TRUSTEES AND TRUST ADMINISTRATION: SCOTTISH LAW COMMISSION'S PROPOSALS FOR REFORM

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As you are probably all aware, the Scottish Law Commission has been conducting a detailed review of the law of trusts, with a view to identifying areas of doubt or uncertainty or unfairness that can usefully be dealt with in legislation. At the same time it has been carrying out a review of procedures to ensure that they work as efficiently as possible in contemporary conditions. To that end we have issued a number of Discussion Papers, dealing with separate topics within the general field of trusts. We are now close to the end of the Discussion Papers; the only remaining subject that has to be considered is accumulations and the restrictions on successive liferents, and work is currently starting on this area. That Discussion Paper will be issued in the course of this year. One final area may be considered, and that is the effect of prescription on trusts. It is likely, however, that if this is considered it will form part of a review of the law relating to executries; the uncertainties that result from the Prescription and Limitation Act 1973 can be seen most clearly in the application of the Act to executries, although they are paralleled to some extent in the field of pure trusts. Following the publication of the whole of the Discussion Papers we will consider the responses received and produce a report identifying the areas where we think that legislation would be desirable**.**

This evening I would like to concentrate on one particular area of the law, that of trust administration. This is obviously an area of immense practical importance, because it affects the day-to-day work of most solicitors with a trust practice. It is, moreover, an area where we think that some reform is needed. In part this is to remove areas of doubt or obscurity; in part it is to update and rationalize the legislation that governs trust administration; and in part it is to reform and simplify the court procedures that are available where trustees think that they are faced with an issue that requires an application to the court.

The Discussion Paper is wide-ranging. The list of headings can be seen in the outline that has been circulated, and I intend to say something about most of these, although I will concentrate more on some than on others.

This is an area of law where the Commission thinks that some reform is needed. Various reasons exist for this situation, but most of them relate quite simply to the age of the existing law. Much of the case law relating to trusts is fairly old; frequently the leading cases date from the second half of the 19th-century. While the quality of the legal reasoning is, as one would expect, usually excellent, many technological, economic and social developments have obviously taken place since then. One of the most obvious changes is that communications have developed in a way that could not have been contemplated more than 100 years ago; even the telephone was its infancy at that time, and the modern use of conference calls, e-mails and the like has had a profound bearing on the way in which people habitually reach decisions. We think that these developments should be clearly reflected in the law of trusts. Another major change relates to the nature of trust property. In

the 19th-century the paradigm trust was perhaps that designed to hold a landed estate. Many of the trust powers were designed to cater for such a trust. So far as other investments were concerned, government stock was perhaps regarded as the norm. Modern investment conditions, permitting a vast choice of stock market securities, involving investment in almost every conceivable economic sector and in almost every part of the developed world, would again be beyond the contemplation of those who formulated the rules. Moreover, that does not apply only to the case law: the Trusts (Scotland) Act 1921, the leading statutory provision governing trust administration, is in large part based on 19th century statutes. In any event, lawyers are by nature a conservative group, and the world view of the typical trust lawyer immediately after the First World War had probably not moved very far from the conditions of the late 19th century. In these circumstances it seems to us that the time is ripe for a reconsideration and restatement of the basic rules relating to trust administration.

I should say at this stage that, if you have comments or questions on any of the topics covered in the Discussion Paper on Trust Administration I would be delighted to hear what you have to say. The Commission is always delighted to have the views of the profession on the subjects that they have under consideration, and trust administration is a field where practising solicitors and accountants are likely to know a great deal about the subject as it operates in the modern world.

Decision-making by trustees: meetings, majorities and quorums.

This area is obviously fundamental to trust administration. The law is generally laid down in cases decided in the second half of the 19th-century; indeed, there appears to be a total absence of cases since 1900. This is an area where we think that technological changes, and the corresponding changes in ordinary business practice, call for some updating of the law. The general rule is well stated in *Wyse v Abbott*, 1881, 8 R 93, where Lord President Inglis said (at 984):

> "No two trustees can do a trust act without consultation with their co-trustee. It is of the essence of the duty of a body of trustees that they should meet and exchange views on the trust affairs. The trustees were bound to see that Mr. Wyse had notice of their intention to nominate co-trustees, and an opportunity of stating his views.... The omission of notice, and the want of consultation, are enough to make the appointment illegal".

