to information about their trust. The Hong Kong government concluded, after taking expert advice, that such matters should be left to the court without any legislative intervention. Most common law jurisdictions have followed the Privy Council decision in *Schmidt v Rosewood*[23] which is generally interpreted as requiring trustees to provide beneficiaries with basic information such as trust deeds and accounts. It is likely that the Hong Kong courts would follow this lead – the authors of the consultation refer to it as the 'leading case'.

(d) Non-charitable purpose trusts – the consultation process did consider the introduction in Hong Kong of legislation to allow non-charitable purpose trusts. The majority of respondents were in favour of this proposal[24]. The proposal was not adopted, in part because of concerns that purpose trusts could be used for nefarious activities including money laundering.

23 [2003] 3 All ER 76.

24 *http://www.fstb.gov.hk/fsb/ppr/consult/doc/to_review_responese_e.pdf.* [Accessed 16 November 2015]

CHAPTER 3

FIRST PRINCIPLES

1. DUTY TO THE CLIENT

3–001 The purpose of drafting a settlement or a will is to give effect to the wishes of the settlor or testator. The professional adviser will do more than this: his duty is to advise, ascertain and carry out his client's wishes.

3–002 This is a matter of explanation and common sense. Suggestions of professional advisers are often brushed aside by those wary or suspicious of them. It is easy to let clients do what they want; or what they think they want: there are, perhaps particularly in Hong Kong, many clients who have been commercially successful and who are not used to having their requests questioned[1]. They or their families will pay the resulting bills in due course, perhaps without complaint; almost certainly without redress. But the responsibility of the adviser is to help his client whose basic wish will be to benefit their family in the most appropriate way. Empathy and an ability to communicate are called for; a little persuasion or cajolery may not be amiss.

3–003 A docile client may sign anything put in front of them. The professional adviser does not serve that client well if he simply places before them the firm's standard draft - even if settled by counsel - for execution without discussion and explanation.

3–004 Consultation with the client comes at two stages.

- First, the general strategy; at this stage consideration can be given to the nature of the trust property, the tax position, the class of beneficiaries and the choice of trustees or executors, and issues of capacity and undue influence.
- Later, when the draft is completed, it should itself be explained to the client clause by clause. A modern style of drafting renders this task easier. The execution of a document which the client does not understand is a recipe for disaster.

3–005 On the question of meeting the client, the Guide to Professional Conduct for Hong Kong Solicitors says:

> *In relation to the preparation of wills, especially where the client may be elderly, it is important to obtain enough information about the client's circumstances to be able properly to act for the client. When asked to prepare a will on the basis of written instructions alone, a solicitor should always consider carefully whether these are sufficient or whether the solicitor should see the client to discuss the instructions*[2].

3–006 Where the client is a trustee or a beneficiary - especially if both - the solicitor has the difficult duty of explaining to the settlor the nature of their rights and duties under the trust. Legal and equitable ownership are subtle concepts. The client must not be left

1 "Well, I don't know as I want a lawyer to tell me what I cannot do. I hire him to tell how to do what I want to do." J.P. Morgan, financier.

2 5.05, The Hong Kong Solicitors' Guide to Professional Conduct, Vol. 1.

with the impression that the trust fund is simply '*their fund*'. The trustee acting on that assumption will inevitably act in breach of trust; disabused of their illusions, the client may blame their advisers; alternatively the trust deed may be dismissed as a sham.

2. ELDERLY OR ILL CLIENT

3–007 In the case of an aged testator, or a testator who has lately suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken. The making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator.

3–008 The Hong Kong Court of Appeal in *Chiu Man Fu v Chiu Chung Kwan Ying*[3] disregarded a certificate prepared by the doctor of a testator because the doctor did not prepare a full attendance note setting out the examination undertaken, and the doctor was not aware of the existence of an earlier will materially different from that executed following the examination (such that he could not ask appropriate questions to ascertain the testator's testamentary wishes). It is imperative, then, that the medical practitioner understand the circumstances of the matter and keeps a full record of his examination and his findings.

3–009 There are other precautions which should be taken. The instructions of the testator should be taken in the absence of anyone who may stand to benefit, or who may have influence over the testator. A file note recording the meeting at which the will was executed should be kept and, perhaps, an affidavit by a witness to record due execution.

3–010 These are not counsels of perfection. If proper precautions are not taken, injustice may result or be imagined, and great expense and misery may be caused unnecessarily.

3–011 The same applies of course to a lifetime settlement made by such a client.

3. DOES DRAFTING MATTER?

3–012 The Courts do not penalise the client for their lawyer's slovenly drafting. It would be more accurate to say that the Courts try not to penalise the client for bad drafting. Slovenly drafting leads to ambiguity and sometimes invalidity. To ascertain the meaning of a poorly drafted document can be a matter of great difficulty. An example is the Hong Kong decision in *Clemencia Manansala Gallagher v Mark Edward Kirkham and Azure Trustees Ltd*[4] in which the judge concluded that the

3 (Unrep., CACV 40/2012, [2013] HKEC 937).

4 (Unrep., HCMP 1850/2009, 19 August 2010), CFI. On appeal it was noted that: '*The judge correctly observed that poor draftsmanship provided considerable scope for advancing different interpretations of the trust instrument. In fact, the trust instrument bristles with difficulties of construction.*' (unrep., HCMP 83/2011 & HCMP 315 /2011, 10 December 2012).

'poor drafting of the Deed had certainly given room for creative construction' and that he would hope that the '*common standard form*' trust deed in question would not be used again as it is '*bound to stir up more troubles than it resolves*'.

3–013 Some apparently trivial drafting errors have disastrous tax consequences. Drafting does matter.

4. Flexibility

3–014 A trust needs to be flexible. This means that trustees require overriding powers to enable them to rewrite the terms of the trust as appropriate. Beneficiaries' circumstances change in ways that are not possible to foresee. Trustees need to adapt to tax changes which are wholly unpredictable.

5. Simplicity

3–015 This book strives for simplicity of style and simplicity of concept. Simplicity of style is self-explanatory: a preference for the shorter formula over the longer; the use of aids to the reader such as punctuation and clause headings; and the rejection of material which is archaic or otiose.

3–016 Simplicity of concept calls for the broad structure of a trust to be simple and comprehensible. Provisions should be set out in a logical sequence. Vastly complicated settlements should not be employed where simpler provisions would be satisfactory.

3–017 Dense and obscure drafting carries a heavier price than may be realised. The more complex a draft, the more professional time must be spent studying it in order to ascertain its meaning, and the greater the chance of errors escaping observation.

6. Sources for Drafting

3–018 The aim of the drafter is to keep, so far as possible, to familiar paths; to be unoriginal. They are happy to use well-worn phrases of established meaning and fearful to use novel forms. To this end the drafter may draw on many sources. Of course such sources should be used as a guide and not a crib. The wide variety of forms and styles employed in statute and published precedents force the drafter to some form of selection. Innovation is constantly required to meet changes in tax and trust law, circumstances of beneficiaries and wishes of settlors.

