CHAPTER 3

STYLE

Introduction

3.1 The drafting style established in earlier centuries should be adapted to contemporary usage. The need for this is unquestionable. The drafter's aim should be to satisfy their client's wishes; and the general public wish to see plain English.[1]

To subject old precedents to critical review is not to disparage them. The old forms offer harmonious cadences which ravish the ear and intellect of the conveyancer; but they make little concession to the natural breaks and lucidities of the English tongue. There is nothing praiseworthy in practising the errors of one's forefathers.

This has been the establishment view now for several decades. Lord Nicholls, then Vice-Chancellor, was asked at the Law Society's annual conference in 1993 what single change he would most like to see in the system of justice. He replied:

> If I could make one change, I would have the White Book rules rewritten in English, in a form that anyone can understand.[2] I would have orders drafted in a form that people can understand and recognise as being in English. That would make an improvement in the administration of justice but also in the impression that the consumer gets. Instead of thinking he's going into some strange world where people use language in documents and sometimes orally that people never use, he would actually be able to understand what was going on.

This comment drew spontaneous applause from the audience.

The modern drafting style adopted in this book, which may have been considered revolutionary at the time of the first edition of this book (1992), is present orthodoxy. The old controversy—whether mistakes are likely to be introduced by the adoption of a modern drafting style—is over.[3] Scarcely any law reform proposal nowadays fails to include "plain legal English" as

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1 This can hardly be doubted; but see the diatribe in *The Times* leader 30 November 1990: "The Solicitors' word processors spew forth an ever-increasing flood of garbage. A clearer case of a profession 'conspiring against the public' is hard to imagine." In response to this pressure, the *Law Society's Client's Charter* (2003) (significantly) "backed by the Plain English Campaign", provides: "A solicitor will make every effort to explain things clearly, keeping jargon to a minimum".

2 This comment can now be seen as a precursor of some of the Woolf reforms.

3 In this debate it was not always appreciated just how far the most "traditionalist" drafting style has advanced. For instance the modern practice of using separate clauses is

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one plank of its reforms.[4] The US Plain Writing Act 2010 shows how far the movement has reached in the US.[5] It is interesting to speculate as to the reason for this change, which may be dated to the early 1990s though its roots lie far earlier.[6] It is probably connected with the loss of respect for the professions generally and the assumption that they "know better" than the layman; the commercial advantages offered by "plain English" in a competi-

innovatory: nineteenth century documents contained no paragraph breaks and different sections were marked only by the use of capitalised words.

4 Three examples will suffice:

1. *The Report of the Pension Law Reform Committee* (the Goode Report), Cm. 2342 (1993), pp.192–194:

> "The skilled draftsman produces text which is almost wholly unintelligible … What concerns us is not particular infelicities of drafting, which are unavoidable, but a sense that clarity is not seen as important. Little thought seems to be given to the need of the user to be able to understand, at least in a broad sense, what it is that Parliament is saying. This results in professionals having to spend much more time than should be necessary trying to understand what the legislation is saying…of course the paramount consideration must always be to produce the required legal effect; communication of that effect necessarily takes second place in the order of priorities. But the two are not incompatible. In recent years government departments had made substantial progress towards simplifying official forms and reducing the numbers in use. This has been widely welcome. We strongly urge a similar approach towards statutory and other rules affecting pension schemes."

2. One of the objects of the Civil Procedure Rules was "to remove verbiage and adopt a simpler and plainer style of drafting": *Woolf Report Access to Justice*, Ch.20.
3. The most ambitious project arising out of this trend is the recent rewrite of UK tax legislation into plain English.

A striking reflection of this mood can be found in a Hansard debate of 26 June 1997 *http://www.kessler.co.uk/wp-content/uploads/2012/04/appendix_to_4th_edn_Hansard_extract.pdf*.

5 *http://www.plainlanguage.gov/plLaw* sets out likes to the Act and associated executive orders covering the use of plain language in regulations.

6 Fierce dissatisfaction with legal drafting can be traced back at least to the Enlightenment:

> "Lawyers … charge exorbitant fees for piling up heaps of turgid documents couched in arcane terminology purposely incomprehensible to non-lawyers, rendering the public helpless victims of their wiles, a conceited, grasping clique, who, instead of serving the common good, cunningly exploit their supposed expertise to generate wealth and bogus status for themselves."

Adriaen Koerbagh (1664) cited in Israel, *Radical Enlightenment* (Oxford: OUP, 2001).

An early statutory example is s.56 Common Law Procedure Amendment (Ireland) Act 1853 ("Pleadings shall state all facts which constitute the Ground of the Defence or Reply in ordinary Language, and without Repetition, and as concisely as is possible consistent with Clearness").

The development of drafting styles can be traced to some extent in the drafting of Acts of Parliament which occasionally contain precedents. For instance, the precedents in Schs.3 and 4 of the Conveyancing and Law of Property Act 1881 are not divided into clauses; the only punctuation is a full stop at the end of the precedent. By the time of the LPA 1925, clauses are used, and, though sparingly, punctuation: see Sch.5. More recent important dates are: publication of Mellinkoff, The Language of Law (1963) which launched the movement for clarity in legal drafting; foundation of the Plain English Campaign (1979) and Clarity (1983). For the history, see the bibliography in Appendix 2.

tive market;[7] that lawyers no longer learn Latin in at school (or learn it to a low level and forget it); but ultimately it is because the arguments in favour of "plain legal English" won the day.

In some areas plain English drafting is required by law. The Consumer Rights Act 2015 requires that terms in consumer contracts be "transparent" (meaning in plain and intelligible language) and "prominent" (meaning brought to the consumer's attention in such a way that the average consumer would be aware of it).[8]

In the past, the style of drafting in the field of trusts and conveyancing fell behind the style of drafting in other areas of law; but this has changed; as witness the Law Society's Standard Conditions of Sale, the Charity Commission model charitable trust, or the STEP Standard Provisions. There are still many who draft without punctuation, etc., but they are somewhat behind the curve.

Lastly, style is not a subject to which one should devote too much time! Many questions of style are matters of taste and discretion, and do not admit a right-or-wrong answer. Even where there is a right-or-wrong answer (such as to prefer *witnesses* to *witnesseth*) these are not issues of fundamental importance. Yet although literary style should not—legally—matter, it is a fact that where style is poor, more serious errors are often found.

There are several style guides to plain legal drafting in English law, but the *Drafting Guidance* published by the Office of Parliamentary Counsel (2014)[9] can be regarded as the most authoritative as it is now the basis for statutory drafting.

Punctuation

Punctuation was traditionally omitted in legal documents. Many trust drafters still use no punctuation. If it is used, a sense of guilt or unease or tradition causes drafters (like children) to use it sparingly and in a manner quite distinct from ordinary English composition.[10] **3.2**

The traditional practice rests on a precedent both ancient and authoritative. The Bible itself, in the original Hebrew, lacks punctuation and even paragraph breaks are rare; though the absence of punctuation adds little ease to its reading or interpretation.

Fortunately the old order has changed and punctuation has begun to appear in trust drafting. The parliamentary drafter led the way. Precedents in

7 Thus some insurance companies, banks and others boast in their advertising that their legal documentation, including trust documentation, is framed in plain English.

8 Section 64 Consumer Rights Act 2015.

9 *https://www.gov.uk/government/publications/drafting-bills-for-parliament*.

10 Thus one sees underlining or absurd spaces to avoid the ordinary use of commas:

> *This Deed is made by John Adam Peter Jones and Adam West …*
> *This Deed is made by John Adam Peter Jones and Adam West …*
>
> This is at least better than the older form:
>
> *This Deed is made by John Adam Peter Jones and Adam West …*
>
> where it is not even clear how many parties there are to the deed.

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the Conveyancing Act 1881 have full stops at the end of them, though no other punctuation. This seems to have been the first concession to the rules of grammar as understood by the non-legal world. Precedents in the Law of Property Act 1925 use commas in addition, though sparingly. The Statutory Will Forms 1925 use punctuation in the manner of ordinary English prose. So do the Law Society's Standard Conditions of Sale. That is the approach adopted in this book.

Punctuation serves two functions: it will make a document easier to read; and it may convey meaning, showing which of two possible readings is correct. In the precedents in this book, punctuation is used only in the first of these ways. So the precedents would have the same meaning even if the punctuation were diligently abstracted by a drafter in time honoured tradition. However, this self restraint is quite unnecessary: the courts will have proper regard to punctuation in the construction of a document. Thus Lord Shaw:

> Punctuation is a rational part of English composition … I see no reason of depriving legal documents of such significance as attaches to punctuation in other writings.[11]

As Lord Shaw suggests, punctuation is an aid, and no more than an aid, towards revealing the meaning of a text. Punctuation is the servant and not the master of substance and meaning. Excessive reliance on punctuation to convey meaning is also contrary to good prose style.[12] For all these reservations, it remains plain that proper use of punctuation makes a document easier to read and understand and this is sufficient justification for its use in legal documents.

Use of capitals

3.3 In lieu of punctuation and paragraph breaks, the traditional style capitalised certain expressions to help the reader find their place. The few large letters offered, in Dickens' words: "a resting place in the immense desert of law hand and parchment, to break the awful monotony and save the traveller from despair". The main expressions put in capitals were as follows:

the opening words: THIS SETTLEMENT
the names of parties;
the introduction to the body of the deed: NOW THIS DEED WITNESSETH …
words of action: DECLARE, APPOINT
that the trustees hold … UPON TRUST …
the first words of the "parcels" clause: ALL THAT …
provisos: SUBJECT TO … PROVIDED THAT …
and finally: IN WITNESS …

Some drafters capitalise the first word or two of every paragraph.

Now all this has lost its purpose with the introduction of paragraph breaks and numbering. The old practice is still common, perhaps because it is thought to give a pleasing legal feel to a document.[13]

One sometimes sees:

> the Trustees hold … Upon Trust … .

Wavering between legal usage (fully capitalised) and ordinary usage (uncapitalised) the drafter sought a compromise and capitalised the first letter only. The precedents set out in the 1925 property legislation do not adopt an entirely consistent practice. They have virtually abandoned the practice of full capitalisation.[14] They waver inconsistently between conventional usage and capitalisation of first letters. Thus in successive forms one sees " … supplemental to a legal charge …" and " … Supplemental to a Legal Charge … .". The drafter clearly gave little thought to the matter.

The initial letters of defined words should be capitalised. In other cases it is considered that ordinary English usage should be adopted, and this is the practice adopted in this book.

Sentence length

3.4 It is better to use a number of short sentences in preference to a single lengthy sentence. Clarity is helped by the use of short sentences (but not so short that the result is distracting). The lengthy clause easily hides ambiguity or error. This has long been recognised.[15] A good example of the problems of an over-extended clause is to be found in the Finance Act 1984, Sch.13, para.10(2). Here the drafter failed to understand their own creation and omitted the word "not"! Parliament later inserted the word in the

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[11] *Houston v Burns* [1918] AC 337 at 348. Scots lawyers never adopted the English custom of drafting without punctuation. It is therefore significant that this was a Scottish case. Lords Finley and Haldane (whose practice had been at the English bar) agreed, Lord Finley discussing earlier English case law, and drawing no distinction between English and Scots law on this point. So the principle became established in English law. The same rule applies for Acts of Parliament: *Hanlon v Law Society* [1981] AC 124 at 197–198; *Marshall v Cottingham* [1982] Ch 82 at 88 where Megarry V.C. sets out, with customary wit, the view which he expressed 20 years earlier: "Statutory Interpretation" (1959) 75 LQR 29. Likewise the EU Joint Practical Guide on the drafting of EU legislation states at para.1.4.2: "Drafting which … respects the rules of punctuation makes it easier to understand the text properly" *http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf.*

[12] *Fowler's Modern English Usage* (2nd edition 1965) entry under Ambiguity: "Ambiguities may sometimes be removed by punctuation, but an attempt to correct a faulty sentence by inserting stops usually portrays itself as a slovenly and ineffective way of avoiding the trouble of re-writing. It may almost be said that what reads wrongly when the stops are removed is radically bad; stops are not to alter meaning but merely to show it up." But the passage is not in the current (3rd edn, 1996) and Fowler did not mean to say that one should try to write without meaningful use of punctuation. This is a feat difficult to achieve and quite contrary to English usage. One need only contrast *Don't Stop!* and *Don't! Stop!!*

[13] The pleasure may not be shared by non-lawyers. "The mutual massaging of the whole profession's ego. Give us capital letters and raise our status." See *Outrageous Fortune*, an autobiography by Terence Frisby, 1998; (recommended holiday reading.) Frisby is unconsciously repeating criticism already made three centuries earlier: see fn.6.

[14] A stray "WITNESSETH" is found in Sch.3, Form 1 LPA 1925.

[15] "I have never understood why some conveyancers should regard it as beneath their dignity to employ sub-paragraphs in a clause so as to make their meaning plain": *Re Gulbenkian* [1970] AC 508 at 526 (Lord Donovan).

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provision. That convenient remedy is not open to the trust drafter (except in accordance with an express power to vary, or under the expensive and embarrassing procedure of rectification).

It is easy to give examples of ambiguity arising from over-long clauses. But even when there is no ambiguity an over-loaded clause is best avoided. Take a clause such as this:

> The Trustees shall stand possessed of the trust fund on trust to sell call in or convert into money such part of the trust fund as shall not consist of money with power to postpone such sale calling in or conversion for so long as the trustees shall in their absolute discretion think fit without being responsible for loss and shall at the like discretion invest the monies produced thereby in the names or under the legal control of the trustees in or upon any investments hereinafter authorised with power at such discretion as aforesaid to vary or transpose any investment for or into others of any nature hereby authorised.

In this standard but tortuous provision are four elements: a trust for sale; a duty to invest trust money; a power to vary investments; and a power to use nominees. They could more clearly be contained in separate clauses. The drafter might then turn their mind to expressing the same thoughts more concisely; they might further consider where the provisions should most logically come; and even whether the provisions are needed at all.

Another example:

> The trustees shall stand possessed of the trust fund UPON TRUST to pay the income thereof to X during her lifetime Provided that the Trustees may at any time or times in their absolute discretion transfer the trust fund to X absolutely free and discharged from the trusts hereof …

This should be dealt with in two clauses: one conferring X's right to income, and the other dealing with the trustees' power to transfer capital. As the EU Joint Practical Guide on the drafting of EU legislation states: "Sentences should express just one idea".[16]

Must every clause be a single sentence?

3.5 Normally each clause is a single sentence. This has the practical advantage that cross referencing to the sentence concerned is easier. Nevertheless, it should not be regarded as an absolute rule and the tradition of one sentence clauses has often led to excessively long sentences. The Model Articles for companies set a good example here. It is sometimes convenient to divide a single clause into two paragraphs. This may be simpler than dividing the material into subclauses. There is statutory precedent for this practice.[17]

16 See *http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf*.

17 See for instance ss.29(1) and 105(1) SLA 1925 (which both contain three paragraphs); s.41 TA 1925; s.190(2) Insolvency Act 1986. The OPC Drafting Guidance states: "1.2.15 The starting point is that each sentence in a clause should be a separate numbered provision. But there is no absolute rule against having more than one sentence in a numbered provision."

Indentation

3.6 The parliamentary drafter is quite prepared to use indentation:

(1) to break up text into smaller pieces; and
(2) to carry meaning.