There are exceptions to the rule that all trustees must be consulted. In one case (*Malcolm v Goldie*, 1895, 22 R. 968) trustees had not consulted with one of their number who had recently emigrated to Australia. It was held that this did not invalidate the trustees' decision. Today, however, it is far from clear that that case would be followed. With modern methods of communication it is not difficult for a trustee in any part of the world to take part in his co-trustees' deliberations and to participate in their decision.

A further area of doubt is whether trustees must actually meet in order to reach a decision, or whether it is possible for them to reach a decision through communications by telephone, e-mail or the like. In *Wyse v Abbott*, LP Inglis stated that "It is of the essence of the duty of a body of trustees that they should meet and exchange views on the trust affairs". Similar statements are made in the leading textbooks on trusts; an exception is Wilson and Duncan, where it is suggested that, if circumstances render a meeting impracticable or impossible, "consultation by written or telephonic communication would usually be acceptable". The

Commission's consultation procedures, however, indicated that in current practice many decisions are made otherwise than as a result of face-to-face meetings; instead, communication by telephone, letter or e-mail is used. It thus appears that the law is at best unclear; at worst, a significant gulf has opened up between strict law and ordinary legal practice. We accordingly think that legislation might usefully provide a clear statement of the rules, and that those rules should reflect current practice. It seems to us that the critical point is that all trustees should be given an opportunity to put forward their views on the issues that require a decision. Modern methods of communication allow this to be done by means other them face-to-face meetings. We accordingly propose that legislation should be enacted providing that, before a decision binding the trustees can be made, all the trustees must be given prior notice of the matters to be decided and an opportunity to put forward their views, either by attending a meeting of the trustees or in any other manner. Those rules are to apply in the absence of any contrary provision in the trust deed. I would welcome your views on this proposal; it seems to us that it would provide a clear legal basis for what is standard contemporary practice.

We also consider the rules relating to majorities and quorums. Section 3(c) of the Trusts (Scotland) Act 1921 provides that, in the absence of provision to the contrary, all trusts shall be held to include a provision that a majority of the trustees accepting and surviving shall be a quorum. It should be noted that that is a majority of the whole of the accepting and surviving trustees, not a majority of those who come to a meeting. In our Discussion Paper we suggest that the use of the word "quorum" is potentially misleading if trustees may make effective decisions otherwise than at meetings. We accordingly propose that section 3(c) of the Trusts Act should be replaced by new statutory provision; this would provide that, for a decision to bind trustees, it must be made by a number of trustees at least equal to the majority of the trustees then acting, but that a trustee who has a personal interest in a decision is not to be counted as an acting trustee and is to be disqualified from participating in such a decision. That would apply in the absence of any provision to the contrary. We think that this would clarify the existing law, as well as drawing attention to the importance of the principle auctor in rem suam, which can of course be of great importance in the dealings of trustees.

Appointment of agents, nominees and custodians; delegation of management powers

The appointment of agents is dealt with by section 4(1)(f) of the Trusts (Scotland) Act 1921, which empowers trustees "to appoint factors and law agents and pay them suitable remuneration". The very wording of this provision seems to speak of a different age, an age where a landed estate was the normal form of trust property. Today agents of many different sorts are regularly employed; an investment manager, or stockbroker acting as an investment manager, is now probably much more common than a factor as a manager of trust property. We think, therefore, that section 4(1)(f) might usefully be replaced by a provision empowering trustees to appoint agents (of any sort) and to pay them suitable remuneration.

