trustee if he-

(a) is not a trust corporation, and
(b) does not act in a professional capacity.

Remuneration of certain trustees.

29. - (1) Subject to subsection (5), a trustee who-

(a) is a trust corporation, but
(b) is not a trustee of a charitable trust,

is entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides to or on behalf of the trust.

(2) Subject to subsection (5), a trustee who-

(a) acts in a professional capacity, but
(b) is not a trust corporation, a trustee of a charitable trust or a sole trustee,

is entitled to receive reasonable remuneration out of the trust funds for any services that he provides to or on behalf of the trust if each other trustee has agreed in writing that he may be remunerated for the services.

(3) "Reasonable remuneration" means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee and for the purposes of subsection (1) includes, in relation to the provision of services by a trustee who is an authorised institution under the Banking Act 1987 and provides the services in that capacity, the institution's reasonable charges for the provision of such services.

(4) A trustee is entitled to remuneration under this section even if the services in question are capable of being provided by a lay trustee.

(5) A trustee is not entitled to remuneration under this section if any provision about his entitlement to remuneration has been made-

(a) by the trust instrument, or
(b) by any enactment or any provision of subordinate legislation.

(6) This section applies to a trustee who has been authorised under a power conferred by Part IV or the trust instrument-

(a) to exercise functions as an agent of the trustees, or
(b) to act as a nominee or custodian,

as it applies to any other trustee.

Remuneration of trustees of charitable trusts.

30. - (1) The Secretary of State may by regulations make provision for the remuneration of trustees of charitable trusts who are trust corporations or act in a professional capacity.

(2) The power under subsection (1) includes power to make provision for the remuneration of a trustee who has been authorised under a power conferred by Part IV or any other enactment or any provision of subordinate legislation, or by the trust instrument-

(a) to exercise functions as an agent of the trustees, or
(b) to act as a nominee or custodian.

(3) Regulations under this section may-

(a) make different provision for different cases;
(b) contain such supplemental, incidental, consequential and transitional provision as the Secretary of State considers appropriate.

(4) The power to make regulations under this section is exercisable by statutory instrument, but no such instrument shall be made unless a draft of it has been laid before Parliament and approved by a resolution of each House of Parliament.

Trustees' expenses.

31. - (1) A trustee-

(a) is entitled to be reimbursed from the trust funds, or
(b) may pay out of the trust funds,

expenses properly incurred by him when acting on behalf of the trust.

(2) This section applies to a trustee who has been authorised under a power conferred by Part IV or any other enactment or any provision of subordinate legislation, or by the trust instrument-

(a) to exercise functions as an agent of the trustees, or
(b) to act as a nominee or custodian,

as it applies to any other trustee.

Remuneration and expenses of agents, nominees and custodians.

32. - (1) This section applies if, under a power conferred by Part IV or any other enactment or any provision of subordinate legislation, or by the trust instrument, a person other than a trustee has been-

(a) authorised to exercise functions as an agent of the trustees, or

(b) appointed to act as a nominee or custodian.

(2) The trustees may remunerate the agent, nominee or custodian out of the trust funds for services if-

(a) he is engaged on terms entitling him to be remunerated for those services, and
(b) the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of those services by him to or on behalf of that trust.

(3) The trustees may reimburse the agent, nominee or custodian out of the trust funds for any expenses properly incurred by him in exercising functions as an agent, nominee or custodian.

Application.

33. - (1) Subject to subsection (2), sections 28, 29, 31 and 32 apply in relation to services provided to or on behalf of, or (as the case may be) expenses incurred on or after their commencement on behalf of, trusts whenever created.

(2) Nothing in section 28 or 29 is to be treated as affecting the operation of-

(a) section 15 of the Wills Act 1837, or
(b) section 34(3) of the Administration of Estates Act 1925,

in relation to any death occurring before the commencement of section 28 or (as the case may be) section 29.