The 1925 property legislation makes considerable use of indentation and even introduces it when re-enacting older provisions where it was not found.[18] The courts take account of indentation to ascertain meaning.[19]

Passive voice

3.7 Plain English style guides agree that the active voice should be preferred to the passive.[20] The reason is that the passive can be used without specifying an agent, so it can be vague. However, this rarely causes difficulty. Sometimes the passive is appropriate because B the agent is unimportant, universal or unknown. The most that can be said is that "restraint" should be exercised in the use of the passive voice.[21]

Gender-neutral drafting

3.8 In 2007 Jack Straw (then about to become Lord Chancellor) made the following statement in parliament:

> For many years the drafting of primary legislation has relied on section 6 Interpretation Act 1978, under which words referring to the masculine gender include the feminine. In practice this means that male pronouns are used on their own in contexts where a reference to women and men is intended, and also that words such as chairman are used for offices capable of being held by either gender. Many believe that this practice tends to reinforce historic gender stereotypes and presents an obstacle to clearer understanding for those unfamiliar with the convention.
>
> I have worked with colleagues in Government to secure agreement that it would be right, where practicable, to avoid this practice in future and, accordingly, Parliamentary Counsel has been asked to adopt gender-neutral drafting … so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility ….[22]

It is considered that the same approach should be applied to drafting legal

18 See e.g. s.31 TA 1925 re-enacting material from s.43(1) Conveyancing and Law of Property Act 1881. This process of introducing indentation and modern punctuation when re-enacting old legislation is still continuing: see e.g. Sch.13, para.7 FA 1999, re-enacting s.59(1) Stamp Act 1891. (Contrast again the Hebrew bible where the now familiar punctuation was introduced into MSS as recently as the tenth century).

19 *Macarthur v Greycoat Estates Mayfair* 67 TC 598 at p.613.

20 The advice goes back to Orwell ("Never use the passive when you can use the active").

21 The view taken in *OPC Drafting Guidance* 1.3.21; and Williams, *Tradition and Change in Legal English*, (Cambridge: Cambridge University Press, 2005), p.159.

22 HC Deb 8 March 2007, col.146 Written Ministerial Statement. For the background to this statement and a discussion of how far this has been achieved, see Williams, "The End of the 'Masculine Rule? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland" Statute Law Review, (2008) Vol 29 p.139.

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documents. This can be done by avoiding gender-specific terms or by using both male and female pronouns and adjectives, i.e. *his or her*.[23] The Family Order Project sensibly provides: "Although not grammatically pure the plural pronoun 'their' should be used in a singular sense instead of 'his or hers'".[24]

Where the drafter knows the identity of the person referred to, they may select his/her, widow/widower as required:

> The Trustees shall pay the income to Jane during her life and thereafter to her widower during his life.

This book adopts that form where possible. It is not too much trouble: every trust must be revised to some extent to the circumstances of the case.

General comment

3.9 The guiding principles are simplicity and clarity. Ordinary English usage is the guideline. Double negatives and worse[25] should be avoided.

Brevity is a merit, but not a central aim. Lord Reid deplored "the modern drafting practice" of compressing to the point of obscurity provisions which would not be difficult to understand if written out at rather greater length.[26] But that comment concerned statutory drafting: the professional trust drafter is hardly ever guilty of causing obscurity by excessive brevity.

Generally, rules of style should be regarded as no more than guidelines. Fowler has discredited many silly schoolmasters' rules of style (such as that no sentence should begin with *and* or *but*).[27] It would be a pity to replace them with new ones (such as not to use the word "shall" or the passive voice).

Numbers: words or figures?

3.10 The authors favour the recommendation of the OPC drafting guidance: figures should normally be used for all numbers above 10. Figures should also normally be used for numbers up to and including 10 that relate to sums of money, ages, dates, units of measurement or in quasi-mathematical contexts. In other contexts, whether numbers up to and including 10 are spelt out or expressed as figures depends on what seems most natural or appropriate in the contexts concerned. A number that begins a sentence should normally be spelt out (but it is probably best to avoid beginning a sentence

[23] For a more detailed discussion of how to achieve gender-neutral legal drafting, see the Office of the Parliamentary Counsel *Drafting Guidance* (2014) para.2.3. *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293866/guidancebook-20_March.pdf*. For a general introduction to this topic, see *Garner's Dictionary of Legal Usage*, 3rd edn (Oxford: Oxford University Press, 2011), entry under "Sexism".

[24] House Rule 22 *http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/annex-c-family-orders-project-house-rules.pdf*.

[25] In the past, Parliament has set a poor example: s.89(2) Value Added Tax Act 1994 is a triple negative; s.102A(4) FA 1986 is a quadruple negative. But perhaps matters are now somewhat improved.

[26] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 at p.171.

[27] See David Crystal's unputdownable history of the English language, *The Stories of English* (London: Allan Lane, 2004) esp. Ch.16 (Standard Rules).

with a number in any event). Mixing words and figures referring, in a single context, to things of the same kind should be avoided.[28]

The use of figures alone is certainly a defensible practice. This has long been the case in court documents.[29]

To set out words *and* figures is in Garner's words "a noxious practice".[30]

Style of clause numbering

3.11 The choice lies between:

(1) the style used in statutes; and
(2) decimal numbering (so-called "legal numbering").

The choice does not much matter. The latter though more cumbersome is gaining ground, and has the support of International Standard ISO 2145:1978.[31] This is used in the precedents in this book; though not quite consistently, as cross-references within a clause are easier to arrange with the other system and when one passes the level of sub-paragraphs, an (a) or (b) seems easier than a number such as 3.2.2.2.1.

Dates

3.12 The form "1 February 1991" is recommended.[32]

The form *"The first day of February 1991" is unwieldy and "The first day of February one thousand nine hundred and ninety one"* should certainly be avoided.

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[28] Paragraph 2.2, following *Garner's Dictionary of Legal Usage*, 3rd edn (2011), entry under *numerals*.

[29] CPR Pt 5, para.2.2(6) (All numbers including dates to be expressed in figures). In affidavits the change from words to numerals was made in 1923: [1923] W.N. 288. In pleadings the use of figures goes back to Sch.1, Ord. 19, r.4 Supreme Court of Judicature Act 1875.

[30] There have been many cases where words and numbers failed to correspond. The mistake is easy enough to make in all conscience. Such errors arise from time to time in practice. Thus a drafting technique presumably intended to prevent ambiguity actually gives rise to new and quite unnecessary difficulties. For the construction of documents where numbers and figures conflict, see Lewison, *The Interpretation of Contracts*, 6th edn (London: Sweet & Maxwell, 2015), para.9.11. The parliamentary drafter has never used both words and figures.

[31] *http://www.kessler.co.uk/wp-content/uploads/2012/04/International_Standard_1502145_1978.pdf*.

[32] The form: "1/2/1991" is best avoided as in the USA it would be read as January 2 1991. The Family Orders Project House Rule 18 provides: Dates shall be specified without ordinal possessives and must use the full name of the month and the year in full form e.g. 17 May 2013 and not 17th May 2013 or 17/5/13 or May 17th, 2013 or "this 17th day of May 2013". *http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/annex-c-family-orders-project-house-rules.pdf*.

Addresses

3.13 Parties to a deed are identified by name and address:

John Smith of 5 High Street, Topton, AB1 3XY.[33]

Or

X Limited of [address][34] …

Two individuals with the same address

3.14 Where two individuals share the same address one could set it out twice in full, though this appears slightly clumsy. The traditional form was to abbreviate using the word "aforesaid", e.g.:

This Deed is made [date] between
John Smith of 21 High St, Topton, OX1 6LX and
Lucy Smith of 21 High St *aforesaid*

This should be modernised: the following sets out formulae to suit all occasions. Where the two individuals are joint parties to a deed one can simply set out the single address:

John Smith and Jane Smith both of 21 High Street, Topton, OX1 6LX ("the Trustees")

Where the two individuals are separate parties say:

This Deed is made [date] between
John Smith of 21 High St, Topton, OX1 6LX ("the Settlor") of the one part and
Lucy Smith also of 21 High St, Topton[35] ("the Trustee") of the other part.

In the case of husband and wife it is more elegant to state the relationship and omit the address of the second party mentioned. An address is included for purposes of identification and having stated the relationship nothing more is needed; thus:

This Deed is made [date] between:
(1) John Smith of 21 High St, Topton, OX1 6LX ("the Settlor") of the one part and
(2) the Settlor and Lucy Smith the wife of the Settlor ("the Trustees") of the other part.

[33] It is sensible to use the conventional form of address with which the Post Office would be familiar rather than the archaic "in the county of Derby".
[34] Alternatively, "whose registered office is at …"; but that is unnecessary. The address is, after all, only for identification.
[35] Give the first part of the address only; alternatively one could say: of the same address.

Age

3.15 It is sufficient to say "the age of 25", not "the age of twenty-five years". There is statutory authority for the omission of the word "years".[36] No one will think it means months, lunar or solar.

Singular and plural

3.16 The singular includes the plural.[37] So do not say "person or persons",[38] "by deed or deeds", "Trustee or Trustees",[39] "beneficiary or beneficiaries", "other or others".

And/provided that/but

3.17 There is nothing wrong with the word "and". There is no harm in a proviso (a clause beginning "provided that …") if used in moderation; but a separate sentence or clause would usually be clearer.

"And/or" generates strong feelings ("that bastard conjunction"[40]) and should be avoided.[41]

Deemed/treated as

3.18 The proper use of "deem" is to assume something to be a fact which is not, or may not be the case: to create a legal fiction. A piquant example is the rule, now abolished, that the income of a married woman living with her husband was:

deemed for income tax purposes to be his income and not to be her income.[42]

The expression "treated as" is a plain English equivalent of "deemed".[43]

Thankfully, deeming provisions are rarely if ever needed in trust drafting and the word "deemed" is not used in this book.

"Deemed" is sometimes employed as a verbose equivalent of the simple present tense. If the reader sees the word "deemed" in trust drafting they will almost always find it misused this way. The sort of sloppy usage one finds is:

Section 32 Trustee Act 1925 shall be *deemed* to apply as if the proviso had been omitted.

[36] Section 71 IHTA 1984 ("a specified age not exceeding eighteen"); s.163 TCGA 1992 ("the age of 50").
[37] Section 61 LPA 1925.
[38] Or worse, "person or persons or corporation or corporations" since the word "person" includes a corporation.
[39] Unfortunately the TA 1925 does not set a good example and often says "trustees or trustee", e.g. s.36(1)(a) TA 1925.
[40] *Bonitto v Fuerst Bros* [1944] AC 75 at 82 (Viscount Simon).
[41] For a discussion see *Dictionary of Modern Legal Usage*, 3rd edn (2011), entry under "and/or".
[42] Section 279 ICTA 1988 (repealed). The rule survives in other jurisdictions, such as Jersey.
[43] E.g. in s.8(2) PAA 2009, rewriting the former s.4(3) PAA 1964, the drafter has taken the opportunity to replace "deemed to be" with "treated as" and other variants are of course also possible.

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"X" shall be *deemed* to mean …

These should read:

Section 32 Trustee Act 1925 shall apply as if …
"X" means …

The otiose "deemed" is used here merely to give a spurious legal feel to the text and should be omitted.[44] The parliamentary drafter adopts this approach.[45]

Archaic and prolix expressions

3.19 That the drafter should avoid archaisms is a familiar refrain. Here are some archaic or prolix forms which can clutter legal documentation. It is not suggested that these expressions should never be used: in normal circumstances, however, they add nothing and are best avoided. The list is not and cannot be comprehensive.

ARCHAIC OR PROLIX FORM	SUGGESTED FORM
accretion e.g. holds as an accretion to	add to
as the case may be	[omit]
as the trustees shall/may think fit	as the trustees think fit
deemed	[generally, omit][46]
desirous of	desires to; wishes to[47]
even date e.g. of even date herewith	on the date of this settlement

44 Of course where the word "deemed" is misused the context should govern the meaning. Thus the literal reading of "deemed" in s.2 FA 1894 accepted in *Earl Cowley v IRC* [1899] AC 19 was rejected in the striking judgment of Viscount Simonds in *Public Trustee v IRC* [1960] AC at 415. The language deserves to be remembered even though Estate Duty is now obsolete: "Observations so patently wrong (may I be forgiven for saying so) that they leave only a sense of wonderment—unnecessary to the decision, for, as Lord Davey pointed out, the same result could be reached by another route—by Lord Davey himself accepted and dissented from in the same breath—flatly contradicted in 1924 by Lord Haldane who in 1914 had adopted them—the source of endless doubt and confusion to all who have been concerned in the examination or administration of this branch of law …".

45 OPC Drafting Guidance para.2.1.24.

46 See 3.18 (Deemed/treated as).

47 The 1925 property legislation uses "is desirous of" and "desires to" interchangeably and in about equal measure. Modern Parliamentary drafting generally adopts the advice of *Garner's Dictionary of Legal Usage*, 3rd edn (2011), see e.g. ss.36(1) and 39 TA 1925.

ARCHAIC OR PROLIX FORM	SUGGESTED FORM
here-words[48] hereof e.g. clause 1 hereof clause 10 hereof the date hereof the trustees hereof hereto e.g.the first schedule hereto	 clause 1 above clause 10 below the date of this deed the trustees of this settlement the first schedule below
irrevocably witnesses	witnesses[49]
infant	minor[50]
instrument	document
issue	descendant
it is hereby declared that	[omit]
it shall be lawful for the trustees to	the trustees may
the laws of England	English law *or* the law of England[51]
moiety	half
moneys	money
notwithstanding any rule of law or equity to the contrary	[omit]
notwithstanding that	even though; whether or not
or other the …	or
presents e.g.these presents	this deed
provided always that	provided that; but
said	[omit]
stand possessed	hold
subject as aforesaid	subject to that

48 The OPC Drafting Guidance discourages *hereby* and states: Other *here-* words should not be used: para.2.1.31.

49 See 10.26 (Testatum).

50 "Infant" has been archaic in English law since s.12 Family Law Reform Act 1969: "A person who is not of full age may be described as a minor instead of an infant …". This is the consistent usage in the TOLATA 1996, e.g. s.7(5) TOLATA 1996, re-enacting s.28(4) LPA 1925, substitutes the word "minor" for "infant". The Children's Act 1989 and other legislation outside property law context (e.g. The Civil Procedures Rules 1998) prefer the term "child". But child can simply mean the son or daughter of a person rather than someone under the age of 18. In trust drafting "children" is usually used in that sense in the definition of Beneficiaries, so "minor" is the best word to refer to a person under 18.

51 The plural form has scarcely been used by the parliamentary drafter since the nineteenth century. William Twining construes the plural laws as an affirmation of legal positivism: *Blackstone's Tower: The English Law School*, (London: Sweet & Maxwell, 1994) p.68. But we may leave that to the dons as it would not occur to, or trouble, anyone else.

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in default of and until and subject to any such appointment …[81]

or in a Default Clause:

> in default of and subject to the trusts and powers hereinbefore declared and to the extent that the same shall not extend or take effect. …

But the modest phrase "subject to that" is equal to them all.

Irrevocability

10.47 This settlement is irrevocable.

In the mid-nineteenth century a power of revocation was standard form. (Of course the powers caused no tax problems in those days.) If the power was, exceptionally, omitted, the court might set aside or rectify a settlement unless the settlor had "distinctly repudiated and refused to have a power of revocation".[82] This explains the origin of the recital that:

> *The Settlor has been advised that unless a power of revocation is reserved the Settlement will be irrevocable but well understanding such advice he had decided to reserve no power of revocation whatsoever and the settlement is irrevocable.*

This is sometimes shortened to a recital that:

> *It is intended by the Settlor that this settlement shall be irrevocable.*

This approach was reversed in the 1880s and the omission of a power of revocation ceased to be a reason for setting aside a trust.[83] Nowadays a UK trust hardly ever has a power of revocation. A trust will therefore be irrevocable unless it actually reserves a power of revocation.[84]

Irrevocability forms have accordingly been unnecessary in English law for more than a century. They were not used in this book until the 6th edition. However, in some American jurisdictions[85] trusts are revocable unless stated to be irrevocable. So it is (just) worthwhile to state the point expressly, not because there would otherwise be any doubt but because some readers unfamiliar with the law might possibly misunderstand the position.