A further problem is the extent to which trustees can competently entrust decisions to agents. The distinction that is usually drawn is that between the delegation of ministerial or administrative functions on the one hand and delegation of discretionary functions on the other hand; the former is permissible; the latter is not. Thus the discretionary functions of trustees must never be delegated. Nevertheless, it has been recognized in recent cases that considerable delegation may be permitted in relation to the administration of the trust

property. That is clear from *Scott v Occidental Petroleum (Caledonia) Ltd*., 1990 SLT 882, where it was held that a tutrix could not delegate her powers and authority qua tutrix but could delegate the administration of the funds held for the benefit of her children. That was important in the particular case, which related to damages payable to the pupil children of one of the victims of the Piper Alpha disaster. The curator ad litem who acted for those children was not satisfied as to the tutrix's ability to manage the funds that would become the children's property, and was not prepared to sanction payment of the funds until proper arrangements were made for the management of those funds. It is clear from the Lord President's opinion that it is permissible to delegate the whole of the decisions as to investment of the funds to a suitable person. Obviously that delegation is subject to recall at any time, but in the circumstances of that case it was most unlikely that the tutrix would recall the delegation.

Despite the decision in *Scott*, the Commission thought that the dividing line between permissible and impermissible delegation was sometimes unclear in practice, and might depend to some extent on the size and nature of the trust estate and the objectives of the trust. In larger trusts, for example, it is unrealistic to insist that trustees should take all decisions that require the exercise of judgment. This is particularly important in relation to the administration of investments, which has obviously become an increasingly technical and specialized area. In some other jurisdictions legislation has been proposed or enacted to clarify the extent to which trustees may delegate; an example is section 11(2) of the English Trustee Act 2000, which allows delegation to agents apart from specified non-delegatable functions; the latter relate to the distribution of assets, apportionment between income and capital, the appointment of trustees and the power to delegate functions (in other words, sub-delegation is prohibited). Against that background, the Commission ask whether the existing common law on the delegation of trustees' powers is satisfactory, or whether it would be better to have new statutory provisions. I would very much welcome your views on this matter.

We also consider the position of nominees, and propose that trustees should, unless the trust otherwise provides, have a new statutory power to transfer ownership of trust property to a person who would hold it as a nominee of the trustees. Nominees are commonly used in current practice, and our view was that the law should authorize trustees to use them in a fairly liberal manner. I do not propose to deal with this issue in detail, once again the Commission would welcome your comments.

Finally, in this area, I should point out that we ask whether section 4(1) of the 1921 Act should be replaced by a general power of administration and investment, or whether it should be amended by the inclusion of additional powers. Once again I do not intend to consider this in detail, but again views would be welcome

Appointment, resignation and removal of trustees

Section 22 of the Trusts Act 1921 empowers the Court of Session or an appropriate sheriff court to appoint trustees in defined circumstances; these arise when trustees cannot be assumed under any trust deed, or when any person who is a sole trustee is or has become insane or incapable of acting by reason of physical or mental disability, or has been absent continuously from the United Kingdom for a period of at least six months, or has disappeared for a like period. This power in fact dates back to section 12 of the Trusts (Scotland) Act 1867. It is thought to cover most of the situations in which judicial appointment of trustees is

found necessary. In addition, a common law power to appoint trustees still exists by virtue of the nobile officium, and may still be used occasionally in cases where section 22 does not apply. Examples of this occur where the trust administration is deadlocked because of disagreement between the trustees, where a sole trustee is removed owing to his unsatisfactory conduct, or where an ex officio trustee has been appointed but the "office" held by him ceases to exist. The Commission considers that the current position could usefully be simplified by conferring a new statutory power on the courts to appoint a trustee where this is necessary for the administration of the trust. It is thought that it would not be necessary to mention specific situations such as the incapacity of a sole trustee. The test proposed is that of necessity, not mere desirability. We think that that is appropriate; so far as the appointment of trustees is concerned the intervention of the court should be a last resort. Consequently, although an application could be made by one of several trustees, the procedure could not be used by a minority of trustees to force the appointment of additional trustees against the wishes of the majority.

In our Discussion Paper we also draw attention to section 13 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which permits the Lord Advocate in certain circumstances to appoint new trustees to a charitable trust; these include the situation where the number of trustees drops below three and the remaining trustees are unwilling or unable to make a further appointment. We suggest that that power might usefully be extended to non-charitable public trusts.