(a) *Statute*

3–019 Statute should be the drafter's starting point: wording which the legislative drafter thought adequate can rarely be criticised as defective. This applies not only to the

precedents which the legislative drafter occasionally provides for the benefit of the profession, but to the vast body of statutory material. Many different styles of drafting are to be found in statutory precedent. This is hardly surprising when one bears in mind that many different hands may have been at work even in a single piece of statute.

(b) *Law Reports*

3–020 In the Law Reports, an immense number of precedents are discussed and analysed, and the adoption of a clause or formula which has the benefit of judicial consideration and approval may be attractive. Conversely, where the Court has disapproved of a form, the drafter should take careful note.

(c) *Company law*

3–021 Precedents from a company law context may assist the trust drafter.

(d) *Legal literature and precedent books*

3–022 There is some body of published precedents of varying age and authority in Hong Kong and, in practice, many practitioners will refer to UK precedents such as *Practical Will Precedents* and *Practical Trust Precedents*. The authors of these works have naturally drawn from similar sources and each other. The forms proposed have a great deal in common; a review of any indenture from an earlier century will reveal phrases or entire clauses still familiar today. At the same time, copyright considerations may have led to an unnatural multiplicity in published precedents.

7. Formal Qualifications for the Drafter

3–023 The position is governed by the Legal Practitioners Ordinance (Cap 159). Section 47 of that Ordinance provides that any 'unqualified person' (that is, a person who is not a solicitor in Hong Kong) not being a barrister or notary public, may not, in expectation of a fee or other remuneration, be involved in the drafting up of any instrument relating to movable or immovable property or to any legal proceedings. '*Instrument*' for this purpose does not include a '*will or other testamentary instrument*'.

3–024 Is a deed of appointment (or appointment of new trustees) a document '*relating to movable or immovable property*' and, if so, what (and where) is the property to which it relates? At first sight an appointment relates to the trust assets. But a trust fund may have assets all over the world. A better analysis would be that the document relates to the equitable interests of the beneficiaries. An equitable interest is probably situate where the trustees are resident, so an appointment governed by Hong Kong law should be drafted by an authorised person if the trustees are resident in Hong Kong. A Hong Kong law trust deed with Hong Kong trustees should likewise be drafted by a qualified person.

8. MONEY LAUNDERING

3–025 Hong Kong solicitors and other practitioners have obligations relating to anti-money laundering pursuant to the Organised and Serious Crimes Ordinance (Cap 455) and the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)[5].

3–026 The Law Society of Hong Kong has provided guidance on anti-money laundering procedures and requirements in Practice Direction P[6].

3–027 The following is not a discussion of the law, which goes beyond the scope of a book on trust drafting, but a summary in the nature of a checklist.

- Does the drafter suspect that the trust fund represents proceeds of criminal conduct? If so, drafting the trust may be an offence.
- If the drafter has this suspicion, he may commit an offence if he does not make an appropriate response.
- The drafter may need to comply with identification and record-keeping procedures, and wider client due diligence obligations in terms of identifying, for example, the source of funds.
- Civil claims against the drafter

3–028 A drafter may of course incur civil liabilities. In this work we need only mention the main heads of liability:

(a) in contract or negligence, to the client;
(b) in negligence, to beneficiaries or trustees;
(c) for dishonestly assisting a breach of trust even though the funds never pass into the drafter's hands;
(d) as constructive trustee for breach of trust, if the trust funds do pass through the drafter's hands as trustee or nominee (i.e. funds paid to a client account); and
(e) in due course, if the drafter becomes trustee, for actual breach of trust.

5 Institutions with whom Hong Kong solicitors deal will have particular obligations prescribed by the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615).

6 *http://www.hklawsoc.org.hk/pub_e/professionalguide/volume2/default.asp?cap=24.17.* [Accessed 16 November 2015].

CHAPTER 4

TRUST TERMINOLOGY AND THE USE OF THE CHINESE LANGUAGE

1. TRUST TERMINOLOGY

(a) *Settlement*

4–001 In general usage, the word 'settlement' describes the situation in which property is held in trust for a succession of interests, or the disposition creating that situation.

(b) *'Trust' and 'settlement'*

4–002 In contemporary usage, the term 'trust' is generally used with exactly the same meaning as 'settlement', and has become the much more common term.

4–003 Sometimes a distinction is drawn under which the term 'trust' is used to refer to will trusts and 'settlement' refers to lifetime settlements; but this distinction is not firmly established and is not recommended.

(c) *'Trust' and 'estate of deceased person'*

4–004 The legal and equitable interest in the estate of a deceased person vests in the executors until the estate is administered, and so an unadministered estate is not a 'trust' if 'trust' is understood to mean a situation where there is a separation of legal and equitable interests[1]; see *Commissioner of Stamp Duties (Queensland) v Livingston*[2].

4–005 Executors are nevertheless often said to hold property on 'trust' and the word 'trust' is often used to refer to the way in which executors hold property in an estate. This usage is so common, both in statute[3] and in law reports[4], it cannot be described as improper or even loose language; it might perhaps be described as a non-technical usage.

4–006 Where a will appoints a person as both an executor and a trustee, it is a question of fact whether the transition from personal representative to trustee has happened. A personal representative holding estate assets will not change to being a trustee under a will trust unless he has made an assent to such a change and, in practice, a will trust comes into being when the residuary estate has been ascertained and is held as such[5].

1 There is a debate between Lord Nicholls and Lord Millett on whether the situation where legal and equitable interests are separated should always be described as a trust; see Millett, '*Restitution and Constructive Trusts*' (1998) 114 LQR 399. But happily the private client lawyer can leave that issue to the commercial lawyers.

2 [1965] AC 694.

3 Section 62(1)(a) of the Probate and Administration Ordinance (Cap 10) provides that on the death of a person intestate, his personal representatives hold his estate 'upon trust'. An example from England can be found in the Statutory Will Forms 1925, Form 8.

4 See eg *Commissioner for Stamp Duties (Queensland) v Livingston* [1965] AC 694 at p707.

5 *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon Hang* [1993] 1 HKC 649.

(d) *Other usage of 'trust'*

'Trust' is also used as a synonym of 'duty'. This usage is confusing and best avoided[6]. **4–007**

'Trust' was used in the past to describe an equitable interest, but this usage is now archaic[7]. **4–008**

The expression 'trusts' is sometimes used simply to mean all the provisions of a settlement. The word 'terms' or 'provisions' would be clearer. **4–009**

(e) *Types of trusts*

Most family trusts fall into one of two categories[8]: **4–010**

- Interest in possession trust. An interest in possession (IP) trust is one where trust income must be paid to a particular beneficiary ('the life tenant').
- Discretionary trust: private client practitioners use the expression 'discretionary trust' where trust income and capital may be paid to one or more of a class of beneficiaries, as the trustees think fit ('at their discretion'), without significant restrictions[9]. If it is desired to identify this type of trust more precisely, it may be called a 'conventional'[10] or 'common form' discretionary trust.