The appropriate place to put this form is in the body of the deed, not a recital.

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[81] This form is used in Statutory Will Forms 1925, Form 9 *http://www.kessler.co.uk/wp-content/uploads/2013/09/Statutory-Will-Forms-1925.pdf.*

[82] Many cases could be cited, but since they are now obsolete it is sufficient to refer to *Hall v Hall* (1871) LR 14 Eq 365; *James v Couchman* (1883) 29 Ch D 212; *Coutts v Acworth* (1869) LR 8 Eq 558; *Wollaston v Tribe* (1869) LR 9 Eq 44.

[83] *Henry v Armstrong* (1881) 18 Ch D 668; *Dutton v Thompson* (1883) 23 Ch D 278; *Tucker v Bennett* (1887) 38 Ch D 1.

[84] No authority is needed for this self-evident proposition (which is of course the basis on which the cases in the two footnotes above were decided). See however, *Farwell on Powers*, 3rd edn (London: Stevens & Sons, 1916), p.306: "A deed once executed cannot be revoked unless it reserves a power of revocation".

[85] Following the American Uniform Trust Code s.602 *www.uniformlaws.org.*

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Chapter 11

DRAFTING OVERRIDING POWERS (APPOINTMENT, RESETTLEMENT AND ADVANCEMENT)

Introduction

11.1 The fundamental desire of the settlor, in creating a trust, is this: to benefit the beneficiaries of the trust in the most appropriate way. It is impossible for the settlor or drafter to anticipate in advance exactly what that will be. Drafts in this book are based on the premise that the trustees should be trusted—as their name suggests—and they may be given wide powers to achieve the settlor's intention. This is the principal function of the overriding powers.

There is a further advantage: the existence of the overriding powers effectively prevents a profligate beneficiary from selling their interest in a trust. They will not find a purchaser for an interest subject to the overriding power: the interest could and probably would be revoked the day after the sale. This, in turn, has an incidental tax advantage. Any tax charge based on the market value of the equitable interest is effectively avoided.

These powers raise questions of principle. The flexibility intended to satisfy the wishes of the settlor may be used to frustrate them. The question of who should exercise the powers, and with what constraints, is discussed at 7.11 (Guidance and control of trustees). This chapter is devoted to the technical drafting issues.

Overriding powers may be divided into three categories.

> **Power of appointment:**
> Power to create new trusts for the beneficiaries.
> **Power of resettlement:**
> Power to transfer funds to a different settlement for the beneficiaries (either a new settlement or one existing already).
> **Power of advancement:**
> Power to apply capital for the benefit of a beneficiary.

Power of appointment

11.2 The power of appointment may take the form of a true power to terminate existing provisions and create new ones; or it may take the form of a discretionary duty, the trustees being (in theory) required to appoint new provisions. The distinction is of little importance.[1] In this book the form used is a true power: this corresponds more closely to the reality.

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[1] 7.2 (Duties and powers distinguished).

The clause must, obviously, specify the form of the new trusts which may be created and the objects who may benefit. In this book the objects are simply described as "the Beneficiaries" and the definition of the term is considered at 5.17 (Definition of "Beneficiaries").

The parliamentary drafter provides one influential precedent:

> The capital and income of the trust fund shall be held in trust for all or any one or more exclusively of the other or others of the Beneficiaries, and if more than one in such shares, with such provisions for maintenance, education, advancement and otherwise, at the discretion of any person or persons, and with such gifts over, and generally in such manner, for the benefit of such Beneficiaries, or some or one of them, as the Appointor shall, by deed, revocable or irrevocable, or by will appoint.[2]

This precedent will be known to anyone familiar with trust deeds. Old style precedents take this material, delete the punctuation, and expand it in a single clause of extraordinary length. The single clause has become unwieldy: Hallett led the way and divided the power into separate clauses, with a view to greater comprehensibility. The clause used in our precedents is a simpler version of the statutory precedent:

> The Trustees shall have the following powers:
> (1) Power of Appointment[3]
> (a) The Trustees may appoint that they shall hold any Trust Property[4] for the benefit of any Beneficiaries, on such terms as the Trustees think fit.
> (b) An appointment may create any provisions and in particular
> (i) discretionary trusts
> (ii) dispositive or administrative powers
> exercisable by the Trustees or any other person.
> (c) An appointment shall be made by deed and may be revocable or irrevocable.

The draft refers to "such terms as the Trustees think fit", which covers all the various terms used in the Statutory Will Forms precedent.

It is usual to require an appointment to be made by deed. This is not essential, but a deed is appropriate since an appointment is a formal legal document.

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2 Statutory Will Forms 1925, Forms 7 and 9 (here slightly amended to stand in isolation), *http://www.kessler.co.uk/wp-content/uploads/2013/09/Statutory-Will-Forms-1925.pdf*.

3 The words "appointment" and "appoint" are the appropriate technical term. Plain English enthusiasts may prefer to call the power of appointment, a "power of variation" and substitute "direct" or "declare" for "appoint". Some old precedents use the formula "direct and appoint". Occasionally one sees: "appoint direct and declare"; pointless collecting of synonyms.

4 Until the 9th edition the text read "the Trust Fund". This old wording follows the example of the Statutory Will Forms. But the other overriding powers use the expression "any Trust Property"; and experience showed that the inconsistency in the wording occasionally caused confusion. The change does not make any difference in the meaning. In particular, just as the power in the Statutory Will Forms could be used over part of the Trust Fund, so the power of appointment in the wording formerly used in this book could be used over part of the Trust Fund.

The power of appointment can be used to alter administrative provisions as well as beneficial provisions.[5]

Sub-clause (b) is essential. A stumbling block for older powers of appointment was the court's view that a power of appointment was (in the absence of clear words) a power to create fixed interests and could not be used to create dispositive trusts and powers. This clause makes the position clear.[6]

It is normal to state that an appointment may be revocable or irrevocable, though strictly even without those words an appointment may be made which is revocable within the time that the power of appointment may be exercised. There is no particular reason why trustees need make revocable appointments when they have a wide flexible power, but it may be convenient to do this.

Unnecessary provisions in the power of appointment **11.3**

Some drafters refer not just to "the Beneficiaries" but to

> *all or any one or more exclusively of the other or others of the Beneficiaries*

This has been unnecessary since 1874.[7]

Some drafters do not refer to trusts for the benefit of the Beneficiaries, but to:

> Such trusts *in favour or* for the benefit of the Beneficiaries

It is considered that the extra words add no meaning. The expression "favour or benefit" is a pointless use of synonyms.

Occasionally drafters use the word "respective" thus:

> The Trustees shall hold the trust fund on trust for the Beneficiaries … with such trusts for their *respective* benefit … as the Trustees shall appoint.

In one case it was held that this word "respective" suggested that the creation of discretionary trusts was not permitted.[8] In practice the trustees will expressly be permitted to create such trusts. So the word "respective" is either erroneous (if the court's comments in *Hunter* are correct) or superfluous (if they are not.) Plainly no one who cares about accurate language will use the word here.

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5 In the standard overriding powers in this book, this is stated expressly, though it would in principle be implied: *Re Rank* [1979] 1 WLR 1242. In consequence, a power to add administrative powers is unnecessary: see 21.5 (Power to add powers).

6 For the position in the absence of such a clause see 11.5 (The problem of narrow powers of appointment).

7 Section 158 LPA 1925, re-enacting the Powers of Appointment Act 1874. See 3.16 (Singular and plural).

8 Cross J. said that a discretionary trust is not for the respective benefit of the beneficiaries: it is a trust for the collective benefit of all of them under which none has any separate benefit: *Re Hunter* [1963] Ch 372. Is this convincing? The word "respective" is vacuous in this context. It does not carry the inference which Cross J. put upon it. But this makes no practical difference. Either the power of appointment will expressly permit the creation of discretionary trusts; or else it will be silent and (as the authorities now stand) discretionary trusts will not be permitted in any event. See the excursus at 11.5 (The problem of narrow powers of appointment).

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It is common to add a requirement that any appointment must observe the rule against perpetuities. This has no legal effect, and may be omitted. (The form might conceivably serve as a reminder to the person who drafts the deed of appointment; but a person who needs that reminder is unlikely to be capable of drafting the necessary deed in any event.)[9]

Some drafters add a provision saying that to the extent that the power of appointment is not exercised, the original trusts continue to apply. This is implied in any case, and is unnecessary.[10]

Some drafters add a provision that the power of appointment cannot be operated retrospectively. For instance:

> *No exercise of this power shall reduce the amount of any accrued benefit to which a beneficiary shall have become entitled under this settlement.*
> *No appointment shall affect income payable to the Trustees before the date of that appointment.*

A provision of that type will be understood by necessary implication and is therefore unnecessary.[11]

11.4 Hallett[12] added two further provisions not generally found in modern powers of appointment, but which should be mentioned for completeness. The Hallett precedent directed that the power of appointment may be used to:

> *provide for the appointment or remuneration of trustees on any terms and conditions whatever.*

There is no need to make an express provision here for remuneration of trustees, since the normal trustee remuneration clause is sufficient.[13]

The Hallett precedent provided that the power of appointment may be used to:

> *direct that the Trust Fund shall be transferred or paid to and held by any persons as trustees …*

The power of appointment (as drafted in this book or in any common form)

[9] See 9.5 (Remaining within the perpetuity period). In one unfortunately worded trust (perhaps drafted for an economically minded settlor) the overriding power was subject to "the rules against excessive accumulations and gratuities".

[10] *Re Hastings Bass* [1975] Ch 25; *Re Master* [1911] 1 Ch 321 followed in *Re Sharp* [1973] Ch 331.

[11] This was accepted without argument in *IRC v Pearson* [1981] AC 753 (confirming the view taken in the HMRC Press Release of 12 February 1976). It is apparent that the power of appointment in that case contained no such proviso: see at first instance [1980] Ch 1. This view is also supported by *Re Delamere* [1984] 1 WLR 813; *Re Master* [1911] 1 Ch 321 followed *Re Wellman* [2001] JLR 218 *www.jerseylaw.je*.

[12] *Hallett's Conveyancing Precedents*, 1st edn (London: Sweet & Maxwell, 1965), p.772.

[13] For good measure, the overriding power in the precedents in this book could be used to make further provision for remunerating trustees. Such provision is an administrative provision. Of course this could only be done if (i) this was for the benefit of the beneficiaries and (ii) there was an independent trustee who did not benefit from the new remuneration clause. See 6.16 (Conflicts of interest). It seems unlikely that this would ever need to be done.

cannot itself be used to transfer the fund to new trustees.[14] However there is the usual power to appoint new trustees, power to appoint separate trustees of separate funds[15] and (in precedents in this book) a separate express power of re-settlement. That seems comprehensive enough.

The problem of narrow powers of appointment[16]

11.5 Modern powers of appointment are generally widely drawn and give rise to no difficulty, but there are many older trusts with powers more narrowly drawn. It is worth considering these in some detail. The reader who is not familiar with the case law may go wrong here: if the old cases are still good law, these powers of appointment do not have the effect which a simple reading would suggest.

Let us start with an example. In *Re Joicey*,[17] property was held on trust for the beneficiaries:

> for such interests in such proportions and in such manner in all respects as the appointor should appoint.

An appointment was made for children who attained a certain age. Trustees were given power to transfer capital to them under that age (a dispositive power). This power was void. This was said to follow from the rule against delegation.

In the following discussion, powers of appointment which allow the appointor to create dispositive powers are described as wider powers; and powers which do not are called narrower powers. The effect of *Joicey* therefore, is to hold that the power considered in that case was a narrower and not a wider power.

It is considered that the law has taken a wrong turning here.

An issue of delegation

First, this line of cases has treated the matter as one of delegation. It need not and (it is considered) should not be put that way. The appointor is not delegating the existing power of appointment but exercising it so as to create new dispositive powers.[18]

[14] This proposition is self-evident, but if authority is needed see *Re Mackenzie* [1916] 1 Ch 125. Happily there is a solution to problems when such powers are lacking. A power of appointment in common form will generally be wide enough to confer upon trustees a power of resettlement.

[15] Section 37(1)(b) TA 1925.

[16] See Oerton, *Trusts and Estates* (1994) pp.317 and 402.

[17] [1915] 2 Ch 115. In other cases the invalid power was a power of maintenance (which would from 1926 be implied by s.31 TA 1925) and a power arising under a protective trust. This is just an early example of a long line of cases, of which the most recent is *Re Hay* [1982] 1 WLR 202. Here Megarry J. took the principle to a new height of absurdity by holding that the trustees had wrongly delegated their discretions to themselves.

[18] The point was accepted in *Re Wills* [1964] Ch 219 at 237 and in *Re Weightman* [1915] 2 Ch 205; (A power of revocation "in no sense" a delegation of a power of appointment).

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A matter of construction

The question whether a power of appointment is narrower or wider is a question of construction. That is not in dispute. The correct question to ask is not whether the power contains within it a right to delegate, but whether it was to be construed widely enough to permit the creation of new dispositive powers. The difference is one of nuance, but it is a significant nuance.[19]

Let us return to the *Joicey* power, and consider whether it should be construed as wider or narrower. Property was held on trust for the beneficiaries:

> for such interests in such proportions and in such manner in all respects as the appointor should appoint.

The phrase "in such manner in all respects" points to the wider construction. In the nineteenth century the courts would nevertheless give it the narrower meaning; for flexible trusts were then unusual. In the present time, a natural reading would apply the wider meaning; for flexible trusts are common; it is most unlikely that a settlor now intends the power to be so limited.[20]

What has happened is that the courts have followed the nineteenth century approach—summed up in *Joicey*—to the present day. This is why such powers are given such a limited meaning. This is a misuse of precedent, which should not be regarded as binding in matters of construction. Unfortunately the Court of Appeal missed the opportunity to correct these errors in *Re Morris*.[21] Evershed M.R. preferred to follow the old authorities, more or less conceding that they were wrong, than to construe the document according to its plain language. The complaint about the state of the law was repeated in *Re Hunter*.[22] If the matter came to be reviewed by the courts, it is considered that principle should take priority over precedent. This, indeed, is what precedent requires.[23] Of course, for the time being, one should act on the cautious view that the old cases might still be followed.

Happily, there is a solution to the problems presented by these narrow powers of appointment. Such powers can in principle be used to confer on the trustees a power of advancement, being either the statutory power (which is exercisable over half the trust fund) or a power of advancement extended over the entire trust fund.[24] Once that is done, of course, the

[19] See *Kain v Hutton* [2007] NZCA 199 in particular [72] to [85]. The matter of delegation was not in issue in the subsequent appeal to the NZSC.

[20] Another way to reach the same conclusion is to rely on the phrase "for such interests". The word "interests" may be used to mean only fixed equitable interests; nowadays it is more often used to mean interests under true powers or trust powers: *Leedale v Lewis* 56 TC 501. But often the wording of the power does not include that phrase.

[21] [1951] 2 All ER 528.

[22] [1963] Ch 372.

[23] See 4.14 (Precedent not the solution).

[24] In *Re Mewburn* [1934] Ch 112 the court approved of the exercise of a power of appointment (in relatively standard narrower form) to create a power of advancement exercisable over one half the trust fund. The judge noted that a power of advancement would (after 1926) be implied by s.32 TA 1925 so it cannot exceed the power of appointment to create it. The case was approved by the Court of Appeal in *Re Morris* [1951] 2 All ER

trustees can, if appropriate, use their power of advancement to achieve results beyond the scope of their narrow power of appointment: see 11.8 (Power of advancement).