The resignation of trustees is currently governed by section 3(a) of the Trusts Act 1921. This replaces earlier statutory powers which started with the Trusts (Scotland) Act 1861; before that, a trustee had no right to resign without either the consent of the whole of the beneficiaries and co-trustees or an express power of resignation in the trust deed. The alternative was an application to the court to authorize resignation if that would be in the general interests of the trust, for example as a result of the poor health of a trustee. Section 3(a) provides that, unless the contrary is expressed in the trust deed, all trusts shall be held to include the power of any trustee to resign office. There are four exceptions: (i) a sole trustee who has not assumed new trustees; (ii) a judicial factor or executor dative; (iii) a trustee who has accepted a legacy or bequest on condition of accepting office; and (iv) a trustee appointed on the footing of receiving remuneration for his services. We can see sense in the first two of these exceptions. In relation to the first, it is clearly undesirable that the trust should be left without trustees, which explains why a sole trustee cannot resign without a successor. In relation to the second, judicial factors and executors dative are appointed by the court, and their resignation should clearly be controlled by the court. We think, however, that the third and fourth exceptions could usefully be revisited. In relation to the third, the 1921 Act permits the court to authorize resignation, if necessary on conditions with respect to repayment or otherwise of the legacy. We think that the law could usefully be rationalized by permitting all trustees falling within the third and fourth categories (those receiving a legacy or bequest or remuneration for their services) to resign, and to leave the question of repayment of the legacy or other remuneration to the rules of unjustified enrichment.

The removal of trustees by the court is possible at common law by an application under the nobile officium. In addition, section 23 of the Trusts Act 1921 empowers the court to remove a trustee who becomes insane or incapable of acting by reason of physical or mental disability, or who is absent from the United Kingdom continuously for at least six months, or who has disappeared for the same period. In our Discussion Paper we make proposals for

reform of this area of the law, which we do not think is satisfactory in its present form. We suggest in particular that the statutory provisions relating to judicial removal should deal with all the grounds of removal, thus superseding the nobile officium in its entirety; we consider that it is potentially misleading for section 23 to present only part of the picture.

If a new statutory provision is introduced, however, the question arises as to what the grounds for removal should be. In South Africa the court is given a general power to remove a trustee. The advantage of such a provision is that the ground for removal is not based on fault, so that there is no necessary criticism of the trustee. Nevertheless, that would appear to give the court an unfettered discretion, and it is not obvious why a trustee should be removed in the absence of some compelling cause. The other extreme would be for the legislation to set out in detail the grounds on which a trustee might be removed. The problem with such an approach is that the legislation would be complex and would require to be amended from time to time to update references to other legislation, such as that dealing with mental health and incapacity. In addition, it would probably not be possible to provide for all possibilities, except with the addition of a final, general, ground. We are generally opposed to over-complex legislation, and accordingly we do not think that detailed grounds would be appropriate. Consequently our preferred approach is to set out the grounds in general terms. Our proposal is that section 23 and the common-law grounds for the removal of trustees should be replaced by a new statutory provision which stipulates that a trustee may be removed by the court, on application, if the court is satisfied that (a) the trustee is unfit or unable to continue to act as trustee in the trust; or (b) the trustee has neglected his or her duties as trustee. We think that these general grounds should be sufficient to cover all cases where the removal of a trustee might be desirable. The grounds are potentially flexible, and would permit the court to take into account the best interests of the trust and its beneficiaries. We give two examples of this. First, a trustee who might otherwise be removed from office might be retained because of his or her intimate personal knowledge of the trust purposes or the beneficiaries' circumstances. Conversely, conduct in matters outwith trust business which might be acceptable in a trustee of a private family trust might be a ground for removing a trustee of a public trust for religious purposes. We think that flexibility is important. No doubt difficult or borderline cases will arise, but it is precisely the function of the court to decide such cases.

Overall, we would very much welcome comment on this proposal. I should add that we also ask whether the court should be given power to suspend a trustee from office on the same grounds as exist for removal. Such a power is conferred in South Africa, and it is thought that it might be useful where, for example, one of the trustees became mentally or physically incapable but was expected to recover in the foreseeable future, provided that there were other trustees capable of acting. The suspension could be for a fixed or indefinite period. Again, we welcome comment on the practical utility of such a suggestion.