In the most literal sense, the expression 'discretionary trust' is taken to mean any trust in which the trustees (or others) have powers ('discretions') over trust income or trust capital. In this strict sense almost all trusts are 'discretionary', since trustees will at least have the power of advancement conferred by s.34 of the Trustee Ordinance (Cap 29). This usage is rare, confusing, and best avoided. **4–011**

(f) *Other terminology*

The following are not full definitions but brief explanations and, inevitably, over-simplifications. So 'except where the context otherwise requires...': **4–012**

> Administrative power: power to deal with the administration of a trust, such as a power to invest trust property; as opposed to a dispositive power.

6 Paragraph 9–002 (Duties and powers distinguished).

7 It was found in s.9 Statute of Frauds 1677 ('all grants and assignments of any trust or confidence shall be in writing...').

8 This is a loose categorisation. There is infinite potential for variety within each category. Settlements may change from one form to another through exercise of trustees' powers or change in the circumstances of the beneficiaries. A settlement may take partly one form and partly another.

9 More accurately, the expression 'discretionary trust' does not have a constant, fixed normative meaning: see *Chief Commr of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [8], *www.austlii.org*.

10 The first recorded usage of this expression in the law reports is in *Kidson v MacDonald* [1974] Ch 342, reflecting the rising popularity of discretionary trusts in the 1960s.

Advancement: see para. 13–044 (Power of advancement).

Appointment: see para. 13–005 (Power of appointment).

Bare trust: see Chapter 21 (Bare trusts).

Default clause: provision in a settlement directing who should become entitled to the trust property if all the other beneficiaries should die or the trusts fail.

Default beneficiary: beneficiary entitled under a default clause.

Discretionary trusts: see Chapter 17.

Duties and powers: see para. 9–002.

Life time interest in possession trust: see Chapter 16.

Interest in possession: the right to the income from trust property.

Life tenant: person entitled to the income of trust property.

Overriding powers: term used in this book to refer to:

(a) power of appointment;
(b) power to transfer property to a new settlement; and
(c) power of advancement.

Power of advancement: power to give a beneficiary trust capital or to apply it for his benefit. See para. 13–044 (Power of advancement).

Power of appointment: power to create new trusts for the benefit of beneficiaries.

Protector: name given to a person who oversees trustees with power of consent and dismissal.

Substantive trust: term used in this book to describe a trust other than a bare trust.

(g) *Other forms of settlement*

4–013 It would not be possible to specify all the fanciful terminology sometimes used in connection with trusts.

- Asset protection trust is one in which the avoidance of insolvency legislation is a primary motive. The term (perhaps understandably) originates from America.
- Marriage settlement; a settlement made in consideration of marriage or in contemplation of an intended marriage. The old form was a life interest for husband and wife, with remainder to such of their issue as they might appoint; and in default of appointment for their children in equal shares. These forms are now obsolete[11] but any modern form of settlement may be a 'marriage settlement'.

11 But financial negotiations prior to marriage, not dissimilar to those described in dusty textbooks on marriage settlements, may yet return in the guise of pre-nuptial agreements.

4–014 There is, it should be noted, a class of trusts recognised under Hong Kong law relating to land in the New Territories. These are governed by Chinese customary laws and are not considered in this book. There are three recognised types of such trusts: tsos, tongs and wuis.

2. USE OF THE CHINESE LANGUAGE

(a) *Background*

4–015 The Official Languages Ordinance (Cap 5) provides that the English and Chinese languages have equal status in Hong Kong and are both official languages. This Ordinance provides that all legislation is enacted and published in both languages, and allows judicial officers the choice of using either language in Hong Kong Court proceedings. Not only may judicial officials choose to use either language in court proceedings, but so too may a party or a witness use either.

4–016 English was the language of the Hong Kong Government until the enactment of the Official Languages Ordinance in 1974. While there is a Chinese language version of the Trustee Ordinance (Cap 29), the original legislation existed in English only and was derived in large part from the (English) Trustee Act 1925. There is, then, as a practical matter, more familiarity with, and guidance in respect of, the English language version of the Trustee Ordinance (Cap 29). Section 10(c) of the Interpretation and General Clause Ordinance (Cap 1) does also provide that an expression of the 'common law' in statute shall be given that meaning rather than any analogous meaning found in the Chinese language version.

4–017 It might be noted that the Recognition of Trusts Ordinance (Cap 76) does specifically provide (s.2(2)) that the English language version of the Hague Convention on the Law Applicable to Trusts and on their Recognition should prevail in the event of any inconsistency with the Chinese language version.

4–018 The Official Languages Ordinance (Cap 5) does not prescribe which Chinese dialect should prevail. There are traditionally considered to be seven main Chinese dialects and the language can be written in either traditional or simplified characters. As the Ordinance does not prescribe which dialect should prevail, any dialed can, in theory, be used in Hong Kong. Since most of the local Hong Kong population speak Cantonese, it is the most frequently used dialect in official communication although, increasingly, Mandarin is being used, as the influence of the mainland People's Republic of China is felt in Hong Kong's economic life.

(b) *Wills*

4–019 It is perfectly possible to draft wills in Chinese, and Chinese language wills are admitted to probate in Hong Kong on a regular basis.

4–020 It used to be the case that a will of a Chinese testator that was written in Chinese and signed would be treated as properly executed, notwithstanding that it failed to comply with the formal requirements of the Wills Ordinance (Cap 30). This provision now only applies to testators dying before 3 November 1995[12].

4–021 An application for probate may be made in Hong Kong in either English or Chinese and the language chosen will determine the language used in the grant issued by the Registry. If Chinese is used, the application should be in traditional characters.

4–022 In relation to an English language will, for a testator whose knowledge of English is as a second language, an appropriate attestation clause should be used. An example would be:

> *This will having first been read over to the said [testator] (who understands the [ ] dialect of the Chinese language but has an imperfect knowledge of, and cannot read, the English language) by me the undersigned [first witness] in English, and having been truly interpreted to the said [testator] by me the undersigned [second witness] who understands both the English and Chinese languages [or both of whom the said [witnesses] understand both the English and Chinese languages], which reading and interpretation were both done in our presence when the said [testator] appeared thoroughly to understand this will and to approve the contents thereof, was signed by the said [testator] with his mark as his last will in the presence of us both present at the same time who at his request in his presence and in the presence of each other have signed our names below as witnesses.*

(c) *Trusts*

4–023 It would be more unusual to prepare a complex will creating testamentary trusts, or a lifetime trust, in Chinese. This is because so much trust law terminology is found in the English usage and exists as 'terms of art'. In addition, concepts and terminology in tax and trusts law in Hong Kong has, due to historical reasons, an English heritage, whereas tax and trusts law in the People's Republic of China and Taiwan have had more influence from other civil law jurisdictions.

