



Scottish Law Commission
promoting law reform

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TRUST LAW REVIEW: TRUSTEES AND TRUST ADMINISTRATION

The Scottish Law Commission today publishes Discussion Paper No 126 on Trustees and Trust Administration

Background

Scots trust law is widely regarded as being in need of modernisation. The Discussion Paper (the third in the Commission's wide-ranging programme of review) puts forward suggestions to clarify the law and bring it up to date rather than to alter trusteeship and the administration of trusts fundamentally. The main proposals are outlined below.

Decision-making by Trustees

There is uncertainty as to the legal requirements for trustees to make effective decisions, ie decisions that bind the trustees, present and future, in their capacity as trustees. 19th century case law seems to require trustees to hold meetings at which trust business is discussed and decisions made. In practice many decisions nowadays are made as a result of correspondence, telephone calls or emails between the trustees. The Commission proposes that, unless the trust deed provides otherwise, the requirements should be that all trustees are given prior notice of the matters to be decided and an opportunity to put forward their views at a meeting or by any other means.

For a decision to be effective it must be made by a quorum. A quorum is a majority of the acting trustees unless the trust deed contains different provisions. The paper suggests that the rule should be reformulated omitting reference to a quorum as the word is not being used in its normal sense of the number of people that have to be present before a meeting is able to transact business.

Use of Agents and Nominees

Trustees do not have to carry out all the tasks themselves; they have common law powers to employ agents to help them and statutory powers to appoint and pay "factors and law agents". The Commission proposes a new statutory provision empowering trustees to appoint and pay agents. Trustees are not able to delegate their discretionary functions to agents, but the line between the non-delegable making of decisions and delegating the carrying out of such decisions is not always easy to draw in practice. Views are sought as to whether a new legislative formula could produce greater certainty.

Those investing in stocks and shares often use nominees to hold title to the securities. This greatly facilitates transactions, especially where the nominees manage a portfolio according to a previously agreed policy. Scots law regards parting with the ownership of trust property as a breach of trust for which the trustees would be liable if any losses occurred. The Commission considers that trustees should be permitted to use nominees and should not be liable provided they selected and monitored the nominee carefully.

A General Management Power?

At present trustees enjoy the administrative powers listed in the Trusts (Scotland) Act 1921, such as the power to sell or lease trust property or take up rights offers by companies in which trust money has been invested. Current trust deeds also confer many additional powers. With a view to simplifying legislation and trust deeds and providing the flexibility required over the lifetime of a trust the Commission suggests that trustees should have all the administrative powers in relation to trust property that individuals have in relation to their own property. The Charities and Trustee Investment (Scotland) Bill, currently before the Scottish Parliament, adopts this approach for trustees making investments. The proposed general power, seemingly unlimited, would in fact be constrained as it would have to be exercised in accordance with the terms and purposes of the trust, the trustees' duty of care and their fiduciary position as trustees. An alternative proposal is that the list of powers in current legislation should be greatly extended.

Removal and Appointment of Trustees

Currently trustees can be removed only by the court, unless the trust deed confers power to remove on others. Expensive and time-consuming legal proceedings may have to be taken to get rid of trustees who are dishonest or fail to carry out their duties. The Commission

proposes to preserve the current position, but also allow the other trustees to remove a trustee who has been imprisoned, convicted of a crime of dishonesty or certified as being mentally incapable. Entitling beneficiaries to remove trustees or the automatic disqualification of trustees in certain circumstances is not favoured.

An application has to be made to the court for the appointment of new trustees if the sole trustee dies or becomes mentally incapable. While not in general favouring giving beneficiaries power to appoint new trustees, the paper asks whether an exception might be made in the above circumstances.

Giving Directions to Trustees and Relieving them of Liability

Trustees may not be certain as to facts relevant to the distribution of the trust estate, for example, whether a person predeceased the testator without issue. At present a declarator that the position is as stated can be sought but courts are reluctant to grant declarators unless the position is reasonably certain as they affect the rights of beneficiaries. Another type of uncertainty is where there is a remote chance of some future event occurring that would affect the distribution of the trust property. In both situations the trustees might not wish to take the risk of distributing the estate to the currently entitled beneficiaries because some other person might possibly become entitled and sue the trustees. To remedy these situations the Commission suggests that the court may authorise the trustees to distribute without any liability should the footing on which the order was made turn out to be incorrect. The true beneficiaries would however remain able to recover the estate from those to whom it had been distributed.

Most trust litigation in Scotland is heard in the Court of Session. The Commission considers that litigants should have a choice, for most applications, of using the Court of Session or the sheriff courts as the latter may be cheaper and more convenient. The appropriate sheriff court would be that with which the trust has its closest and most real connection or, if there is no such court, the court for the place where any of the trustees resides. If neither of these criteria applied, Edinburgh sheriff court would deal with the application.

Advances of Capital

In the absence of any such power in the trust deed, advances of capital require to be approved by the court. The court's powers are confined to advances to minor beneficiaries whose income is insufficient for their maintenance or education or adults where some unforeseen circumstance arises and an advance is necessary. The Commission proposes that a new, less restrictive, statutory power should be introduced and that it should be exerciseable by the trustees rather than the courts.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is Lord Eassie, a senior Scottish judge. The other Commissioners are Professor Gerard Maher QC, Professor Kenneth G C Reid, Professor Joseph M Thomson and Mr Colin J Tyre QC.

2. Further information can be obtained by contacting Dr David Nichols, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk).

3. The paper may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.