The next area that I would like to consider is the question of non-judicial removal of trustees. In many other jurisdictions procedures are available for removing trustees without the necessity of making an application to the court. Even in Scotland, some trust deeds confer a power to remove or replace trustees, either on the truster or on others. No problem arises where power is contained in the trust deed. In other cases, non-judicial removal could take a number of different forms, including removal by a resolution of the other trustees or by the beneficiaries. The advantage of a non-judicial procedure is that it may be faster and cheaper than an application to the court (unless, of course, the validity of the removal is contested in court, which is far from a remote possibility!) The problem with such a

procedure, however, is that it may fail to protect the interests of the trustee in question. In particular, if that trustee is taking a stand on a matter that he considers to be of importance to the trust, or which may reflect badly on the other trustees, it is not obvious that there should be an automatic right of removal; in such cases the protection of the court is clearly highly advantageous.

On the other hand, there are cases where a person's holding of an office comes to an end automatically on the occurrence of certain events. For example, under section 18 of the Solicitors (Scotland) Act 1980 a solicitor's practising certificate is automatically suspended if he is admitted to hospital and becomes liable to be detained under mental health legislation, or if a guardian is appointed under the Adults with Incapacity (Scotland) Act 2000, or if his estate is sequestrated, or he grants a trust deed for creditors, or a judicial factor is appointed on his estate. A broadly similar provision in relation to persons concerned in the management or control of Scottish charities is found in section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990; this covers conviction for offences involving dishonesty or disqualification under the Company Directors Disqualification Act. On this basis, mental incapacity could be a ground for termination of trusteeship. We are not in favour of framing legislation in terms of a list of the various orders that are possible under the Adults with Incapacity (Scotland) At 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003, and perhaps the equivalents in the other United Kingdom jurisdictions. Such legislation would necessarily be complex and would require amendment every time there was a change in the mental incapacity legislation. We consider that it would be better for termination to occur if the trustee were certified as suffering from mental disorder or if an order had been granted on the basis of certified mental disorder or mental incapacity. We do not think that sequestration should be a ground for automatic removal; some people become bankrupt by misfortune rather than financial malpractice or ineptitude, and a bankrupt trustee may have personal knowledge of the family trust that is difficult to replace. It would not normally be particularly difficult to prevent the bankrupt from having any access to trust funds. In all the circumstances our provisional view is that there should be no provision for automatic termination of trusteeship; the complexity of the statutory provisions would outweigh any advantages.

Another procedure that we have provisionally rejected is removal of a trustee by the beneficiaries. In England and Wales, under the Trusts of Land and Appointment of Trustees Act 1996 the beneficiaries, if absolutely entitled to the trust estate and acting unanimously, can direct a trustee to resign or direct the trustees to appoint a specified person as a new trustee in replacement of an existing trustee. The beneficiaries may also replace a mentally incapable trustee. We are inclined to think that such provisions are undesirable; the administration of the trust should remain in the hands of the trustees, and permitting beneficiaries to direct trustees confuses their respective roles. In addition, beneficiaries have other remedies to deal with unfit trustees. The removal of trustees is serious, and we think that it should require some maladministration or unfitness for the part of the trustee before it can take place. Mere incompatibility with the beneficiaries should not be sufficient, and any disputes as to the running of the trust should be resolved by the courts, not by replacement of the trustees at the hands of the beneficiaries.

Nevertheless, we propose that trustees should be given a discretionary power to remove a fellow-trustee on becoming aware that that trustee has either (a) been certified as being mentally disordered or mentally incapable of acting as a trustee, or is the subject of an order grounded on certified mental disorder, or (b) has been convicted of a crime involving

dishonesty or imprisoned. We ask for views as to whether there should be other situations, such as bankruptcy, in which the trustee should have the power to remove one of their number. The thinking behind this proposal is that termination of a trustee's office by the remaining trustees should be confined to certain situations where the facts are easily proved and are clearly incompatible with exercise of the office of trustee. Similar provisions were considered in Ontario, where the Law Reform Commission expressed the view that trustees should not have to make subjective value judgments or resolve disputed questions of fact. We agree with that approach. Consequently situations that involve judgments of that nature, such as whether or not a breach of trust has been committed, should be dealt with by the courts. In the case of mental illness or a mental disorder, however, a certificate or order will provide the trustees with clear evidence of the condition. Similarly, we do not think that there would be many cases where a trustee convicted of a crime of dishonesty, or who was imprisoned during his or her period in office, would not be removed.