4–024 It would be common in Hong Kong legal practice for unofficial Chinese translations to be prepared of English language documents. While this is helpful in terms of ensuring that clients understand the terms of documents, it is, of course, important that the translation be clearly marked as such providing that the English language version of the document is that which applies. Example language would be:

12 The commencement date of the Wills (Amendment) Ordinance 1995 (No 56 of 1995).

注意:本中文譯本僅供參考。若有歧異，概以英文原文版本為準。

[Note: This Chinese translation of the English version is for reference only. If there is any inconsistency or ambiguity between the Chinese version and the English version, the English version shall prevail.]

CHAPTER 8

EXECUTORS AND TRUSTEES

1. NUMBER OF TRUSTEES

Unless a trust provides otherwise, the minimum number of trustees is one[1]. There is no maximum, though minor complications arise if trustees of land exceed four[2]. The maximum number of personal representatives who can take a Hong Kong grant is also four[3]. **8–001**

Otherwise than when a professional trust company is appointed, there should normally be two trustees: **8–002**

(a) a professional trustee who should be a partner in a firm of solicitors or accountants. This gives slightly more security than a sole practitioner; and
(b) the settlor, or a friend or member of the family.

There may be more than two trustees, though trust administration becomes more cumbersome. In older precedents, one occasionally sees requirements that there should be at least two or even three trustees at all times. This seems unnecessary and has rightly fallen out of favour. **8–003**

2. CHOICE OF EXECUTORS AND TRUSTEES

The settlor may be a trustee and so may the settlor's spouse. The appointment of the settlor (or spouse) as trustee does not have any tax drawback, at least from a Hong Kong perspective. **8–004**

3. BENEFICIARIES AS EXECUTORS AND TRUSTEES

Old precedents sometimes direct that a beneficiary may not be appointed trustee. This is entirely the wrong approach. The appointment of a beneficiary as trustee **8–005**

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1 A sole trustee is competent in every respect with the following exceptions:
(1) A sole trustee may not be able to give a valid receipt for capital sums derived from land: s20(3) of the Trustee Ordinance (Cap 29) although s.15(2) of the Trustee Ordinance (Cap 29) allows for a valid receipt to the given under a trust for sale of land by a single trustee under a power to sell).
(2) Two individual trustees may be needed to discharge a retiring trustee under the statutory power (s.38(1)(c) Trustee Ordinance (Cap 29).
These restrictions do not apply to a trust corporation. Rules 2 is excluded in the precedents in this book.

2 Section 36(2) of the Trustee Ordinance (Cap 29) provides:

In the case of ... dispositions creating trusts of land ...
(a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;
(b) the number of the trustees shall not be increased beyond four.

3 Section 25 of the Probate and Administration Ordinance (Cap 10).

gives them a direct interest and involvement in their family's financial affairs, and may be highly advantageous.

8–006 The appointment of a beneficiary as executor or trustee does, however, give rise to a possible conflict of interest. There are various ways to minimise the problems which may arise. First, of course, no one will appoint a beneficiary as executor or trustee unless confident that the appointee will act properly. Secondly, the beneficiary will not be the sole trustee. There will be a professional trustee to hold the balance. A settlor creating a trust for their two children and their respective families might appoint each child trustee to safeguard each family interest. Thirdly, the trust will provide that a beneficiary who is a trustee cannot exercise powers in their own favour without the concurrence of an independent trustee.

8–007 In short, it is thought that the conflict of interest will be manageable and should not be a serious objection to the appointment of a beneficiary as executor or trustee. Given the advantages of a beneficiary acting as executor or trustee, the rigorous exclusion of the possibility of conflicts of interest carries too high a price.

4. PROFESSIONAL EXECUTORS AND TRUSTEES

8–008 The aim in combining family and professional executors or trustees is that the estate or trust should be administered both with technical expertise and an understanding of the needs of the beneficiaries.

8–009 Professionals will be reluctant to act if they may incur personal liabilities unless indemnified. Trustees may incur liabilities to third parties (e.g. loans to acquire trust property, leases with onerous covenants, sale or purchase agreements or shareholder agreements). Here, with care, it should be possible to arrange that the professional trustees are not personally liable beyond the extent of any trust property. This, therefore, should not cause the trust to be deprived of the benefit of a professional trustee. Tax liabilities (and liability for breach of trust) are inescapably joint and several liabilities of trustees. These may be liabilities for which trustees cannot be suitably indemnified. The solution may be for a professional trustee to retire in favour of a family trustee before any liability accrues[4].

5. INFORMING THE CLIENT

8–010 The drafter should provide clients with sufficient information to make an informed decision about the appointment of a professional as executor or trustee and its related costs. It is important that clients understand that such an appointment is not compulsory and may be inappropriate if the estate or trust is small or straightforward. If non-professionals (e.g. friends or family) are appointed, they can

4 However, a retirement in order to facilitate a breach of trust may itself be a breach of trust.

always engage the services of a professional to assist them with the administration of the estate or trust.

6. PARTNERS IN THE FIRM OF SOLICITORS

8–011 A testator may not want to name an individual solicitor as executor because they may predecease him, retire or change firms. It is not possible to appoint a partnership as this does not have legal personality. The solution is to appoint partners in the firm at the date of death, with the wish that only two take out a grant and act. Even if only two take out a grant, all the partners will be appointed executors but this should cause no problem because they can disclaim and the proving executors can administer the trust in the meantime.

8–012 It is important to make provision for the firm being succeeded. The following form is suggested:

> *I appoint the partners at the date of my death in the firm of [ ] of [ ], or the firm which at that date has succeeded to and carries on its practice to be the executors and trustees of my will (and I express the wish that two and only two of them shall prove my will and act initially as my executors and trustees).*

7. CORPORATE TRUSTEES

8–013 There is a choice between professional individuals, and trust companies. Trust companies will neither die nor retire. On the other hand, if a trust company is appointed executor or trustee, the personnel actually managing the estate or trust may, and usually will, change from time to time, without the consent and perhaps even without the knowledge of the testator or settlor. It is also common for trust companies to be sold, in which case effective management and even the jurisdiction of administration may change. This is a good reason for the settlor or protector to have power to change trustees.

8. ACCOUNTANTS AS TRUSTEES

8–014 An accountant may be unable to act as trustee if their firm also audits a company held by the trust. These rules have caused some accountancy firms to hive off their trust companies or to dispose of them altogether.

9. DIRECTOR OF LISTED COMPANY AS TRUSTEE

8–015 A person's interest in the relevant securities of a company listed in Hong Kong of which he is a director, whether the interest arises from his acting as a

trustee or otherwise, and any changes in such interests, are discloseable under the Securities and Futures Ordinance (Cap 571) (the 'SFO'). Any proposed dealing in the listed securities by a director (again, whether as a trustee or otherwise) is also subject to insider dealing rules under the SFO and certain other restrictions under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited.