Power of resettlement **11.6**

The form used in this book is as follows:

> (1) The Trustees may by deed declare that they hold any Trust Property on trust to transfer it to trustees of another settlement, wherever established, to hold on the terms of that settlement, freed and released from the terms of this Settlement.
> (2) The Trustees shall only exercise this power if:
> (a) every Person who may benefit is (or would if living be) a Beneficiary; or
> (b) with the consent of
> (i) the Settlor, or
> (ii) two Beneficiaries (after the death of the Settlor).

This may be used to transfer property to a new trust or to another trust already in existence. The wording makes it clear that any new trust will be a separate trust from the existing trust, as intended. The reported cases indicate what is needed. The phrase "freed and released from the terms of this settlement" could be omitted, but it spells out the effect of the transfer clearly, and has judicial approval.[25]

Trustees are sometimes given power to transfer the trust fund to any trust if only one beneficiary of the present trust happens also to be a beneficiary of the new trust. That is equivalent to authorising trustees to add beneficiaries; a serious proposition if the power is exercisable without restraint. The form used here brings in the same safeguards as the power to add beneficiaries; see 5.37 (Power to add beneficiaries).

528 at 533 where the principle was held to apply

> "... at all events where the instrument creating the power [of appointment] enables any appointment to be made 'in such manner and form in every respect' or 'generally in such manner for the benefit of' the objects of the power, as the donee of the power may appoint."

If it is permissible to create a power of advancement over one half the trust fund, it must logically be permissible to create a power over the whole, especially now s.32 has been extended to apply to the whole. The opposite conclusion was apparently reached in *Re Joicey* [1915] 2 Ch 115. There an appointor tried unsuccessfully to use a narrower power of appointment to create a power which (at first sight) appears an ordinary power of advancement. But this case no longer represents the law. That decision was based on the view that the (to modern eyes unexceptional) power which the appointor attempted to create was not an ordinary power of advancement. That view could not now be sustained in the light of (i) s.32 TA 1925 and (ii) the comments in *Re Pauling* [1964] Ch 303 at 333 (which contradict the view of the power taken at [1915] 2 Ch 123).

[25] *Hart v Briscoe* 52 TC 53. The leading cases are *Roome v Edwards* 54 TC 359; and *Bond v Pickford* [1983] STC 517.

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Power of resettlement and power of appointment compared

11.7 A power of appointment can vary the terms of a trust. The power of resettlement may effectively achieve the same result, but will also result in trust property being held by a different trust (perhaps, but not necessarily, with different trustees and a different governing law). As a matter of trust law there may not be much difference between altering the terms of an existing trust (in a power of appointment) and transfers to a new trust (by a power of re-settlement), except in relation to trust liabilities. There are, however, important differences for tax purposes:

(1) The transfer to another trust is a disposal for CGT purposes;[26] an exercise of a power of appointment does not normally involve a disposal.[27]
(2) If only part of the trust fund is transferred to a new trust, the result is two separate trusts. The trustees of one trust are not subject to liabilities of the second, and that may obviously be more convenient when different branches of a family wish to go separate ways. It would then be possible to appoint foreign trustees for one trust but not for the other.
(3) Some tax planning arrangements require transfers of funds to new trusts. A discussion of such planning is beyond the scope of this book, but a well drafted trust should give scope to make such arrangements in case it becomes appropriate.

Tax aside, this power may also be useful to combine trusts with similar terms, so as to reduce administrative costs; or to split up one trust with several sub-funds into separate trusts with separate classes of beneficiaries.

Power of advancement

11.8 The term "power of advancement" is used to describe a power to transfer trust property to a person, or apply it for their "advancement or benefit".[28] The person for whose benefit the trust property may be applied (or to whom the property may be transferred) is called the "object" of the power.

Trustees have a power of advancement by statute. The statutory power is however subject to three important restrictions:[29]

[26] The position is different if the power is exercised by the executors during the administration period: in which case there is no disposal and the new trustees acquire as legatees for CGT purposes.

[27] Section 71 TCGA 1992. This may be undesirable if a CGT charge would arise. For this reason trustees will generally prefer the power of appointment to the power of resettlement if the aim is only to vary the terms of the trust. However there will be occasions when trustees want a disposal of trust property; for instance, to realise losses.

[28] This is the usage of the parliamentary drafter: the power conferred by s.32 TA 1925 is described as "power of advancement" in s.32, and as "the statutory power of advancement", e.g. s.47(1)(ii) AEA 1925.

[29] And for completeness three minor restrictions:

(1) The power does not apply to Settled Land Act settlements (now obsolescent).
(2) The power does not apply where there is an expression of contrary intent; it seems that a very shadowy one will suffice.

(1) Only a beneficiary with some interest in trust capital is an object of the power. Thus a life tenant is not an object of the power.
(2) The power only extends over the object's share in the trust fund. Thus if a fund is held on trust, say, for A and B, contingently on their attaining the age of 25, then A's share may be applied for A but not for B; and vice versa.
(3) The trustees can only exercise the statutory power with the consent of any beneficiary with a prior interest.

This book adopts a different approach. The form used in this book is:

> The Trustees may pay or apply Trust Property for the advancement or benefit of any Beneficiary.

None of the restrictions which inhibit the statutory power of advancement apply:

(1) All beneficiaries are objects of the power.
(2) The entire trust fund may be advanced to any beneficiary.
(3) Consents of beneficiaries are not needed.

This is in line with the approach of this book, that trustees should be trusted with wide powers and that beneficiaries' consents are not desirable.[30] The restrictions which apply to the statutory power raise some difficult questions of trust law.[31] An advantage of our approach is that none of these difficulties can arise.

The form adopts the statutory phrases "pay or apply", and "advancement or benefit." The full form is used to display the clause's parentage, s.32 Trustee Act 1925, so as to suggest that the useful case law giving a wide meaning to "benefit" should apply. In the light of the amendments to s.32 made by the Inheritance and Trustees' Powers Act 2014 suggest the wording "the Trustees may pay, transfer or apply …". But it is not necessary to make that change, as a transfer is a kind of application, and the shorter and simpler wording is considered to be preferable.

It is intended that trustees should be able to use their power of advancement informally, so a deed is not required. No written document is required at all. It may be appropriate for the trustees to record their decision in a formal written resolution (particularly in larger or more complex cases) but that is a matter for them. This rather simplifies the administration of the trust. The statutory power takes the same approach.

Where there is a wide power of advancement, as in our draft, there is clearly no need for the statutory power. In the lifetime trusts in this book it is therefore not necessary to provide that the statutory power should apply (with or without amendment). In the Will Trusts it is also unnecessary,

(3) Where the beneficiary is to become entitled to a share (and not the whole) of the trust property, any advance is to be brought into account as part of that share (the hotchpot rule).

s.32 TA 1925.

[30] See 7.27 (Giving powers of consent to beneficiaries).

[31] What is a "prior" interest? A question "of great difficulty" according to Clausen J. in *Re Spencer* [1935] Ch 533; in *IRC v Bernstein* 39 TC 391 at 403 Lord Evershed M.R. was "glad" to follow authority which refrained from expressing a view on the question. Such authorities are of more assistance to the Bench than to practitioners.

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except that it might be useful in Wills 5 and 7, which contain an absolute gift of residue. So the extended statutory power is included in the administrative forms for wills but not for lifetime trusts. Although strictly only needed for Will forms 5 and 7, it does no harm in the other will forms.

Other forms in powers of advancement

Older trust precedents gave trustees power to *raise money* and pay or apply the trust money. This has been unnecessary since 1925.[32]

Another precedent gives power to *raise a share* in the trust fund and pay or apply that share for the advancement or benefit of a beneficiary. Here the word "raise" adds nothing but a puzzle of what it might mean.[33]

Power to pay or transfer to beneficiary

11.9 A common form in older trusts is:

The Trustees may pay or transfer trust funds to [a Beneficiary] for his own use and benefit absolutely.

This power is narrower than the common form power of advancement, since it does not allow funds to be applied for the benefit of the beneficiary but only to be paid or transferred to them absolutely.[34] The power is unnecessary where (as in the drafts in this book) there is a wide power of advancement.

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[32] Section 16 TA 1925 (power to raise money by sale, mortgage, etc.). Hence the word "raise" is not used in the statutory power of advancement. In a modern trust there would also be an express power to borrow.

[33] It has been said that "raise" in this context has "a broad sense" and means no more than identify or set aside trust capital for the purpose of the exercise of the power: *Re Wills* [1959] Ch 1 at 14. This does however give the word a sense which it does not normally have. When one talks in ordinary usage of "raising funds", **"raising"** means obtaining money, either by loan, or by issuing shares for cash, or by any other method (as in charity "fundraising"). So another interpretation is suggested. A power of advancement of this kind might be read with a comma after the word "pay" so it empowers trustees to do one of two things:

(1) "Raise" trust capital (i.e. raise money, by borrowing, mortgage, or sale of trust assets) and pay the money to or for the benefit of beneficiaries; or
(2) apply trust capital in specie (without "raising" money) for the benefit of beneficiaries.

Whichever is the right approach does not in practice matter: the trustees can exercise a power of advancement without troubling themselves about any requirement of "raising" capital.

[34] The words "pay or transfer to" do not in their normal sense mean "pay to or apply for the benefit of". Of course the context may show that an extended sense is meant: for examples see the 7th edn of this book at 14.7. But here the words "for his own use and benefit absolutely" require that the object becomes absolutely and beneficially entitled to the property paid or transferred to him. If appropriate, the court may extend a narrow power to "pay or transfer" into a wider power to "apply for the benefit" under s.57 TA 1925; this may solve the problem of the narrow power. Another solution is to transfer to the beneficiary and let the beneficiary re-settle; but of course that raises tax and property law issues.

Power of appointment used to make advance to beneficiary

11.10 The power of appointment (or indeed the power of resettlement) may be used so as to transfer trust capital to a beneficiary. But it may be easier to use the power of advancement for this purpose, since no formal deed is required. Trust money can simply be transferred by cheque or bank transfer.

Power of advancement used to create new trusts

11.11 The power of advancement in a trust may be used:

(1) to transfer trust property to a new trust where it may be held on terms wholly[35] or partly[36] different from the original trust;
(2) to alter the terms of the existing trust so as to create new beneficial interests which may wholly or partly replace the existing beneficial interests;[37] or
(3) to alter administrative provisions.[38]

Thus the power of advancement may be used broadly to the same effect as powers of appointment or resettlement.

This is particularly important where a trust is drafted badly, or inflexibly, because even badly drafted trusts generally contain a full power of advancement, which should allow terms of the trust to be altered where necessary.

In the following discussion:

(1) It is assumed that under a trust ("the Original Settlement") trustees have power to apply capital for the benefit of an object, "O".
(2) The exercise of the power of advancement which results in a settlement of the funds advanced is called a "settled advancement" and the trusts created are called "advanced trusts".
(3) The beneficiaries of the trusts created by the settled advancement are called "Advanced Beneficiaries."

A typical case is where trustees, having power of advancement for the benefit of O, exercise that power by a settled advancement, in such a way that the trust fund is held on trust for O for life, with remainder over to O's family.

The starting point is to note that the Advanced Beneficiaries include persons other than the object, O – in this example, O's family. The advance must be for the benefit of O; but it is easy to see that this settled advance-

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[35] As in *Re Clore* [1966] 1 WLR 955 (transfer to charity).

[36] In *Re Hastings-Bass* the trustees transferred trust property to a new trust but created only a limited beneficial interest in income and no exhaustive beneficial trust of capital of the funds advanced. The new trustees held on the terms of the old trusts, which remained in effect to the extent that the new trusts were not comprehensive. See [1975] Ch 25 at 42. In the leading case of *Pilkington v IRC* 40 TC 416 the new trusts were nearly, but not quite, exhaustive.

[37] In *Re Hampden* the new trusts were nearly but not quite exhaustive. This important case is reported in [1977] TR 177 and also, belatedly, reported in [2001] WTLR 195 *http://www.kessler.co.uk/wp-content/uploads/2012/04/Hampden.pdf*.

[38] *Howell v Rozenbroek* (14 December 1999: *http://www.kessler.co.uk/wp-content/uploads/2012/04/Howell.v.Rozenbroek.pdf*).

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ment may be an application of the trust fund for the benefit of O, since it will usually be for O's benefit that there should be funds to maintain O's family after O's death. It is not relevant whether or not O's family are beneficiaries under the original settlement. They may be or they may not be; but the reason they become Advanced Beneficiaries is because this is for the benefit of O, and not because of their status under the original settlement. O him or herself need not be an Advanced Beneficiary at all. All that matters is that the settled advancement is for the benefit of O.[39] But the settlor cannot be an Advanced Beneficiary if there is a settlor exclusion clause.[40]

A settled advancement can only create new trusts in a manner which is specifically for the benefit (albeit "benefit" in the wide sense) of the object, O.[41] If there is a power to advance for the benefit of O, one cannot normally create new[42] trusts giving trustees a wide power of appointment in favour of O's siblings, or cousins, or more remote family, as that will not normally be for the benefit of O. The test is whether the trustees have O's interest and O's interest only, in mind. By contrast, the normal power of appointment can be used to create any type of trusts so long as the beneficiaries of the created trusts are objects of the power of appointment.[43] Where it is not obvious that a proposed advance is for the benefit of the object, a possible course may be to exercise the power of advancement so as to confer powers of appointment which are exercisable by the object or which are exercisable with their consent or for their benefit. This brings out more clearly the benefit for the object. The next chapter sets out some precedents.

The commonest examples are a settled advance:

(1) to make provision for O's family; or
(2) to prevent O from becoming absolutely entitled to trust capital because:
  (a) O is immature and irresponsible as regards money so it is a benefit to retain the capital in the trusts;[44] or
  (b) this avoids a tax charge on O becoming entitled to the trust fund;

[39] Striking examples are *Re Clore* [1966] 1 WLR 955 – transfer to charity favoured by object of power of advancement; *Re Hampden* [1977] TR 177, also belatedly reported in [2001] WTLR 195 *http://www.kessler.co.uk/wp-content/uploads/2012/04/Hampden.pdf*: transfer to trust for benefit of children of object of power of advancement.

[40] See 13.13 (What does a settlor exclusion clause cover?).

[41] "Under such a power the trustees can deal with capital in any way which, viewed objectively, can fairly be regarded as being to the benefit of the object of the power, and subjectively they believe to be so." *Re Hampden*, above.

[42] It is different if such trusts already exist and the exercise of the power of advancement merely preserves them.

[43] This is all that Upjohn J. meant in *Re Wills* [1959] Ch 1 at 14: "Trustees cannot under the guise of making an advancement create new trusts merely because they think that they can devise better trusts than those which the settlor has chosen to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power."

[44] This was grudgingly accepted in *Re T* [1964] Ch 158 "only because a strong case on the facts is made out for protection of this nature". But attitudes have changed. In Jersey:

> "It is not in our judgment generally in the interests of young persons to come into possession of large sums of money which might discourage them from achieving qualifications and from leading settled and industrious lives to the benefit of themselves and of the community."

(3) to transfer to another trust for the reasons discussed at 11.7 (Resettlement and appointment compared).

It is considered that similar principles govern a common form power of *appointment*. For instance, a power of appointment for the benefit of the children of the settlor may be used to create trusts for the children for life with remainder to the grandchildren (not objects of the power, but assuming the provision for the grandchildren is regarded as a benefit to the children who are objects).[45]

Under the statutory power of advancement the trustees need the consent

See *Re Gates* [2003] 3 ITELR 113 *www.jerseylaw.je*. This view would be accepted now in England. Lord Eldon shared this sentiment: see Campbell's anecdote of Lord Eldon *http://www.kessler.co.uk/wp-content/uploads/2012/04/Eldon_on_young_adults_income.pdf*.