In England and Wales the Trustee Act 1925 enumerates a number of possible reasons for the removal of a trustee by his fellow trustees; these include refusal or unfitness to act or a trustee's being incapable of acting. We think that refusal and unfitness require a subjective value judgment as to the quality of the trustee's actings, with the result that removal on these grounds should be reserved to the courts. Incapacity, we think, can be satisfactorily established by the certification of mental disorder or the grant of an order grounded on certified mental disorder. Similarly, conviction for a crime involving dishonesty can be readily established. That explains the relatively limited nature of the proposal that we have made. I should add that we do not envisage that it will be commonly applied, but it may be of assistance in a small number of cases.

The role of the courts.

In Scotland the general attitude that has been taken by the courts is to leave the administration of the trust in the hands of the trustees. To the extent that the trustees are given discretionary powers, the courts are normally very reluctant to interfere with any decision of the trustees. The basic theory is that the truster has committed the administration of the trust to nominated trustees, or their duly appointed successors, and it is the trustees' task to conduct the administration in such manner as they think fit. The classic authority is perhaps the opinion of Lord President Inglis in *Orr Ewing v Orr Ewing's Trs*, 1884, 11 R 600 at 627-628:

> "The great principle in the administration of Scotch testamentary trusts is, to leave the administration where the testator himself has placed it, unless from fault or accident the trust has become unworkable; and even in that case the Courts do not undertake the administration, but appoint new trustees, or a judicial factor, who will occupy the same position, and possess the same powers of extra-judicial administration which the trustees named by the testator occupied and possessed".

Thus the Scottish courts are very reluctant to undertake anything in the way of detailed trust administration. This approach is surely correct; it is the trustees who possess all the necessary background information that is required for the operation of the trust, and if the court were to substitute its own decisions a great deal of (expensive) factual investigation would be required.

The courts have been willing to intervene in certain fairly limited circumstances. Generally speaking, these are cases where the trustees can be said to be in breach of their duties.

One example is where trustees are given a discretion but refuse to apply their minds to the question; in such a case they may be compelled to exercise their discretion. This was done on occasion in the late 19th and early 20th centuries. For example, in *Baird v Baird's Trs*, 1872, 10 M 482, the testator left an estate valued at in excess of £1 million (a very large amount in those days) in trust for his wife and son. The trustees proposed to pay the widow between £1000 and £2000 per annum for the maintenance of the son. The court thought, however, that this should be increased to £3000 per annum. This was on the basis that it was highly desirable that the boy (aged 10 at the time) should "imbibe a taste for field sports and other country pursuits, which necessitate a very liberal establishment in stable and kennel". Today, one has to ask what the anti-field sports lobby would make of such a decision! The basis for such judicial interference, however, was that the trustees had come to an unreasonable decision. That amounts, of course, to a question of law, and will normally justify judicial interference.

In modern times the classic statement of the test is that of Lord Reid in *Board of Management for Dundee General Hospital v Bell's Trs*, 1952 SC (HL) 78, at 92:

> "If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the Court will intervene".

In addition, unreasonableness or irrationality is a ground for interference, as in *Baird*. Mackenzie Stuart (at 252) suggests that the court will be more ready to intervene if the trustees have an interest in the decision. Finally, the court will intervene in the same way whether or not the trustees give reasons; it must be said, however, that if reasons are given it is easier to establish that the decision is wrong in law and thus challengeable.

The general view of the Commission is that this area of the law is generally quite satisfactory and there is no reason to change it. Nevertheless, as with every other area of the law that we have considered, we would welcome views from the profession.