10. CONFIDENTIAL INFORMATION AND TRUSTEESHIP

8–016 Similarly, a person who is in possession of, or may come into possession of, confidential information relating to a trust asset or a type of asset may be constrained by legislation (if the asset is regulated) or by conflict of interest principles from dealing with the trust asset. Such persons may be unsuitable to act as trustee[5].

11. CUSTODIAN TRUSTEES

8–017 A custodian trustee is a trustee who merely holds trust property and/or documents relating to it on behalf of active trustees, known as managing trustees. Custodian trusteeship is a concept found in Hong Kong and referred to in statute, eg s.6 of The Bank of East Asia, Limited (Merger of Subsidiaries) Ordinance (Cap 1173). The custodian trustee is similar to a nominee but with rather greater powers and responsibilities. A custodian trustee does avoid having to vest trust assets in new trustees upon a change of trustees. Custodian trustees are more trouble than they are worth outside of the commercial trusts context, and in practice they are not and should not be used either for private trusts or for charitable trusts.

12. FOREIGN TRUSTEES

8–018 If it is desired to appoint non-resident trustees, the choice is generally restricted to professional trustees. The disadvantages of non-resident trustees in terms of additional expense and inconvenience is one factor to be considered, although many trust companies now have local representation offices.

8–019 If offshore trustees are appointed, it is recommended that the settlor (i) should find a firm with professional liability insurance and (ii) should insist that there is no wide indemnity clause. An anxious settlor might set up a private offshore trustee company.

5 *Wight v Olswang (No. 1)* [1998] NPC 111 *http://www.kessler.co.uk/wp-content/uploads/2012/04/Wight_v._Olswang.pdf* [Accessed 16 November 2015] illustrates these difficulties.

13. ORDER OF TRUSTEES' NAMES

8–020 The order in which the trustees' names appear is of little significance[6]. The idea that the first named trustee is in a special position is a fallacy. This misconception is based on a confusion with some company law rules which provide that, in the case of joint shareholders, the company has regard to the vote of the shareholder named first on the register.

14. FLEE CLAUSES

8–021 The purpose of 'flee clauses' is to facilitate the appointment of new trustees if, where the old trustees reside, there is a breakdown of law and order, or confiscation of private property. These are sometimes seen in offshore trusts, but they fall outside the scope of this book. There are a number of difficulties with them; the authors' view is that the possibility of their being usefully invoked is not sufficient to warrant their inclusion in a standard draft. There are instances in which flee clauses have been triggered in situations in which, in practice, the draftsman would not have wanted a change of trustees.

8–022 But a settlor may take the view that a not wholly satisfactory clause is better than nothing at all.

15. CONFLICTS OF INTEREST

8–023 The general rule is that a trustee cannot enter into any transaction which might conflict with their duty as trustee[7]. Trustees cannot purchase trust property, or sell property to the trust, nor can property be sold between trusts which share a trustee. Trustees cannot take a lease of property which was formerly let to the trust. A trustee-landlord cannot consent to the assignment of the lease to a property company of which the trustee is director. The prohibition is not absolute: such acts may be carried out with the consent of the Court, or may be authorised in the trust deed.

8–024 The aim of the rule is the prevention of fraud; but the rule is too strict: one independent person would be sufficient to safeguard the interests of the trust[8]. That is the aim of this clause:

6 For an exception see s.36(2)(a) of the Trustee Ordinance (Cap 29)(more than four trustees of land appointed; only the first four named are validly appointed).

7 See *Kao Lee & Yip v Kao Hoi Yan Donald* [2003] 3 HKLRD 296.

8 This is the view of Millett L.J. in *Ingram v IRC* [1997] STC 1234 at p.1260:

> 'The rule has been thought in modern times to operate harshly where one of several trustees purchases the trust property at a fair price properly negotiated with his co-trustees.'

(a) *In this clause:*
  (1) *'A Fiduciary' means a Person*[9] *subject to fiduciary duties under the Trust.*
  (2) *'An Independent Trustee', in relation to a Person, means a Trustee who is not:*
    (i) *that Person*
    (ii) *a brother, sister, ancestor, descendant or dependant of the Person;*
    (iii) *a spouse of (i) or (ii) above; or*
    (iv) *a company controlled by one or more Persons within (i), (ii) or (iii) above.*

(b) *A Fiduciary may:*
  (1) *enter into a transaction with the Trustees, or*
  (2) *be interested in an arrangement in which the Trustees are or might have been interested, or*
  (3) *act (or not act) in any other circumstances;*
  even though their fiduciary duty under the Trust conflicts with other duties or with their personal interest.

(c) *Sub-clause (2) above has effect only in relation to administrative and not dispositive matters, and only applies if:*
  (1) *the Fiduciary first discloses to the Trustees the nature and extent of any material interest conflicting with their fiduciary duties; and*
  (2) *there is in relation to the Fiduciary an Independent Trustee in respect of whom there is no conflict of interest, and the Independent Trustee considers that the transaction arrangement or action is not contrary to the general interest of the Trust.*

8–025 It is sometimes said that clauses of this type should be strictly construed. But it is considered that these clauses should be construed fairly and naturally, according to their terms, like any other clause[10].

8–026 The aim is to cover all eventualities. This has led to a fairly complex draft; though not so complex, it is hoped, that it needs reading more than once to be understood. The clause is in three respects more widely drawn than others in use.

(a) The clause authorises a wide range of transactions. A common form which simply authorises trustees to purchase trust property would not solve many difficulties which arise in practice.
(b) The clause defines in detail the qualifications of an independent trustee. The definition is not wholly comprehensive; there may be occasions where it is doubtful whether there is a 'conflict of interest' or what is meant by 'control of a company'. This should not matter in practice, where there will generally

9 The expression 'Person' is defined in the precedents in this book to include any person in the world, and to include a trustee. It is understood that the self-dealing rule applies to all fiduciaries and not just to trustees (e.g. *Aberdeen Railway Co v BLaukie Bros* (1854) 1 Macq 661).

10 This was the approach of the English Court of Appeal in *Sergeant v National Westminster Bank* (1990) 61 P. & C.R.518 *http://www.kessler.co.uk/wp-content/uploads/2012/04/Sargeant_v._Nat_West.pdf*. [Accessed 16 November 2015].

be a professional trustee of undoubted independence. Further refinements (such as defining 'control') are thought unnecessary.
(c) The clause applies to trustees and other persons subject to fiduciary duties. If it applied only to trustees then others (e.g. former trustees and the protector if there is one) might remain subject to the self-dealing rule.

The clause specifies that the transaction is only to proceed if the trustees consider it to accord with the general interest of the settlement. It would be possible simply to require the independent trustee's 'consent'; but it seems better to spell out the circumstances in which consent is to be granted. **8–027**

16. DISTINGUISHING PERSONAL AND FIDUCIARY CONFLICTS

Some drafters distinguish between: **8–028**

(a) *Fiduciary* conflicts of interest, for instance, where it is desired to sell assets from one trust to another, and the same person is a trustee of both trusts.
(b) *Personal* conflicts of interest, for instance, where a trustee wishes to purchase property him or herself from a trust of which s/he is a trustee.