[45] The word "benefit" has two distinct meanings, a narrow meaning and a wide meaning:

(1) Direct Financial Advantage only. In the narrow sense, **"benefit"** means only a direct pecuniary benefit. In this sense it is not a "benefit", say, to a person to pay their children's school fees.
(2) Intangible Non-financial Benefit also. In the wide sense, "benefit" includes not only direct financial advantage, but also intangible non-pecuniary advantages including mental satisfaction. In this sense (only) it is for the benefit of a person:
  (a) to pay their children's school fees (assuming the person wishes to see their children privately educated); or
  (b) to provide a fund for their use (assuming the person wishes to see his children financially secure); or
  (c) to make a contribution to a charity which that person wishes to support; or
  (d) to avoid family disharmony: *Re H* [1990–91] CILR N.24; *Re Q* [2001] CILR 481.

A similar distinction is made in the law relating to a fraud on a power. An appointment with the motive of securing a financial benefit to the appointor is void: but an appointment satisfying an appointor's moral obligation is valid. See *Palmer v Locke* (1880) 15 Ch D 294 at p.303.

Confusion can be caused by failing to ask which of these meanings applies. The context must decide which meaning is intended.

In tax legislation the narrow meaning is normal and the wide meaning is exceptional. For instance, the word "benefit" in the context of the income tax or CGT settlement provisions or the IHT gifts with reservation provisions has the narrow meaning and refers to direct financial benefits only. No-one has ever suggested that a payment to a person's minor children is a "benefit" to the parent, so as to bring those sections into application.

In the context of a power of advancement, a power to apply for the advancement or "benefit" of O, the word "benefit" bears the wide meaning and includes any intangible non-financial advantage. This construction is perhaps supported by the phrase "advancement or benefit" showing that a wider sense of "benefit" is intended; but in any event it is long settled by the authorities cited above.

In the context of a common form power of appointment, a power to appoint on trusts for the "benefit" of O, it is considered that the word "benefit" has the same wide sense. This was accepted without argument in *Re Leigh* (1980) belatedly reported [2005] TLI 109; [2006] WTLR 477. The position is the same if the power of appointment refers to "trusts in favour or for the benefit of the Beneficiaries", i.e. the words "in favour of" are mere synonymy and do not extend the width of the power.

In the context of a common form power to apply income for the benefit of a beneficiary, it is again suggested that the word "benefit" has the same wide sense. A little support for this view might be gained from the old case of *Allen v Coster* (1839) 1 Beav 202, *www.commonlii.org*. In this remarkable case a fund of £6,000 was held (in short) for the benefit of two minors. The parents "were in a state of great indigence, and kept from the parish by a person who charitably allowed them 10s. a week". Lord Langdale

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of a beneficiary with a prior interest. The consent of O is not needed however,[46] though in practice trustees should take O's views into account and circumstances where the trustees can properly act contrary to O's views (if adult) will be rare.

O is not the settlor of the advanced trusts for any tax purposes.

The statutory power of advancement can only be used for the benefit of an object or objects individually, and not for the benefit of two or more objects as a class.[47]

The statutory power of advancement can only be used in favour of living beneficiaries, and not in favour of unborn beneficiaries.[48]

There has been some debate whether, under the statutory power of advancement, the terms of the Advanced Trusts can include any dispositive powers for the trustees or others. That is said by some to amount to a delegation of the power of advancement, and so prima facie not permitted. After some disagreement in the lower courts, this view was rejected by the House of Lords and does not represent the law.[49] In the precedents in this book, however, the question does not arise since trustees have a wide power of delegation.

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said: "I think this is a case in which the Court can increase the maintenance of the children for the support of their parents … I may give to the infants the benefit of the property, so as to assist the parents: To do so is evidently for the benefit of the infants themselves."

In any particular case, regard must be given to the exact wording of the power concerned.

46 "It is no bar to an exercise of the power of advancement that the primary object neither requested nor consented to it"; *Re Cameron* [1999] Ch 386 at [77]; *Pilkington v IRC* 40 TC 416 at p.439.

47 Suppose a trust fund is held on trust for A and B contingently upon attaining the age of 25 in equal shares; and the trustees have the statutory power to apply capital for the benefit of "any person contingently entitled to the capital". They can apply half the trust fund for the benefit of A; and they can apply the other half for the benefit of B separately. They cannot create discretionary trusts for the class of A and B; or create a trust of the whole fund for A for life with power to appoint to B. This is an application of capital for the benefit of A and B, collectively, as a class. Even applying the Interpretation Act principle that the singular includes the plural, it does not seem correct to construe the section to mean that this is permissible.

It is considered that the wide power of advancement in the form in this book could be exercised in favour of a class of Beneficiaries.

48 In relation to the statutory power this is clear. An unborn beneficiary cannot be said to be "entitled" to trust property, even contingently, and so is not an object of the statutory power. It is considered that the wide power of advancement in the form used in this book could be exercised in favour of unborn beneficiaries.

49 The view that the power of advancement is restricted in this way was championed by Lord Upjohn. He expressed this view in *Re Wills* [1959] Ch 1. The view was criticised in strong language by Dankwerts J in *Pilkington v IRC* ("I am not quite sure what the learned Judge had in his mind …") but repeated by Lord Upjohn in Pilkington in the Court of Appeal. The law was settled by the House of Lords in *Pilkington* 40 TC 416. For the terms of the advanced trusts approved by the House of Lords included protective trusts, i.e. they included discretionary trusts. This is absolutely right in principle, it is respectfully considered, because any powers exercised by the trustees of a new trust are not the powers of advancement, delegated; they are new powers created by the exercise of the powers of advancement. See 11.5 (The problem of narrow powers of appointment). Many of the other cases also authorised settled advances with dispositive powers of some kind. *Lewin on Trusts* agrees (19th edn (2015) para.32–20). The contrary view must necessarily involve the conclusion that the decision of the House of Lords was *per incuriam*.

The advanced trusts are governed by the perpetuity and accumulation rules as they apply to the original trust.[50]

One conclusion to draw from all this is that the drafter should include in a trust all three overriding powers: powers of appointment, resettlement and advancement. They should not rely on one to do the work of the others.

A narrowly drafted trust will generally include a power of advancement but no power of appointment or resettlement. In such a case the trustees still have some scope to alter the terms of the trust, or to transfer to a new trust, by use of the power of advancement. This is a matter of considerable practical importance.

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50 However, where a common law perpetuity period applies, the advanced trusts can include an appropriate "Royal Lives" period even if this was not found in the original trust. See 12.5 (Appointment creating royal lives clause).

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the client and the solicitor.[54] It may not be appropriate to act at all.[55] The transaction is at best tax neutral (for small estates) but has the potential for putting the client in a much worse fiscal position.[56]

the reach or otherwise prejudice the interest of the local authority. In addition, if the client moved into residential accommodation within 6 months of the transfer, the local authority might seek to recover the charges from the trustees under s.21 Health and Social Services and Social Security Adjudications Act 1983. See, e.g., *Brent LBC v Kane* [2014] EWHC 4564 (Ch).

54 On the basis that the "iniquity principle" applies. The principle is that advice sought or given for the purpose of effecting iniquity is not privileged: *Barclays Bank v Eustice* [1995] 1 WLR 1238 at 1249. Although the case law refers to crime, fraud or dishonesty, it is plain that the term "fraud" is used in a relatively wide sense: Eustice at 1249D. A scheme to effect a transaction at an undervalue is sufficient (as in Eustice); as is making dispositions with the intention of defeating a spouse's claim for financial relief (see *C v C* [2008] 1 FLR 115). In *Brent LBC v Kane* [2014] (see fn.53 above) disclosure was ordered where there was found to be a prima facie case that a daughter had effected various property transactions with the purpose of avoiding payment for her father's residential care by the local authority. There is no reason to suppose that the same approach would not be taken where the capital deprivation rule is engaged directly.

55 The first two mandatory principles in the SRA Code of Conduct 2011 are that solicitors must uphold the rule of law and the proper administration of justice and act with integrity. The outcomes which they must achieve in order to comply with those principles in the context of client care include O(1.3), "when deciding whether to act, or terminate your instructions, you comply with the law and the Code". The old Rule 2.01 of the Solicitors' Code of Conduct 2007 provided that solicitors must refuse to act or cease acting for a client when to act would involve them in a breach of law. This would seem to include transactions in breach of s.423 Insolvency Act 1986 and possibly those to which the capital deprivation rule applies. See also the *Law Society's Practice Note on Making Gifts of Assets* (6 October 2011): *https://www.lawsociety.org.uk/support-services/advice/practice-notes/making-gifts-of-assets/*.

56 If the clients' interests exceed their NRB, there will be an immediate charge to IHT and ongoing relevant property charges. The first to die's NRB will be used up so that no transferable NRB is available on the survivor's death. The interests will also be taxed as part of the clients' estates under the GWR rules. If the first to die's interest had simply been left on life interest trusts for the surviving spouse, none of these problems would arise.

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CHAPTER 21

ADMINISTRATIVE PROVISIONS

Introduction

The administrative powers of trustees conferred by the general law are broadly but not wholly satisfactory. The Trustee Act 2000 improved matters considerably, but the general law still imposes restrictions (sometimes complex and bureaucratic) intended to reduce the risk of mismanagement.[1] The statutory powers of investment and delegation are good examples. This approach is well intentioned but misguided. Where the general law of trusts falls short, it falls to the drafter to ensure that the trust has the administrative provisions needed to allow trustees to manage the trust fund in the best way; and to find a fair balance between trustees and beneficiaries when their interests conflict. **21.1**

It is convenient to place all the provisions dealing with the administration of the trust in a schedule.[2]

Unnecessary provisions

Provisions duplicating the Trustee Acts

Where the general law already confers powers on trustees, no purpose is served in repeating the terms of the statute at length in the trust. This is often found in trust deeds: probably the drafter is following precedents unrevised since the enactment of the Trustee Act 1925 or its nineteenth century predecessors. Common examples are the power to apportion blended funds[3] and power to ascertain and fix valuations.[4] **21.2**

1 *Law Commission, Trustees' Powers and Duties* (Law Com Report No 260), para.2-19 *http://www.lawcom.gov.uk/project/trustees-powers-and-duties*."The law must aim to achieve a balance between two factors—(1) the desirability of conferring the widest possible investment powers, so that trustees may invest trust assets in whatever manner is appropriate for the trust; and (2) the need to ensure that trustees act prudently in safeguarding the capital of the trust."

2 10.30 (Schedule of administrative provisions).

3 Section 15(b) TA 1925.

4 21.50 (Power of appropriation).

Power to insure

21.3 Trustees have full power to insure trust property.[5]

It is quite common to provide that trustees should not be liable for any loss that may result from a failure to take out insurance. In this book a provision of this kind is intentionally omitted. It is considered that trustees should be expected to give proper consideration to the question of whether or not to insure trust property. Proper reasons for not taking out insurance may include cost and difficulties of funding. They would not of course be liable for loss if, having considered the matter, they reasonably decided not to insure.[6]

Power to vary investments

21.4 *The Trustees may vary or transpose the investments for or into others of any nature hereby authorised.*

Wherever trustees have a power to invest, they have by implication power to sell any trust property and invest or reinvest the proceeds.[7] This provision is still found in some precedents. Perhaps it is thought worthwhile to express clearly what would otherwise only be implied; perhaps the form is retained under the influence of obsolete statutory precedent.[8] The provision was sometimes incorporated into the trust-for-sale clause, now happily obsolete. More logically, it is sometimes given the status of a separate power. In any event, it is certainly unnecessary; especially where there is a general power of management.

Power to add powers

21.5 Some trusts give trustees power to confer additional administrative powers. In the precedents in this book such a power is unnecessary. The powers conferred expressly are comprehensive. For good measure the power of appointment can be used to confer additional administrative powers.[9] The power to add powers would do no harm;[10] but the possibility of the power being usefully invoked is so remote that it merits no place in a standard draft.

Power to accept additional funds or onerous property

21.6 *The Trustees may accept such additional money or investments or other property as may be paid or transferred to them upon the trusts hereof by the settlor or by any other person (including property of an onerous nature) the acceptance of*

5 Section 19 TA 1925.
6 This is the view of the *Law Commission: Trustees' Powers and Duties* (Law Com Report No 260), paras 6–8 *http://www.lawcom.gov.uk/project/trustees-powers-and-duties*.
7 *Re Pope* [1911] 2 Ch 442.
8 Section 1(1) Trustee Investments Act 1961. The contemporary provisions in the TA 2000 have no equivalent.
9 11.2 (Power of appointment).
10 It might be objected that the extent of the power is unclear: the borderline between administrative and dispositive powers is not a precise one. But the existence of the power would not give rise to difficulties; and questions of doubt should not arise in practice.

which the Trustees consider to be in the interest of the beneficiaries.

Trustees do not need express power to accept additions to the trust fund.[11] (If anyone doubts this, let them ask: what remedy would there be for a breach of trust of this kind?)

The power as regards onerous property needs more consideration. The expression "onerous property" suggests property which may give rise to a liability, such as a lease with tenants' covenants, or shares which are not fully paid up or contaminated land.[12] "Accepting" such property suggests that on acquiring the property, the trustees become liable for leasehold covenants, calls on the shares, or subject to duties imposed on the owner of the land.

The trustees could use trust funds to purchase such property. On what basis could it possibly be said that they were not entitled to accept such property if given to them? Possibly the onerous property may have no value or a negative value: it may (in common parlance) be a liability. In that case the trustees could not properly accept it as a gift (unless authorised in specific terms to accept onerous property to the benefit of the "donee" and to the detriment of the trust fund). It is therefore considered that a general power to accept additional property is unnecessary in a standard draft.[13]

Powers relating to accounts and audits

21.7 For all practical purposes the powers in the Trustee Act 1925 are sufficient, and no special provision is required.[14]

Powers to deal with shares and debentures

21.8 Section 10(3) of the Trustee Act 1925 gave trustees a general power to deal with securities:

> Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement)
>
> (a) for the reconstruction of the company;
> (b) for the sale of all or any part of the property and undertaking of the company to another company;
> (bb) for the acquisition of the securities of the company, or of control thereof by another company;
> (c) for the amalgamation of the company with another company;

11 10.40 (Definition of "the trust fund").
12 The expression "onerous property" is not a term of art. Contrast the more elaborate definition of "onerous property" in s.178 Insolvency Act 1986.
13 The power may be useful if it is important for tax purposes that added property forms part of the trust to which it is added. This is not sufficiently common to merit a place in a standard draft. See also 17.17(Gift by will to existing trust).
14 Section 22(4) TA 1925 provides that trustees may arrange audited accounts every three years or more often if it is reasonable to do so. The power is wide enough to allow trustees to have accounts audited every year if they wish, or produce unaudited accounts, or for a dormant trust, not to produce any accounts at all.

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(d) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them;

in like manner as if they were entitled to such securities beneficially …

"Securities" here meant shares and stocks, but (arguably) not debentures.[15] Some drafters therefore set out at length in their drafts the terms of s.10(3) TA 1925 but with one extension: the term "securities" is defined to include "debentures". This is here called "the extended s.10(3) power".

Is the extended s.10(3) power needed? It is thought not. The only reason for s.10(3) is that the proposed arrangements might cause the trustees to acquire new assets in place of their old securities. Those new assets might not be authorised investments. This is the problem which the s.10(3) power was intended to meet.[16]

It follows that where (as is now the case) the trustees have a wide power of investment they do not need the s.10(3) power at all; a fortiori they do not need any extension of the power to deal with debentures. This was recognised by the Trustee Act 2000 which repealed s.10 in its entirety. For good measure, the general power of management would cover this situation. In this book, therefore, the extended s.10(3) power is not adopted.

Power to repair and maintain trust property

21.9 Trustees have power to repair and maintain trust property.[17] It is not necessary to make express provision.

Unnecessary forms relating to administrative powers

"Powers not restricted by technical rules"

21.10 *These powers shall not be restricted by any technical rules of interpretation. They shall operate according to the widest generality of which they are capable.*

This form is not desirable: see 4.17(Construction not restricted by technical rules).