The next area that we consider in our Discussion Paper is court directions. In this area the view expressed in the Discussion Paper is that the present law is generally satisfactory. Various forms of procedure are available. These include a petition for directions under section 6(vi) of the Court of Session Act 1988, a special case and a multiplepoinding. In addition, an ordinary action may be raised; that may in particular be an action for declarator of the trustees and beneficiaries' rights, powers and obligations. The procedure for a petition for directions is designed to provide a summary remedy for dealing with urgent requests by trustees. It has been said that it should not be used as a means of "throwing into court, without due consideration and preparation, questions which ought to be dealt with formally by special case or by other existing procedure": *Henderson's Trs v Henderson*, 1938 SC 461, at 464 per L.P. Normand. The result of such statements is that the procedure is perhaps used less often than is desirable. Nevertheless, it is a means of obtaining a fairly rapid and authoritative decision from the court on any point of law or procedure that the trustees find difficult. Personally I would encourage the legal profession to use this procedure much more than at present. It is important, however, that the question or questions that the court is asked to decide should be carefully formulated; nothing irritates a judge more than not knowing precisely what he is being asked to do! The special case procedure is an alternative where a more considered view is required from the court. Nevertheless, in a special case the facts must be agreed precisely and stated fully. The

procedure can, however, work well, and it provides an immediate decision from the Inner House. (The utility of the procedure is not confined to the field of trusts; it can also be used to obtain an authoritative decision on issues in commercial or property law, provided that the facts are agreed and the issues are genuinely legal in nature). Finally, so far as trusts are concerned, the multiplepoinding procedure has been described (by Lord President Hope in *Taylor v Noble*, 1836, 14 S817, at 819-820, as "the common mode by which trustees seek to obtain judicial exoneration".

As I have said, the Commission's view is that the existing procedures seem broadly satisfactory. The question is raised, however, as to whether a procedure should be introduced akin to the English *Benjamin* order, under which trustees can be authorized by the court to distribute the trust estate on a particular footing, for example of a particular person predeceasing the testator without issue. (The original case was *Re Benjamin*, [1902] 1 Ch 723, which raised facts along those lines). The grant of judicial authority protects the trustees against being personally liable unless it can later be shown that the situation as understood at the time was not as represented to the court. Under the existing Scottish procedures, the court decision affects rights and binds the beneficiaries. By contrast, a *Benjamin* order merely provides immunity to the trustees; consequently the English courts appear to be more willing to grant them. Because of the limited nature of such an order, the various persons interested in the trust estate can of course have their true legal rights enforced if it turns out that the facts are otherwise than was assumed at the time of the court's decision.

A further situation that sometimes arises is the question of a contingency: a future event that may or may not happen. An example of this is found in cases involving Lloyds Names. Lloyds syndicates incurred disastrous losses during the 1990s, mostly as a result of product liability or public liability claims in the United States. Consequently the amounts due by Names could not be ascertained, but it was known that these might be very large indeed. (The liability of a Lloyds Name was of course unlimited). The liabilities of syndicates were generally reinsured, but executors were reluctant to make over the estates of Lloyds Names to legatees because of the possibility that the reinsurance would prove inadequate. In *Neilson's Trs*, 25 June 2002, unreported, the court authorized distribution without retention or other provision being made for the contingency. It was held that the risk was remote, in view of the existence of reinsurance, and it was thought that the injustice of holding up distribution for many years was greater than the injustice that the creditors might be deprived of recourse against the executors personally. The court also granted the executors relief from any personal liability arising out of distributing the estate in accordance with its directions. Following this decision a Practice Note (No 2 of 2002) was issued to regulate procedure in similar cases. These cases took the form of a petition for directions, although it should be noted that a fairly elaborate report was obtained on the underlying factual circumstances.