The distinction is a real one and, strictly, rather more protection is needed in the case of a personal conflict of interest. This school of drafting therefore sets out different rules to govern the dealings of trustees in the two situations. For instance, trustees may be authorised to act in all situations where there is merely a fiduciary conflict of interest; and an independent trustee is required only in cases of personal conflict. It is considered that the matter is not of sufficient practical importance to be worth taking the trouble to make these distinctions in a standard draft. **8–029**

17. TRUSTEE-BENEFICIARIES

The powers of the Trustees may be used to benefit a Trustee (to the same extent as if he were not a Trustee) provided that: **8–030**

(a) *There is in relation to that Trustee an Independent Trustee in respect of whom there is no conflict of interest; or*
(b) *The Trustees consist of, or include, all the trustees originally appointed under this Settlement.*

A trustee is not, generally speaking, able to exercise a fiduciary[11] power of appointment in their own favour unless expressly or implicitly authorised to do so[12]. **8–031**

11 Different considerations apply to powers vested in individuals, not trustees; see *Taylor v Allhusen* [1905] 1 Ch 529 and *Re Penrose* [1933] Ch 793 but these powers are not used in the precedents in this book.

12 *Public Trustee v. Cooper* [2001] WTLR 901 at p.933.

It is a matter of construction whether the exercise of a power is implicitly authorised. In the absence of an express clause the answer may not be entirely clear. Even where there is no implicit authority to act in conflict of interest, there are cases where trustees are nevertheless able to exercise their power[13]. That is, the rule prohibiting exercise of trustees' powers in cases of conflict is not always an inflexible rule. In appropriate cases the exercise of the power will be valid. (The onus of proof may rest on the trustees if challenged but that does not ultimately matter.) Once again, however, the extent of that leniency is not entirely clear.

8–032 All these problems should be avoided by a clause which addresses the point directly.

8–033 The course adopted here is to say that this can be done with the approval of an independent trustee or where the trustees are those originally appointed.

8–034 Another possible course is to provide that the beneficiary could appoint property to that beneficiary even if there is no independent trustee, provided there is at least a second trustee. This would be more appropriate where a settlor wanted all the trustees to be members of the family, so there would be no independent trustee (as defined). A precedent is:

(a) *In this clause 'a Fiduciary' means a Person subject to fiduciary duties under this Trust.*
(b) *A Fiduciary may:*
  (1) *enter into a transaction with the Trustees, or*
  (2) *be interested in an arrangement in which the Trustees are or might have been interested, or*
  (3) *act (or not act) in any other circumstances;*
  even though their fiduciary duty under the Settlement conflicts with other duties or with their personal interest.
(c) *Sub-clause (2) above only has effect if there is at least one other Trustee and the Fiduciary first discloses to the Trustee(s) the nature and extent of any material interest conflicting with their fiduciary duties*
(d) *The powers of the Trustees may be used to benefit a Beneficiary who is a Trustee (to the same extent as if the Beneficiary were not a Trustee) provided there is at least one other trustee.*

8–035 Another course is to provide that the beneficiary could appoint property to that beneficiary even if the beneficiary is sole trustee. This raises a number of difficulties, and is not recommended[14].

13 *Public Trustee v. Cooper* [2001] WTLR 901 at p 933-934.
14 *Drexel Burnham Lambert UK Pension Plan*; *Re Penrose* [1933] Ch 793.

A form found in some trusts is: **8–036**

> *The trustees shall have power to enter into any transaction concerning the trust fund, notwithstanding that one or more of the trustees may be interested in the transaction other than as one of the trustees and without any trustee who is so interested being liable to account for any reasonable incidental profit, provided that at least one of the trustees who is not interested in the transaction other than as a trustee approves the transaction.*

The English High Court (just) managed to construe this as allowing a breach of the self-dealing rule[15]; but it would be desirable for the drafter to express the position more clearly. **8–037**

Where there is a protector, he or she is an ideal person to authorise a breach of the self-dealing rule. This allows the form to be simplified: **8–038**

(a) *In this clause 'a Fiduciary' means a Person subject to fiduciary duties under this Trust, but not the Protector.*
(b) *A Fiduciary may:*
  (1) *enter into a transaction with the Trustees, or*
  (2) *be interested in an arrangement in which the Trustees are or might have been interested, or*
  (3) *act (or not act) in any other circumstances;*
  even though their fiduciary duty under the Settlement conflicts with other duties or with their personal interest.
(c) *Sub-clause (2) above only has effect if:*
  (1) *the Fiduciary first discloses to the Protector the nature and extent of any material interest conflicting with their fiduciary duties, and*
  (2) *the Protector considers that the transaction arrangement or action is not contrary to the general interest of the Settlement.*
(d) *The powers of the Trustees may be used to benefit a Beneficiary who is a Trustee (to the same extent as if the Beneficiary were not a Trustee) with the consent in writing of the Protector.*

18. CONSTRUCTION OF TRUSTEE EXEMPTION CLAUSES[16]

This section considers the meaning of the wide range of expressions used in exemption clauses. It should be read in light of the revised Trustee Ordinance **8–039**

15 *Breakspear v Ackland* [2009] Ch 32 at [102].
16 A note on terminology. The terms 'exemption clause', 'exoneration clause', 'exclusion clause', 'exculpation clause' and 'indemnity clause' are all used interchangeably. 'Indemnity clause' means a clause which provides an indemnity for an extant liability, rather than a clause which prevents a liability arising, but the end result may be the same.

15. PROCEDURE AFTER EXECUTION OF DEED OF APPOINTMENT/ RESETTLEMENT/ADVANCEMENT

14–031 The following is a checklist of possible issues (which will all not arise in every case):

(1) Transfer legal title to beneficiaries/new trustees (if appropriate).
(2) Inform beneficiaries. Concealment may be taken as evidence of a fraud on a power[21].
(3) Consider stamp duty implications.

21 As in *Duke of Portland v Topham* (1864) 11 HLC 32.

CHAPTER 15

SETTLOR EXCLUSION AND DEFAULT CLAUSES

1. WHY EXCLUDE THE SETTLOR AND SPOUSE?

15–001 It may be appropriate to exclude the settlor and spouse from benefit under their trust. The settlor might sometimes be excluded for tax purposes. They might also be excluded in relation to trusts established at the conclusion of matrimonial proceedings.

15–002 Hong Kong estate duty was abolished on 2 November 2005 for deaths on or after 11 February 2006. In practice, estate duty is now rarely relevant to practitioners but many older Hong Kong trusts still provide for the exclusion of the settlor. This is because the settlor of a trust could, in accordance with the provisions of the Estate Duty Ordinance (Cap 111), be taken to have trust assets within their dutiable estate if they reserved an interest in the trust.