Restricting administrative powers to perpetuity period

21.11 Administrative powers are not subject to the rule against perpetuities and need not be restricted to the perpetuity period.[18]

"In addition to the statutory powers"

21.12 One sometimes sees a form that the powers of the trustees conferred by the trust shall be in addition to the powers conferred by statute or by law. This is unnecessary.[19]

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15 Section 68(13) TA 1925.
16 Wolstenholme and Cherry, *Conveyancing Statutes*, 13th edn (Oyez, 1972) Vol.4, p.10.
17 *Re Hotchkys* (1886) 32 Ch D 408 at 416–7; s.6 TOLATA 1996.
18 Section 1 PAA 2009.
19 Section 69(2) TA 1925 already provides that the powers conferred by statute shall be in addition to the powers conferred by the trust.

Trustees entitled to expenses of exercising powers

21.13 The exercise of a power may involve expense. One sometimes sees an express provision authorising the trustees to incur that expense. Even the parliamentary drafter is not above this practice.[20] However, trustees have a general power to reimburse themselves for all expenses properly incurred when acting on behalf of the trust.[21] Individual "charging" provisions are therefore unnecessary.

A further issue is whether the expenses should be paid out of income or capital. In the precedents in this book this is dealt with in a separate clause so it is not necessary to address this question in any individual power.

Trustees not liable for loss from exercising powers

21.14 This is otiose: see 6.21(Construction of trustee exemption clauses).

Other provisions

21.15 Some provisions are not permitted in trusts intended to qualify as IP or IHT special trusts. Such powers must be avoided in trusts of the appropriate type; they may be included in discretionary trusts and non-estate IP trusts. See Chapter 16 (Provisions inconsistent with IP and IHT special trusts). For provisions authorising trustees to act negligently, see 6.21(Construction of trustee exemption clauses). For power to change the name of a trust, see 10.18 (Power to change name of trust). For power to change the trust period, see 9.4 (Power to curtail the trust period).

Void powers

Power to decide between income and capital

21.16 The following power was held to be void:[22]

The trustees may:

(1) determine what articles pass under any specific bequest
(2) determine whether any moneys are to be considered as capital or income
(3) determine all questions and matters of doubt arising in the execution of the trusts of my will and every such determination whether made upon a question actually raised or only implied in the acts or proceedings of the trustees shall be conclusive and binding upon all persons interested under my will.

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20 Section 23(1) TA 1925 (repealed): "Trustees … may, instead of acting personally, employ and pay an agent … *and shall be entitled to be allowed and paid all charges and expenses so incurred* …".
21 Section 31 TA 2000; *Dowse v Gorton* [1891] AC 190.
22 This was invalid as an attempt to oust the jurisdiction of the court: *Re Wynn* [1952] Ch 271. The power set out here is a simplification of the actual form used in *Wynn*. Other parts of the clause (not set out here) repeat provisions of the TA 1925 and were otiose. The division into sub-clauses as set out in the text above is not in the original draft. If the drafter in *Wynn* had divided his long clause into subclauses it would have been easier to consider their implications.

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Accordingly trustees were not entitled, despite the clear terms of this power, to decide whether the proceeds of a sale of timber constituted capital or income. Danckwerts J. said:

> the insertion of a clause of this kind ... is not desirable, because it is likely to mislead equally trustees and beneficiaries as to their true position and rights; and, therefore, it would be far better if a clause of this kind was omitted.

So trustees should not be given power to decide whether a sum received by them is income or capital; or whether expenditure is of an income or capital nature. These questions must be decided by the courts; even though it has been said that the courts have not made a particularly good job of answering them.[23] This principle does not prohibit powers which allow trustees to treat income as capital, or vice versa; see 21.30(Provisions relating to the income/capital distinction).

Power to determine questions of fact or law or "matters of doubt"

21.17 The general rule is that trustees should not be given power to determine questions of law. Plainly it is a mistake—though once a common form—to give trustees power to determine "questions and matters of doubt".

Trustees may in principle be given power to determine questions of fact. The classic example is a power to make valuations. There is a statutory precedent for this.[24]

In practice many questions are difficult to classify as "fact" or "law". The drafter must tread warily in this area. To be safe, no-one should be given power to determine the meaning of expressions used in a trust. Nor, which is similar, should anyone have power to determine whether a condition of the trust is satisfied. But in special cases the courts will permit this.[25] If the

[23] Kay, *Is Complexity in Taxation Inevitable?* (IFS Working Paper 57, February 1985) *http://www.kessler.co.uk/wp-content/uploads/2012/04/Kay_Is_Complexity_in_Taxation_Inevitable.pdf*. Kay is an economist; but few lawyers would disagree. There is a good argument that *Wynn* should not be followed by a modern court, but the drafter should not proceed on that basis. *Wynn* was followed in *Wendt v Orr* [2004] WASC; 26 [2005] WTLR 223; 6 ITELR 989 (reversed on other grounds on appeal). However, in *Richardson v FCT* (2001) 48 ATR 101; [2001] FCA 1354 the Federal Court of Australia treated as valid, for the purposes of argument, a power "to determine whether any real or personal property or any increase or decrease in amount number or value of any property or holdings of property or any receipts or payments from for or in connection with any real or personal property shall be treated as and credited or debited to capital or to income ..." *Re Wynn* and similar authorities were not brought to the court's attention. Moreover, s.11 TA 2000 assumes that trustees can have "a power to decide whether payments should be made out of income or capital." Modern market practices have blurred the income/capital distinction still further.

[24] Section 22(3) TA 1925. Section 5 Trustee Investments Act 1961 (repealed) is another example.

[25] The court brushed aside a provision that "my trustees shall be the sole judges of what the term 'advancement in life' may signify" where the trustees exercised the power in self-

point is likely to be important the general practitioner should seek specialist advice. This book does not employ any provisions using this technique.

Power to make determinations subject to jurisdiction of court

21.18 The Trustees may (subject to the jurisdiction of the Court) determine whether receipts and liabilities are to be considered as capital or income, and whether expenses ought to be paid out of capital or income. The Trustees shall not be liable for any act done in pursuance of such determination (in the absence of fraud or negligence) even though it shall subsequently be held to have been wrongly made.

This is a power to determine doubtful capital/income issues, but only so far as the law allows. This is not objectionable, but it is of no effect, so long as *Wynn* is good law. This clause was found in earlier editions of this book. Now that *Wynn* has been followed, there seems to be no point at all in this clause. The clause does contain an exclusion of liability for trustees who make erroneous determinations but the general trustee exclusion clause in this book will cover that point.

Power exercisable with consent of court

21.19 The drafter should not direct that any power or provision in the trust should depend on the consent of the court. Such provisions are void.[26]

Which powers should the drafter include?

21.20 It is hard to predict exactly what powers trustees will need, because trustees in different circumstances need different powers. Trusts designed to hold investments, a residence, or shares in a family company each have different requirements.

When drafting administrative provisions two considerations lead the drafter to a policy of all-inclusion. First, circumstances may change. It is easy to see that trust property of one sort may be sold and other property acquired. So broad provisions should be included regardless of current needs. The second motive is the desire for a standard form of trustees' powers; so the drafter can run off their trusts and wills without *too* much consideration of individual circumstances. This is not laziness: it is efficiency: the client ultimately has to pay for the drafter's time and trouble.

interest: *Molyneux v Fletcher* [1898] 1 QB 648. But the courts respected a provision that the question whether a person belonged to "the Jewish Faith" be determined by the Chief Rabbi: *Re Tuck* [1978] Ch 49. The logical basis for this area of law has yet to be fully worked out. This is not the place to summarise the tentative solutions proposed in the cases. The practitioner is fortunate that this area has sparked considerable academic interest and a correspondingly large amount of literature; perhaps equally fortunately, the point arises only rarely in practice.

[26] *Re Hooker* [1955] Ch 55.

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STEP Standard Provisions

21.21 The Society of Trust and Estate Practitioners (STEP) has published the second edition of its standard provisions.[27] The text is based on the provisions used in this book. They are designed to be incorporated by reference.

Standard forms of this type are not an innovation. Standard forms in conveyancing and company documentation are taken for granted. Standard precedents in trust and will drafting are not unknown.[28]

The use of the STEP standard provisions has the following advantages. It shortens the length of a document; it reduces the risk of unfortunate omissions or inclusions; and practitioners familiar with the standard form will save time because they will not need to review individual administrative provisions at length when dealing with the trust.

On the other hand, if administrative provisions are set out at length, the material is immediately available for the testator and other readers; one need not turn to a separate document to find out the terms of the trust.

Where is the balance of advantage? The best course is to use the STEP standard provisions in simple matters, and to set out an express schedule of provisions in more substantial ones. The STEP standard provisions are now very widely used in exactly this sort of situation.

The course for which there is absolutely no justification is where the drafter fails to provide adequate provisions. The typical will is only two pages long. After the Trustee Act 2000 a trust governed by the general law is just about adequate. Nevertheless the lot of the beneficiaries under such wills would be improved if wills of this kind included the STEP standard provisions by reference.[29] This led Professor John Adams to describe the provisions as "quite the most exciting development for private client drafters for several decades"; and Ralph Ray to describe them as "an enormous asset".[30]

The first edition of the provisions remains in effect if it is incorporated into a will or trust whenever made.[31] A will should incorporate by reference only a document in existence at the date of execution.[32] The second edition was formally adopted by STEP on 16 April 2011. Which provisions are incorporated depend on the terms of the document. The recommended course is to use the current (2nd) edition.

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[27] The text is set out in Appendix 1. The text is also published in *Precedents for the Conveyancer*(looseleaf); *Wills, Probate and Administration Service* (looseleaf); *Encyclopaedia of Forms and Precedents*, 5th edn (2007), Vol. 40(1), para.3576; *Administration of Trusts* (looseleaf); *http://www.step.org/step-standard-provisions*. For the first edition see 10th edition of this book.

[28] See e.g. s.33 TA 1925 (protective trusts); s.179 LPA 1925; the Statutory Will Forms 1925; s.11 Married Woman's Property Act 1882; Law Society's Standard Conditions of Sale; s.7 Agricultural Holdings Act 1986.

[29] Such wills generally contain absolute gifts, rather than trusts; but trusts for minors may come about under s.33 Wills Act 1837 and the provisions may also be needed for the due administration of the will even if it does not create any trusts.

[30] *Taxation*, Vol.138, p.348.

[31] It is possible to carry on using the first edition but we strongly recommend switching to the second edition.

[32] Section 9 Wills Act 1837. The problem does not arise with lifetime settlements.

Incorporating the STEP standard provisions

The drafter has a choice, either: 21.22

(1) to incorporate only the "core" provisions (clauses 1–13) of the Standard Provisions; or

(2) to incorporate the fuller form which includes the "special provisions".

The default choice is the core provisions. The special provisions (clauses 14–23) can only be incorporated by reference:

> The standard provisions and all of the special provisions of the Society of Trust and Estate Practitioners (2nd ed.) shall apply

Specified special provisions may be incorporated by the words:

> The standard provisions and the following special provisions of the Society of Trust and Estate Practitioners (2nd ed.) shall apply:
> [specify which special provisions apply, as appropriate]

The reason for giving this choice is that the drafter faces a conflict between two irreconcilables: (1) restricting trustees' actions so that they cannot fail to carry out the wishes of the testator or settlor and (2) giving trustees freedom so that they can deal with the fund sensibly in the light of circumstances which cannot be exactly anticipated by the testator. The STEP provisions are drafted to give this choice. The standard provisions are narrower, and the special provisions are wider. Our recommended approach is to give the trustees the wider powers and rely on them to use them sensibly. Executors and trustees are persons chosen by the testator or settlor, specifically, and they should choose people who can be expected to carry out their wishes. We therefore recommend that all the special provisions are incorporated.

Subsequent editions of STEP standard provisions

A will should incorporate the STEP standard provisions as at the date of the will, not as at the date of the death.[33] STEP will not bring out new editions often but at some time a third edition may be needed. The standard provisions therefore provide that the executors or trustees may by deed incorporate that or any subsequent edition.[34] If the special provisions have not been incorporated, the trustees cannot incorporate them at a later stage. 21.23

Standard administrative provisions

We can now turn to consider the standard administrative provisions. 21.24

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[33] The better view is that a will may validly incorporate the provisions at the date of death, or as issued from time to time. However, it might be argued that the clause is invalid because of s.9 Wills Act 1837, so this form is not recommended. The problem does not arise with lifetime trusts.

[34] Later editions may be incorporated in this way: see *Re Beatty* [1990] 1 WLR 1503.

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Power of investment

21.25 In the absence of an express power of investment, trustees may invest in any investment[35] except land outside the UK.[36]

The exception is misguided. The Law Commission state:

> The concept of the trust is not universally recognised and, even in those jurisdictions that do recognise trusts, the law does not necessary give effect to the safeguards for the protection of the interests of beneficiaries against the claims of third parties that apply in England and Wales.[37]

The Law Commission Report is surely rare if not unique in that it contains a refutation and repudiation of its own position: the Scottish Law Commission observe in the following page of the same report:

> Trustees are subject to a duty of care at common law in the exercise of their functions. This duty requires them to consider the risk associated with purchasing immovable property in a foreign country that does not recognise trusts (such as claims by personal creditors of the trustees, and rights of succession on their death) in the same way as it requires them to weigh the risks of investing in securities in developing countries, for example, or the more volatile sectors of the British economy.[38]

Quite so. Accordingly, the form used here extends the power of investment. The form used in this book is as follows:

> (1) The Trustees may make any kind of investment that they could make if they were absolutely entitled to the Trust Fund. In particular the Trustees may invest in land in any part of the world and unsecured loans.
> (2) The Trustees may invest in speculative or hazardous investments but this power may only be exercised at the time when there are at least two Trustees, or the Trustee is a company carrying on a business which consists of or includes the management or administration of trusts.

The opening sentence echoes the statutory power.[39] The specific extension

[35] On the meaning of "investment" see Hicks, "The TA 2000 and the modern meaning of 'investment'" [2001] TLI 15(4) 203 *www http://www.kessler.co.uk/wp-content/uploads/2012/04/HicksTrusteeAct2000.pdf*.

[36] Section 3 TA 2000.

[37] Law Com., Report No. 260, *Trustees' Powers and Duties*, para.2.42 *http://www.lawcom.gov.uk/project/trustees-powers-and-duties*.

[38] Law Com. Report No. 260, *Trustees' Powers and Duties*, para.2.46. The Trustee Act (Northern Ireland) 2001 also follows the Scottish reasoning and contains no exceptions for foreign land. In Northern Ireland it was felt in particular that prohibiting the acquisition of land in the Republic of Ireland without express authorisation could not be justified. It is doubtful if the English statutory rule is EU law compliant, but it is not necessary to pursue that here.

[39] A power to invest "in such investments as the trustees think fit" was held to be unlimited without adding "as if they were absolutely entitled": *Re Harari* [1949] 1 All ER 430; *Re Peczenick* [1964] 2 All ER 339. See 6.24 ("As if the trustees were the absolute/beneficial owner"). For another statutory precedent see s.34 Pensions Act 1995.

to unsecured loans is only for the avoidance of doubt.[40] It is unlikely that trustees would ever want to invest in unsecured loans (absent a desire to confer a benefit on a beneficiary-borrower), but on balance it is preferable to give them clear power to do so if they wish.

Former editions of this book provided that trustees are under no obligation to diversify the Trust Fund. There is no rule which requires trustees to diversify trust investments; the rule is that trustees must consider the need for diversification (so far as is appropriate to the circumstances of the trust).[41] This provision is therefore not strictly necessary. On balance we consider that it is best left out.[42] Some drafters exclude the duty to *consider* the need for diversification[43] but that is wrong in principle.