The Commission proposes that it would be useful to introduce a procedure that gave the courts an express power to authorize distribution of trust estate and at the same time relieve the trustees from personal liability. It was thought that this power should be framed in general terms, and should be available where it was likely (but not certain) that a particular event had or had not happened or where there was a remote chance that the present beneficiaries' entitlements would be defeated by some future event. Such a procedure would fill a gap in existing Scottish procedures; the special case procedure is not available unless the facts can be agreed, and the petition for directions is not ideally suited to cases

where there is any significant doubt about the facts. No doubt a multiplepoinding can be used, or possibly an action for declarator, but there is probably a need for the particular type of procedure that is suggested by the Commission. Nevertheless, I would welcome views on this matter.

On the subject of court procedures, I should mention two further proposals in the Commission's Discussion Paper. The first is that the court should be empowered, on an application by trustees, to grant an order conferring additional administrative and managerial powers in relation to the trust estate, if satisfied that the order would be of benefit to the future administration of the trust. Beneficiaries would have an opportunity to object, but an order should be capable of being granted notwithstanding the objections of some of the beneficiaries. The court would also be empowered to attach conditions to the order. It was thought that this would clarify an obscurity in relation to the court's powers under the nobile officium. The procedure for variation of trusts under section 1 of the Trusts Act 1961 can be used to enlarge or alter administrative powers, but it is a procedure better designed for variation of trust purposes, and is arguably over-elaborate for mere alterations to trustees' powers.

The second proposal is that the Outer House and the sheriff court should be given concurrent jurisdiction in relation to a range of trust applications, including those under the Trusts Act 1921 and petitions for trust variation. I am bound to say that I have some reservations about involving sheriff courts; trust law is a very specialised field, and the requisite level of expertise does not necessarily exist in every sheriff court. I do think, however, that the great bulk of trust work could be dealt with in the Outer House rather than the Inner House. Nevertheless, the ability to bring a special case directly in the Inner House is valuable in cases where an authoritative decision on the law is required, and we would not envisage any change in this procedure.

Advances of capital; payment of income; aliment

The final area covered by the Commission's Discussion Paper relates to advances of capital to beneficiaries, the payment of income to beneficiaries and alimentary payments to children who are in need of support. At present authority to advance capital to beneficiaries may be obtained from the Court of Session either under section 16 of the Trusts (Scotland) Act 1921 or under the nobile officium. Section 16 only permits advances if the income of the fund is insufficient or not applicable to the beneficiaries in question and the advance is necessary for their maintenance or education. That is quite narrowly drawn. In addition, the beneficiary's right to capital must either be vested or, if contingent, contingent only on survivance. The power under the nobile officium is only exercised when an application under section 16 is incompetent, where there has been some unforeseen and unprovided for circumstance, and where the advance is necessary for the education or maintenance of a beneficiary. Once again the power is relatively narrow. We think that both section 16 and the power under the nobile officium could usefully be replaced by a new statutory power; this would permit trustees to advance capital to a beneficiary who has a right to all or part of the capital of the trust estate, such right being vested or vested subject to defeasance, or a right that will vest provided that some uncertain future event occurs. The advance must be for the maintenance, education or benefit of the beneficiary, and every person with a prior life or other interest who would be prejudiced by the advance must consent. If such consent is not available the trustees would be entitled to apply to the court to authorize the advance. The primary power to make advances would be conferred on the trustees rather than the court,

but beneficiaries would be protected by the requirement that they should consent. If consent is not available, the court's power effectively replaces the existing power under section 16, but without the somewhat narrow restrictions to which the latter power is subject. We think that from the point of view of practical trust administration this would be a considerable improvement.

In relation to income, there are no statutory provisions that authorize trustees to pay income for the maintenance or education of beneficiaries, although such payments may be authorized by the court under its nobile officium. We propose that there should be a new statutory provision that authorizes trustees to pay a beneficiary income arising from his or her prospective share where they consider that that is required for the beneficiary's maintenance, education or benefit. It would be necessary that the beneficiary's prospective share be vested or vested subject to defeasance or would vest provided that some uncertain future event occurred. Once again, we think that this would be a useful provision in most trusts. We would, however, very much like to hear the views of the profession on these proposals.

That is all that I have to say at present. I hope that I have given some indication of the way in which the Law Commission's thinking is moving. I very much value opportunities like this to explain our views and to receive in return your own views on the subjects that I have touched on. Now I can perhaps pass matters over to you!