15–003 For some tax purposes, the settlor's civil or same sex partner may also have to be excluded, and references in the text to a spouse should where appropriate be expanded to include a civil or same sex partner. There is no equivalent to a civil partner in the Hong Kong and so express drafting would be required to effect such an exclusion within a Hong Kong law trust. This can sometimes be by reference to statute (e.g. the English Civil Partnership Act 2004), or a fuller definition may by required. Example drafting would be to define the 'spouse' of a person as such person's '*husband, wife or civil partner*' with '*civil partner*' then defined as '*a person who has entered into a civil partnership, civil union, domestic partnership, marriage or other relationship similar in nature to the foregoing with a person of the same sex that is recognised by the law of the jurisdiction where the said relationship was registered*'.

15–004 The exclusion of the settlor and spouse is not as straightforward as one might have thought. There are five ways by which a settlor may benefit under a trust of which they are the settlor; each requires separate means to counteract it.

2. EXCLUDING SETTLOR – DRAFTING

(a) *Direct benefit*

15–005 The trust may make express provision for the benefit of the settlor. This should be easy enough to avoid.

(b) *Resulting trust*

15–006 The settlor may benefit under a resulting trust. This is prevented by an effective default clause.

(c) *Power to benefit settlor*

15–007 The settlor may benefit if the trustees have any powers which may be used to benefit them. It does not matter whether the power is in fact exercised in that way;

the mere possibility of benefit may, in some contexts, be disastrous. This possibility is averted by a settlor exclusion clause.

(d) *Actual benefit*

15–008 The settlor may benefit directly or indirectly from trust property, despite everything in the trust, by the consent of beneficiaries or through breach of trust.

15–009 No feat of draftsmanship can prevent this: this problem must be dealt with through careful and effective trust administration.

(e) *Reciprocal arrangements*

15–010 The settlor may be excluded from his own trust, but may benefit from another trust under a reciprocal arrangement. The solution of this problem does not lie in the trust drafting; but in the careful avoidance of arrangements which have an element of reciprocity.

15–011 It sometimes happens that spouses (or other members of one family) make trusts at the same time, and each settlor may benefit under the other's trust. It is considered that these are not (normally) 'reciprocal settlements' because (normally) one trust is not made in return for the other[1].

3. SETTLOR EXCLUSION CLAUSE

15–012 If a settlor exclusion clause is to be included, this is the suggested form:

> *Notwithstanding anything else in this settlement, no power conferred by this settlement shall be exercisable, and no provision shall operate so as to allow Trust Property or its income to become payable to or applicable for the benefit of the settlor or the spouse*[2] *of the settlor in any circumstances whatsoever.*

1 There is an interesting discussion of reciprocity from a sociological perspective in Zygmunt Bauman, *Postmodern Ethics* (Wiley–Blackwell, 1993), pp.56–58, accessible at: *http://www.kessler.co.uk*. There is no discussion in the cases, but it is suggested that Bauman is right that the essential element of reciprocity is that it affects motive. The distinction is between disinterested generosity on the one hand and conduct inspired by considerations of self--interest on the other. Reciprocity (like so much in life) offers delicate shades of grey, matters of fact and degree, which the tax system must resolve into black or white.

2 If the clause is desired for UK tax reasons, add 'or Civil Partner'. 'Civil Partner' should in turn be defined to have the same meaning as in the Civil Partnership Act 2004.

4. WHAT DOES A SETTLOR EXCLUSION CLAUSE COVER?

15–013 The words of the common form settlor exclusion clause '*are so wide that everyone agrees there must be some limitation placed upon them*'[3]. There are a number of situations where it has been held not to apply.

15–014 An obvious case is where the benefit to the settlor is '*a mere voluntary application of income by a beneficiary to the settlor, outside the provisions of the trust itself*'[4]. For the same reason, the clause does not prevent trustees paying capital to a child of the settlor who is a minor, even though the settlor would benefit on the intestacy of the child (and of course the child could not make a will to prevent this).

15–015 HMRC in the UK accepts that the clause does not exclude the settlor's right to reimbursement for tax paid by them on trust income or gains, under the UK settlement provisions[5]. This is because that right does not arise under the settlement: it arises under the statute. The settlement cannot exclude a right which does not arise under the settlement. (Suppose, for instance, that the trustees owed money to a creditor, and the creditor assigned the right to that debt to the settlor. No one could possibly suggest that a settlor could not (as a matter of property law) enforce the debt, just because there was a settlor exclusion clause). It may also fairly be said that reimbursement is not a 'benefit' for the settlor because (looking at the matter broadly) the settlor has gained no advantage. Likewise, the clause does not exclude the right of a settlor/trustee to reimbursement of expenses[6]. For similar reasons it is considered that the clause does not exclude the settlor's right to trustee remuneration[7].

15–016 The clause does not prevent trustees benefiting beneficiaries who are the dependants of the settlor (e.g. school fees for the settlor's children). One reason is that such a payment is generally merely an intangible, non-financial benefit to the settlor, not a 'benefit' within the sense of the clause (a direct financial benefit)[8]. But the same applies where the settlor is under a direct legal obligation to maintain and pay school fees for their children (such as may arise on a divorce or in other family law proceedings). Here, there is a benefit to the settlor but the benefit is not prohibited by a standard form settlor exclusion clause because it is unintended, merely incidental[9]. Likewise, the clause does not prevent trustees making a payment

3 *Glyn v IRC* 30 TC 321 at 329.
4 *Ibid. West v Trennery* [2003] STC 580 at para. 51 (point not discussed on appeal). HMRC in the UK accept this.
5 SP5/92 paras 8–10.
6 *West v Trennery* [2003] STC 580, paras 41–44 (point not discussed on appeal).
7 See para. 8–144 (Can the settlor charge if he or she is a trustee but there is a settlor exclusion clause?).
8 On this distinction see Section 11 of Chapter 13 (Power of advancement used to create new trusts).
9 *Fuller v Evans* [2000] WTLR 5, accessible at: *http://www.kessler.co.uk*. It is interesting (and relevant, because some have doubted the correctness of *Fuller v Evans*) to note that the Courts reached exactly the same conclusion two centuries ago in relation to comparable wording in the Mortmain Acts: *Att. -Gen. v Munby* (1816) 1 Merivale 327, accessible at: *http//www.kessler.co.uk*.

to a divorced spouse of the settlor, even though an incidental and unintended effect may be to increase the settlor's claim for financial relief in divorce proceedings. In these cases special consideration must be given to the doctrine of fraud on a power.