Although wide, the power of investment is restricted by the usual principles applying to fiduciary[44] powers (supplemented by statutory provisions which merely state what the general law would in any case have implied). Accordingly:

> (1) **Duty to maximise return.**
> The trustees must aim to seek the best return for the beneficiaries, judged in relation to the risks of the investments in question.[45] For instance, they should not invest merely to accommodate the wishes of the settlor.[46]
> (2) **Prudence.**
> Trustees must in principle be prudent in their choice of investments. This does not mean they must avoid risk altogether, but no more than a "prudent degree of risk" is acceptable.[47] Trustees must avoid "hazardous" or "speculative" investments unless the trust deed confers express authority to do so.

Should the drafter alter this rule? In some cases the settlor or beneficiaries will be entrepreneurs and the trust fund will be invested in their business. In these cases a power to invest in hazardous or speculative investments will be necessary. In other cases the trust fund is a "nest egg" for the beneficiar-

[40] *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* [1934] AC 529 was based on the curious ground that a secured loan is, but an unsecured loan is not, an "investment". The concept of "investment" is much wider than it used to be, and this ground of the decision would not now be adopted in the UK.

[41] Section 4(3)(b) TA 2000. This is clear from the statutory wording, but if authority is needed, see *Gregson v HAE Trustees* [2009] 1 All ER (Comm) at [90].

[42] On principle, it is best not to include clauses which have no effect and are merely "for the avoidance of doubt" unless it is clear that they do good and no harm. In this case, omission of the clause may confuse those who (wrongly) think there is a duty to diversify. However, its inclusion may confuse those who (wrongly) think it excludes the duty to consider diversification. On balance, we therefore prefer to omit it. The same approach is adopted in the STEP standard provisions.

[43] TA 2000 does not state expressly that the duty can be excluded but this should be implied: the point is discussed in more detail in the context of excluding s.15 TA 2000, see 21.62 (Delegation).

[44] On the fiduciary nature of a power despite the "absolute owner" form.

[45] If land is acquired as an investment for the trust, the trustee has a duty to derive income from it if possible: *Brudenell-Bruce v Moore* [2014] EWHC 3679.

[46] *Cowan v Scargill* [1985] Ch 270.

[47] See e.g. *Daniel v Tee* [2016] 4 WLR 115.

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ies and the settlor would not want the trustees to indulge in anything approaching speculation.

What is the drafter to do? The precedents in this book include a clause authorising speculative investments subject to a two-trustee safeguard, though it should be deleted in appropriate cases.[48]

(3) **Duty to select suitable investments.**
The trustees must have regard to the suitability of the investment to the trust.[49] See s.4(3)(a) Trustee Act 2000. Some drafters direct that this section should not apply, but that is not done here. Plainly, trustees should try to select suitable investments; where the power is expressly excluded the duty of the trustees could hardly be different.

(4) **Duty to obtain and consider proper investment advice so far as necessary and appropriate.**[50]
This, again, does no more than spell out the implications of a fiduciary power in our era of investment sophistication and complexity, and it is not sensible to alter this rule.

Matters not belonging in an investment clause.

21.26 An investment clause sometimes confers a power to acquire residential property for a beneficiary to occupy, but this is not the logical place for that power. The acquisition of a residence for that purpose is not an "investment". The matter is more appropriately covered in a separate clause. Likewise questions of wasting assets, non-income producing assets and joint property are best dealt with in separate clauses. On power to vary investments, see 21.4 (Power to vary investments). On the formula "whether producing income or not", see 21.37 (The balance between income and capital). No express power is needed to acquire insurance policies as an investment.

General power of management and disposition

21.27 The form used in this book is as follows:

> The Trustees may effect any transaction relating to the management or disposition of Trust Property as if they were absolutely entitled to it.[51] In particular:
>
> (a) The Trustees may repair and maintain Trust Property.
> (b) The Trustees may develop or improve Trust Property.

Statute confers general powers in relation to land in England and Wales.[52]

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[48] It is best to resist the temptation to specify the circumstances in which hazardous investments may be made. Even if speculative investments are authorised, the trustees remain under a general duty to seek the best return for the beneficiaries, judged in relation to the risk involved.

[49] *Daniel v Tee* [2016] 4 WLR 115.

[50] Section 5 TA 2000.

[51] On the interpretation of the phrase "as if they were absolutely entitled" see 6.31 ("absolute owner" and "beneficial owner" clauses).

[52] Section 6(1) TOLATA 1996. The draft clause is loosely based on this section.

This general power is therefore still needed for personal property and for land outside England and Wales.

One could attempt to specify and authorise every conceivable form of disposition. This leads to a thesaurus of legal terminology:

> *The Trustees may retain or sell, exchange, convey, lease, mortgage, charge, pledge, license, grant options over and otherwise conduct the management of any real or personal property comprised in the trust fund …*

Section 57 Trustee Act 1925 and s.64 Settled Land Act 1925 are the basis for other precedents to the same effect. Trustees should be allowed to manage trust property without restrictions; this is the effect of the above form.

Power to improve trust property

> The Trustees may develop or improve Trust Property. 21.28

Trustees normally have power under the general law to make improvements.[53]

Improvements would normally be paid out of capital. Under the general law the trustees may in some cases, and must in other cases, recoup the cost of improvements gradually out of income. This is supposed to be done by instalments over a period of up to 25 years.[54] In practice it will be rare for the trustees to want to do this. However, in the precedents used in this book, the trustees are given a discretion in the matter: recoupment out of income is not compulsory.

It is quite common to find extended provision allowing the cost of improvement to be paid directly out of income:

> *The Trustees may apply capital or income of the Trust Fund in the improvement or development of Trust Property.*

This raises a problem. The power to use income for improvements is dispositive in nature, and inconsistent with an IP.[55] A clause of this kind is best avoided.

Power of joint purchase

The form used in this book is as follows: 21.29

> The Trustees may acquire property jointly with any Person.

Trustees may wish to acquire property jointly with others or to merge two

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[53] In the case of land in England and Wales, under s.6(1) TOLATA 1996; in other cases improvement expenditure may be authorised as an "investment" under the power of investment.

[54] Section 84(2)(a) (b) SLA 1925. It is considered that this rule continues to apply after TOLATA 1996. By implication, this must plainly be permitted under the rule against accumulations, and consistent with an interest in possession. There is a difference between this sort of gradual recoupment and paying the entire cost out of one year's income. The position is analogous to sinking funds: see 21.36 (Sinking fund).

[55] The question arises whether the power would be a "departure" power or a "disqualifying power". This would depend on the words used, but in the absence of any clear indication in the wording, the latter is the better view. See 16.11 (IP trusts: "departure" v "disqualifying" powers).

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trust funds together. It is considered that the general power of investment is wide enough to authorise this,[56] but the point is made expressly for the avoidance of doubt.

The clause refers to "acquiring property" rather than "investing in property". The common case of joint property will be the purchase of a residence jointly by trustees and a beneficiary; such a purchase may not, strictly, amount to an "investment".

Provisions relating to the income/capital distinction

21.30 Under a trust it is frequently necessary to decide whether a receipt or an item of expenditure is one of income or capital. In principle this is a matter of law, to be decided by the courts if need be. A provision that the trustees can decide such questions is void as it ousts the jurisdiction of the court: see 21.16 (Power to decide between income and capital). This is a shame, as it cannot be said that the courts have made a particularly good job of elucidating this troublesome distinction. Fortunately there is another drafting technique which has the same effect and which does not "oust the jurisdiction of the Court". This is a provision which directs trustees (or empowers trustees at their discretion) to treat an income receipt as if it were capital, or to treat a capital receipt as if it were income. It is a question of construction whether a clause confers a power to determine whether a receipt is income or capital (void) or a power to treat income as capital (valid). In practice of course it is easy to devise a clause which is unambiguous and valid, if one bears these principles in mind.[57]

Power to pay capital expenses out of income

21.31 The form used in this book is:

> The Trustees may pay taxes and other expenses out of capital or income whether or not they would otherwise be so payable.

This is an important power, for two reasons:

(1) It is sometimes unclear whether expenses should be paid out of capital or income;[58] using this power the trustees do not have to decide the point.

[56] This was the view of the Law Commission: *Trustees' Powers and Duties* (Law Com Report No 260), para.2.28. For the position in the absence of such wide general powers, see *Webb v Jonas* (1888) 39 Ch D 660. In *Re Harvey* [1941] 3 All ER 284 the absence of such a power was solved by an application under s.57 TA 1925. There is a power in s.15(b) TA 1925 to apportion blended funds.

[57] This paragraph was cited with approval in *Morgan Trust Company of the Bahamas Limited v DW*, Supreme Court of the Bahamas, Butterworths Offshore Service Cases, Vol.2, p.31. *http://www.kessler.co.uk/dtwt-archive*.

[58] The modern cases are *Carver v Duncan* 59 TC 125 and *HMRC v Clay* [2009] STC 469. In *Carver v Duncan* the House of Lords (obiter) took a very restrictive view of what constitutes an income expense. An expense is capital if it is incurred for the benefit of the estate as a whole. Annual investment management charges are on this test a capital expense! In *HMRC v Clay* the Court of Appeal held that an expense is incurred "for the benefit of the whole estate" if the purpose or object for which that expense was incurred was to confer benefit both on the income beneficiaries and on those entitled to capital on

(2) It is sometimes convenient to pay out of income expenses which are strictly capital expenses.

The Trustee Act 2000 has effected a significant change here. Formerly trustees had to pay capital expenses out of capital and income expenses out of income. Now it is considered they have a discretion.[59] The contrary view is arguable,[60] so it remains best to confer an express power.

This power is permitted for IP and IHT Special trusts, as it is administrative, see 16.7 (Power to pay capital expenses out of income).[61]

Accumulated income

The form in this book is as follows: **21.32**

> The Trustees may apply accumulated income as if it were income arising in the current year.

When income is accumulated, it is converted into capital at that time. Trustees can now accumulate income for the entire perpetuity period of 125

the determination of the income trusts. An expense can only be charged against income if it is incurred *exclusively* for the benefit of the income beneficiaries.

[59] To explain the law it is convenient to start with the power of insurance. The trustees have power to pay insurance premiums out of the "trust funds"; this expression means any income or capital funds of the trust: see s.19(5) TA 1925 (as amended by TA 2000). (This overrides the natural meaning of "Trust Funds", which is "Trust Capital".) Plainly, trustees can pay insurance premiums out of income or capital as they think fit. This is what the Law Commission intended: Trustees' Powers and Duties (Law Com Report No 260), para.6.6 *http://lawcommission.justice.gov.uk/*. Now, s.31 TA 2000 authorises a trustee to be reimbursed out of "trust funds" for any expenses properly incurred when acting on behalf of the trust. "Trust funds" is likewise defined as "income or capital funds of the trust": s.39(1) TA 2000. So the trustees must have the same discretion in relation to expenses generally. It is surprising that this significant change was made without express discussion in the Law Commission paper; it appears to have been unintentional. However, it is the only natural construction. It is consistent with many other statutory provisions, e.g. s.22(4) TA 1925. It is also a highly satisfactory result as the former law was complex, uncertain, unworkable, and ignored in practice. The old case law is still relevant as showing what is the position in the absence of an exercise of the trustees' powers. (*Carver v Duncan* 59 TC 125 would still be decided the same way, though slightly different reasoning is needed to reach the same conclusion).

[60] It is preferred by *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015) para.25–108. The consequence of the view adopted here is not as extreme as the horrified editors of Lewin suggest, because the power must be exercised in the context of the general duty on trustees to hold a fair balance between life tenant and remainderman.

[61] This is consistent with the principles in 16.2 (Significance of administrative/dispositive distinction) and supported by the Trustee Act 2000 (see fn.59 above). However, in *Re Rochford* [1965] Ch 111 at 123 the line was expressed slightly differently (though in practice there would rarely be any difference between the two approaches). On the one hand, it was said, there may be "some liability for a comparatively small amount—say counsel's fees for an opinion given to the trustees—which would normally be payable out of capital but trustees would probably have no difficulty in paying it out of income, without having to resort to anything which could be described as an accumulation of income." On the other hand, it was said, the capital liabilities may be "far too large to be paid out of any income payable to the next income beneficiary which would come to the hands of the trustees before the first date upon which such beneficiary might normally expect to receive a payment of income from the trust."

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years.[62] This power enables the trustees to pay that accumulated income (i.e. capital) to a person to whom income is payable. Although a payment of accumulated income would generally be a capital receipt,[63] the terms of the trust link the payment with an income interest of a beneficiary so that it is received as income.[64] That will generally be a good thing as the trustees will want an income receipt to reclaim the tax credit under s.494 Income Tax Act 2007.

Power to augment beneficiary's income from capital

21.33 The suggested form is:

> The Trustees may pay money that is Trust Property to an Income Beneficiary as their income, for the purpose of augmenting their income

The expression "Income Beneficiary" should be defined. The suggested form is:

> **"Income Beneficiary"**, in relation to Trust Property, means a Person to whom income of the Trust Property is payable (as of right or at the discretion of the Trustees).[65]

This power applies more widely. It is not limited to accumulated income. It would apply if there were no accumulated income

The power might be useful if trustees are unsure whether a receipt or an expense is one of income or capital. However it may also be needed for tax planning purposes. Suppose trustees wish to transfer trust capital to a beneficiary. Under the trusts in this book there are two ways to achieve this:

(1) The trustees may use their overriding power to advance the capital to the beneficiary.
(2) The trustees may use this power to treat the capital as income; and then pay that "income" to the Income Beneficiary.

From a practical, property law point of view there is no difference. Either way, the beneficiary simply receives the same property. There is, however, an important difference for tax. In the first case the receipt is one of capital;[66] in the other case it is a receipt of income.[67] If it is income, the beneficiary will suffer income tax, so a capital receipt will normally be preferred. However, there will be circumstances where it is better to have an income receipt. The common case would be where the trustees have accumulated

62 Section 13 PAA 2009. See 9.8 (The rule against accumulations).
63 *Stanley v IRC* [1944] 1 All ER 230.
64 See the comment of Knox J in *Stevenson v Wishart* 59 TC 740 at 757D.
65 The wording is reflected in section 3(4) Trusts (Capital and Income) Act 2013 which provides: "In this section 'income beneficiary', in relation to a trust, means a person entitled to income arising under the trust, or for whose benefit such income may be applied."
66 *Stevenson v Wishart* 59 TC 740.
67 That might not, exceptionally, be the case where the larger part of the trust fund is disposed of in this way. For the mere use of the label "income" is not determinative: see *Jackson's Trustees v IRC* 25 TC 13.

income and paid tax at the trust rate or dividend trust rate: an income receipt allows the beneficiary to reclaim that tax.[68]

In short, it will sometimes be better for a beneficiary to receive a sum as income; sometimes they should receive it as capital. It is desirable that the trustees should have power to achieve either result; so they can decide between income or capital as appropriate. The general law only allows this choice in restricted circumstances.[69]

The decision to apply trust funds as income should be documented by an appropriate trustee resolution.

Demergers

21.34 Where a company whose shares are held by a trust carries out an indirect demerger, the shares received are treated as trust capital. Where there is a direct demerger, however, the demerged shares were formerly treated as income.[70] Section 2 Trusts (Capital and Income) Act 2013 now provides that a distribution under a demerger which is exempt under ss.1076–1078 Corporation Tax Act 2010 is capital. This will apply to trusts whenever made. This does not apply to foreign demergers, to which the CTA will not apply. However use of the sinking fund power is a practical solution.[70]

Rent: income or capital receipt?

21.35 Under the general law rent is income. Under SLA settlements (now obsolescent), in the exceptional case of mining leases granted under the statutory power, rent was partly income and partly capital.[71] This explains why one occasionally sees in old trust deeds a provision to reverse the SLA rule:

> *No part of any mining or other rent shall be set aside as capital*;
> or
> **"Income of the trust fund"** *includes the net rents and profits of all land held in the Trust Fund.*

These forms are now obsolete because the mining rent under a trust of land will in principle now be regarded as wholly income, not partly capital.[72]

Some old precedents provide that:

68 Section 494 ITA 2007 (assuming the beneficiary does not pay tax at the higher rate). On the IHT position, see SP E6.
69 Income accumulated during a beneficiary's minority under s.31 TA 1925 can be applied as income during the beneficiary's minority, so long as the beneficiary's interest continues. The statutory power lapses when the beneficiary attains 18, or dies. However, the power may be modified by express provision so that it continues: see Appendix 1, 17 (Powers of maintenance: deferring income entitlement to 21). "Direct" and "indirect" demergers are transactions of the kind described by s.1076 and s.1077 Corporation Tax Act 2010. See *Sinclair v Lee* [1993] Ch 497; the law is discussed in more detail in Law Commission, *Capital and Income in Trusts: Classification and Apportionment* (Law Com Report No 315, 2009) *http://www.lawcom.gov.uk/project/capital-and-income-in-trusts-classification-and-apportionment*.
70 See 21.36 (Sinking fund).
71 Section 47 SLA 1925.
72 According to Gover, *Capital and Income*, 3rd edn (1933), this already was the position

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No part of any mining or other rent shall be set aside as capital unless and until and except to such extent as the Trustees in each or any case may think fit so to set aside the same.

Rather than this narrow form it would be better to have a general power to create a sinking fund (into which this power would be subsumed).

Sinking fund

21.36 Income may be set aside and invested to answer any liabilities which in the opinion of the Trustees ought to be borne out of income or to meet depreciation of the capital value of any Trust Property. In particular, income may be applied for a leasehold sinking fund policy.

This form would allow trustees to accumulate a sinking fund to replace wasting assets such as a lease. This is an administrative power, permitted in any form of trust.[73] The draft is based on statutory precedent.[74] There is some support for the view that trustees have this power under the general law[75] though it is better to state it expressly. The power is not affected by the rule against accumulations (though that rule now only concerns pre-2009 trusts).[76]

The power also offers a solution to the problems of foreign demergers and returns of capital in the form of special dividends, as a distribution which substantially reduces the value of trust capital could be retained as trust capital even though it was strictly classified as an income receipt rather than a capital receipt.

We consider that this form allows fairness which the general law does not,[77] and should not in practice be difficult to apply.

The balance between income and capital

21.37 The following form is used in this book:

The Trustees are under no duty to hold a balance between conflicting interests of Persons interested in Trust Property. In particular:

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under a trust for sale, after 1925; until 1997 that was perhaps debatable; but since the repeal of s.28 LPA 1925, it is reasonably clear that s.47 SLA 1925 treatment does not apply to trusts of land.

73 16.8 (Retention of income to provide for liabilities or depreciation of a capital asset).

74 *Re Hurlbatt* [1910] 2 Ch 553. Form 8(7)(b) of the Statutory Will Forms 1925 *http://www.kessler.co.uk/wp-content/uploads/2013/09/Statutory-Will-Forms-1925.pdf*. The power is also probably conferred (in relation to land) by s.6(1) TOLATA 1996, but it is helpful to state it expressly.

75 Underhill & Hayton, *Law of Trusts and Trustees*, 19th edn (London: LexisNexis, 2016) para.44.17 (Depreciation reserves).

76 Because the rule against accumulation does not apply to administrative provisions: see 16.2 (Significance of administrative/dispositive distinction). *Re Gardiner* [1901] 1 Ch 697.

77 The clause is administrative and not dispositive for tax purposes: see *Miller v IRC* [1987] STC 108. The clause does not affect who is the settlor. In particular, the life tenant is not the settlor: see Kessler, Taxation of Non-Residents & Foreign Domiciliaries, 15th edn (2016), 87.25 (Payment of administrative expenses) and 87.26 (Trust retains life tenant's income) online version *www.foreigndomiciliaries.co.uk*.

(1) The Trustees may acquire:
  (a) wasting assets, and
  (b) assets which yield little or no income

for investment or any other purpose.[78]

(2) The Trustees are under no duty to procure distributions from a company in which they are interested.

It is a general principle that trustees should maintain a fair balance between beneficiaries interested in income and capital. Two consequences arise.

1. Investment policy.

Trustees should invest the trust fund so as to produce a reasonable amount of income and to protect the capital values of the trust fund.[79] It would be wrong to invest the entire trust fund in a non-income producing asset (e.g. an insurance policy) or in a building society account (leading to capital depreciation owing to inflation). A fortiori this precludes an investment of the entire trust fund in a wasting asset (such as a short lease). The rule is flexible. For instance, where a life tenant is in special need of income, trustees might adopt an investment policy which will increase his or her income at some expense to capital.[80] **21.38**

This rule seems sensible enough; is it wise to exclude it? On balance, it is better to do so. There may be occasions where, for good reasons, trustees would like complete freedom either to invest in wasting assets—perhaps completely depriving the remainderman of his or her capital—or in non-income-producing assets—perhaps completely depriving the life tenant of income. For instance, the life tenant may be in state subsidised residential accommodation and find that all the income is taken to pay the cost of care.[81]

Decisions on these matters are better left to the good sense of the trustees rather than the general principles—however flexible—of trust law.

A standard form in old fashioned investment clauses authorises trustees to purchase investments "whether producing income or not". It is considered that this form does not affect the overriding duty to act fairly. It addresses the (now rejected)[82] view that an asset not yielding income is not an "investment" at all. Since it is clear that "investments" do nowadays include assets not yielding income, this form serves no purpose and should not be used.

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78 The words "or any other purpose" are needed, for instance, to authorise the acquisition of a short lease for the residence of a beneficiary.

79 *Re Dick*, Lopes-Hume v Dick [1891] Ch 423.

80 *Nestlé v National Westminster Bank* [1993] 1 WLR 1260 at 1279; applied in *Daniel v Tee* [2016] 4 WLR 115 (conclusion: the claimants could show some breaches of duty, particularly as regards early decisions made as to the types of investments, but could not prove that they had suffered loss as a result: [183]).

81 See Ch.20 (Wills and Care Fee Planning).

82 *Marson v Morton* 59 TC 381.

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2. Management of company held by trust.

21.39 The same principle governs the management of the trust fund. Where trustees exercise control over a company, they should adopt a dividend policy which is fair to all. The rule could be inconvenient, especially if the trust property consists of shares in a family company, and it seems best to exclude it.

Application of trust property

21.40 Trustees will generally have power to transfer trust property to some of the beneficiaries. Where this is the case, the following clauses offer the trustees alternatives to a simple transfer of trust capital. The power to apply accumulated income as income arising in the current year and the power to augment income from capital can also be used.

Loans to beneficiaries

21.41 The form used in this book is as follows:

> The Trustees may lend money that is Trust Property to an Income Beneficiary without security, on such terms as they think fit.

Trustees should have power to make loans to beneficiaries on favourable terms. Such loans may be convenient in practice and tax efficient. This clause authorises trustees to do this. It is uncertain to what extent such loans would be proper in the absence of express authority.[83]

This power should be made subject to the consent of the protector where there is one.

Express mention is given in the draft to unsecured loans in view of the general suspicion of unsecured loans expressed in the context of trustees' power of investment.[84]

Some drafters provide that no loan should be made to the settlor. This is not necessary. The settlor exclusion clause will prohibit loans on favourable terms. No harm arises from the mere possibility that loans could be made on arm's length terms. The actual making of the loan may have severe tax consequences: but that is a matter for the trustees to consider at the time of the loan.

In IP trusts the restriction to income beneficiaries could be simplified by saying

> **"Income Beneficiary"** means a beneficiary entitled to an interest in possession in the trust property.

However, that would cease to be appropriate if the trust ceased to be IP in form. In discretionary trusts the restriction may be omitted.

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[83] The power of investment will authorise loans by way of investment. Loans on favourable terms raise more problems. In *Re Laing* [1899] 1 Ch 593 trustees had power to invest trust funds "upon personal credit without security". It was assumed that trustees, under this clause, could lend (presumably interest free) to the life tenant.

[84] *Khoo Tek Keung v Ch'ng Joo Tuan Neoh* [1934] AC 529.

To the extent that the power is dispositive, it should strictly be restricted to the trust period. However, it is better to leave the "wait and see" rule to have this effect rather than to complicate the drafting by saying this expressly.

Trust property as security for beneficiaries' liabilities

The form used in this book is as follows: 21.42

> The Trustees may:
> (1) guarantee the debts or obligations of an Income Beneficiary
> (2) charge Trust Property as security for debts or obligations of an Income Beneficiary.

An alternative to the trustees lending money to a beneficiary is for them to provide security so he or she can borrow more easily elsewhere. This requires express authorisation.

This power should be made subject to the consent of the protector where there is one.

The restriction to income beneficiaries is the same as the power to apply trust capital as income.

Occupation and use of trust property

The form used in this book is as follows: 21.43

> (1) The Trustees may acquire any interest in property anywhere in the world for occupation or use by an Income Beneficiary.
> (2) The Trustees may permit an Income Beneficiary[85] to occupy or use Trust Property on such terms as they think fit.
> (3) This clause does not restrict any right of beneficiaries to occupy land under the Trusts of Land and Appointment of Trustees Act 1996.

Trustees have a statutory power to acquire land for a beneficiary's occupation, but the power is not completely comprehensive.[86] An unrestricted power is desirable, and sub-clause (1) sets this out.

Where trustees hold land, a life tenant has certain statutory rights of occupation.[87] These could be excluded by the drafter.[88] The rules are,

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[85] It is assumed that **"Income Beneficiary"**, in relation to Trust Property, means a Person to whom income of the Trust Property is payable (as of right or at the discretion of the Trustees).

[86] The statutory power only applies to freehold or leasehold land in the UK: s.8 TA 2000. On the objection to purchasing land outside the UK see 21.25 (Power of investment). *Re Power* [1947] Ch 572 is sometimes cited as authority for the proposition that a common form power of investment never permits trustees to purchase a residence for a beneficiary because a residence is not an "investment". More accurately, the position is considered to be that the acquisition of a residence *may* not be an investment, and so may be outside the scope of a common form power of investment, but this depends on the circumstances of the acquisition. But after the TA 2000 the issue could only arise in unusual circumstances, e.g. if trustees wish to purchase property for occupation by a person who is not a beneficiary (at a rent or rent free with the consent of a life tenant).

[87] Section 12 TOLATA 1996.

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however, quite satisfactory, and this precedent retains them: sub-paragraph (3). Where these rules do not apply (e.g. discretionary trusts, or property other than land) then the matter is left to the trustees' discretion. This would probably be the position in any event, but it seems best to cover it expressly.

This power should be made subject to the consent of the protector where there is one.

The draft clause covers both land and chattels; it seems unnecessary to deal with these in separate clauses. The clause rests loosely on statutory precedent.[89] Some precedents detail the terms on which the beneficiaries may use the property (e.g. "on such terms as to payment of rent, repair, decoration, insurance, etc."). The formulae end with a general power ("and such terms generally as the trustees think fit") which must include all that has gone before; nothing is gained.

Some drafters follow the statutory precedent and add that trustees shall not be liable for loss. Presumably, the fear is that one beneficiary will drop the Ming vase; and another will sue the trustees. Now, if the trustees are acting properly and within their powers, it is hard to see that they are liable. And in any case, should not the vase have been insured? The matter is adequately dealt with by the general provision discussed at 6.21 (Construction of trustee exemption clauses).

In IP trusts the restriction to "Income Beneficiaries" could be simplified by saying that **"Income Beneficiary"** means a beneficiary entitled to an interest in possession in the trust property; but that would cease to be appropriate if the trust ceased to be IP in form. In discretionary trusts the restriction may be omitted.

To the extent that the power is dispositive, it should strictly be restricted to the trust period. However, it is better to leave the "wait and see" rule to have this effect rather than to complicate the drafting by saying this expressly.

Power to trade

21.44 The form used in this book is as follows:

> The Trustees may carry on a trade, in any part of the world, alone or in partnership.

Trustees cannot properly carry on a trade without express power.[90]

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88 In some cases the provisions of TOLATA are expressly subject to contrary terms in a trust (e.g. ss.8, 11); in some cases the provisions expressly override any expression of contrary intent (e.g. s.4). In ss.12 and 13, however, there is no guidance in the statute either way. It is considered that these statutory rules can be excluded by the drafter. It is a fundamental principle of trust law that it is up to the settlor to decide what rights to confer under the trust. Restrictions on freedom of disposition should not be lightly inferred. Contrast the exclusion of s.15 TA 2000; see 21.66 (Delegation). (However, this question is academic. The statutory right of occupation is so limited that in circumstances where it confers a right of occupation trustees acting reasonably would almost invariably exercise their power to let the beneficiaries into occupation in any event.)

89 Section 8 TA 2000; s.47(1)(iv) AEA 1925.

90 A standard form power of investment is wide but does not confer a power to "invest" in a trade: *Re Berry* [1962] Ch 97 at p.111.

In practice trustees rarely carry on a trade, though trading trusts offer some tax[91] and commercial[92] advantages. The inclusion of the power does no harm, whereas it is conceivable that its absence may be regretted.[93] The standard practice is to include this power in all cases.

The draft is concise, self-explanatory and, it is thought, comprehensive. There is little trust law on the subject but there is a company law precedent.[94]

Some drafters authorise the trustees to carry on a trade or business. The word "business" is wider than the word "trade".[95] It is hard to see what this adds. If it is a business of making or holding investments, there is already ample authority for that in the power of investment. It is not necessary to give trustees an express indemnity against the trust fund for trading debts properly incurred by them.[96]

Deposit of documents and nominees

21.45 The form used in this book is as follows:

> (1) The Trustees may deposit documents relating to the Trust (including bearer securities) with any Person.
>
> (2) The Trustees may vest Trust Property in any Person as nominee, may authorise the use of sub-nominees, and may place Trust Property in the possession or control of any Person.

It is often convenient to use a nominee. This can save time, paperwork and expense, especially on a change of trustees or on the sale of securities. It also reduces the cost of investment management.

In *Mason v Fairbrother*[97] Judge Blackett-Ord V.C. considered:

> a proviso about a nominee being a bank or something like that. But in my view that is an undesirable complication. I will simply authorise the trustees to appoint a nominee or nominees to hold any investment in the fund. That is a power

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91 The IHT and CGT system generally favours trade over investment, a partial reversal of the 19th century upper class prejudice against trade. (Income tax is now heading the opposite way.) However, the distinction the law draws between trade and investment is (inevitably) a formal one, and often the same economic result can be achieved by an "investment" or in a form which the law regards as a trade. For instance, trustees holding land used by a trader may arrange to trade in partnership with the occupier of the land so as to qualify for 100% IHT business property relief, or for CGT roll-over and entrepreneurs reliefs. This is easy if the land (often farmland) is occupied by a beneficiary, but may be possible even if the occupier is unconnected with the trust.

92 A trading trust with a corporate trustee enjoys an element of limited liability without public disclosure of trading accounts.

93 Indeed, its absence caused the trustee in *Re Portman Estate* [2015] WTLR 871 to apply to the court pursuant to s.57 Trustee Act 1925 for an expansion of its administrative powers, including the addition of a power to trade.

94 Section 3A of the former Companies Act 1985 (there is no direct equivalent in the current s.31 Companies Act 2006).

95 *American Leaf Blending Co. Sdn Bhd v Director-General of Inland Revenue* [1978] STC 561.

96 21.13 (Trustees entitled to expenses of exercising powers).

97 [1983] 2 All ER 1078 at 1087. (This was an application for additional powers under s.57 TA 1925).

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