5. DRAFTING THE SETTLOR EXCLUSION CLAUSE

The draft echoes the relevant statutory provisions in the UK. The words '*notwithstanding anything else in this settlement*' are traditional, though unnecessary. **15–017**

(a) *Joint settlors*

Where a trust is made by joint settlors (most commonly husband and wife), each must be excluded, together with their spouses. See para. 12–024 (Form where trust made by joint settlors). **15–018**

(b) *Exclusion of additional and indirect settlors*

Our draft assumes the term 'the settlor' is defined elsewhere in the trust, and excludes only the person so defined. **15–019**

This book does not extend the settlor exclusion clause to exclude anyone who adds or provides funds. If such a clause is used, it is recommended that each settlor is only excluded from the property they actually add or provide. Otherwise a trivial provision of property to the trust may have drastic repercussions. The drafting becomes complex and is rarely attempted. **15–020**

(c) *Reference to 'spouse' in settlor exclusion clause*

It is necessary to say 'spouse of the settlor' in the settlor exclusion clause and wrong to identify the individual who is the spouse by name. This is for two reasons: first, so that after the death of the settlor, the widow, no longer a 'spouse', falls outside the clause. The widow may then benefit under the trust. Secondly, in case the settlor should divorce and remarry: it is necessary to exclude future spouses. **15–021**

A standard settlor exclusion clause provides simply that the trust property should not be used to benefit: **15–022**

(d) *The settlor or the spouse of the settlor*

This form is apt to exclude the settlor's wife or husband. It does not exclude the settlor's widow or widower, since a widow or widower was not a spouse[10]. Nor does it exclude a divorcee. **15–023**

10 *Vestey v IRC* 31 TC 1. *Guardian v Bermuda Trust Co* (Bermuda, December 1, 2009), accessible at: *http://www.kessler.co.uk*.

6. UNNECESSARY PROVISIONS IN SETTLOR EXCLUSION CLAUSE

(a) *Extending the settlor exclusion clause to exclude trustees*

15–024 In the days of estate duty in the UK, some practitioners extended the settlor exclusion clause to exclude trustees, but even then this was 'unnecessary and overly restrictive'[11]. This exclusion was also not required for Hong Kong estate duty purposes — estate duty not including property held by the deceased as a trustee.

(b) *No reservation of benefit*

15–025 Some drafters provide that:

> *The Trust Fund shall be possessed and enjoyed to the entire exclusion of the settlor and of any benefit to him/her by contract or otherwise.*

15–026 This echoes the UK inheritance tax 'Gift with Reservation' provisions. There is no advantage in this form: the drafting cannot alter, one way or another, the question of whether the settlor actually enjoys any direct or indirect benefit from the trust fund. The conventional form, excluding entitlement to benefit, does all that documentation can do.

15–027 The effect of the standard settlor exclusion clause is to prohibit the trustees making a loan to the settlor (or spouse) on beneficial or favourable terms. In the drafts in this book, it remains possible for trustees to lend money to the settlor on commercial terms as an investment. Some drafters prohibit this. This course is not taken here: the existence of the power to make the loan has no adverse tax consequences (though tax problems may arise if such a loan is actually made).

15–028 One occasionally sees this form:

> *If any person who enjoys any benefit hereunder or under any exercise of any power conferred by this settlement, should marry the settlor, then this settlement and any appointment made pursuant to any power hereby conferred shall upon such marriage take effect as if such person were dead.*

15–029 It is considered that the standard settlor exclusion clause would, in principle, exclude any beneficiary who married the settlor. So a provision of this kind is not necessary to satisfy the UK tax requirements. Moreover, the possibility that the settlor should marry a person who enjoys some benefit under the trust seems exceedingly remote. Accordingly, this provision is unnecessary.

11 *Tankel v Tankel* [1999] 1 FLR 679; [1999] Fam. Law 93, accessible at: *http://www.kessler.co.uk*. In this amusing (except to those concerned) case the clause excluding trustee--beneficiaries from benefit was later overlooked and subsequent appointments were void. An attempt to rectify the clause rightly failed on the facts.

(c) *No resulting trust for the settlor*

15–030 Some drafters provide in the settlor exclusion clause that:

> *There shall be no resulting trust to the Settlor; or*
>
> *Under no circumstances shall any interest be taken under this deed by the Settlor.*

15–031 The correct way to avoid a resulting trust is to use an effective default clause; see para. 15–034 (Default clause). If this is done there can be no resulting trust, and it is neither necessary, nor appropriate, to exclude one. Accordingly, this form is not used in this book.

15–032 If a badly drafted trust deed does not have a proper default clause, and does exclude resulting trusts with a form like the above, what (to the extent that the validly declared trusts do not take effect) is the result? Some say that there is nonetheless a resulting trust and a form of words simply purporting to prevent a resulting trust do not take effect. So the form is totally ineffective[12]. Another view is that the clause takes effect as it says, and the trust property becomes property of the Hong Kong Government as *bona vacantia*[13]. That might or might not suit the settlor, depending on the attitude of the Hong Kong Government and the value of the property forgone. It is tentatively suggested that neither extreme view should be adopted, but the question should be regarded as one of construction, turning like all questions of construction, on the circumstances of the individual case[14].

7. DEFAULT CLAUSE

15–033 The clause used in this book is as follows:

> *Subject to that, the Trust Fund shall be held on trust for*
>
> *[a named living individual] absolutely.*
>
> *or [two or more named living individuals] in equal shares*[15] *absolutely.*

12 This is the view taken by Robert Chambers, *Resulting Trusts* (OUP, Clarendon Law Series, 1997), pp.64–66 and supported by *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399.

13 *Davis v Richards & Wallington Ltd* [1990] 1 WLR 1511 at 1538; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1997] AC 669 at 708.

14 It is further *suggested* that this sensible position is more consonant with the authorities than either extreme; but a full discussion is beyond the scope of this book.

15 The words 'in equal shares' are significant: they ensure that the individuals hold as tenants in common and not as joint tenants (so there is no right of survivorship).

or [a named charity] absolutely.

or such charities as the trustees shall determine[16].

15–034 The default clause (sometimes called a 'longstop provision') has a general purpose and, in some cases, a specific tax function.

15–035 The general purpose is to specify who should become entitled to the trust property, should the other terms of the trust fail (e.g. if all beneficiaries die). The trust should state how the trust property should pass in that event. (Even though it is unlikely or almost inconceivable that the default clause will ever come into effect.)

15–036 In the absence of a default clause, on the death of all the beneficiaries, the trust fund could revert to the settlor under a resulting trust. This could be unsatisfactory from a tax perspective if there is a desire to exclude the settlor from all benefit under the trust to avoid the settlement provisions. The drafter must provide that the trust property will have a clear destination in all circumstances, so the trust fund cannot revert to the settlor.

(a) *Drafting the default clause*

15–037 The usual practice is to direct that the property should pass to named children or grandchildren of the settlor or more distant relatives. If these have died, the trust property will then pass according to the terms of their wills or intestacies[17]. An alternative is that the trust property should pass to charity or a more distant relative. The person who receives the trust property in these circumstances is sometimes called 'the Default Beneficiary'.

15–038 The following clauses fail to satisfy the tax requirement:

Subject as aforesaid the trust property shall be held on trust for X if he is then living.

15–039 This fails to satisfy the tax function: X may not then be 'then' living; so the trust fund may revert to the settlor:

Subject to that, the Trust Fund shall be held upon trust absolutely for such of them the Beneficiaries[18] *as shall then be living.*

16 This trust could not fail since it would be administered by the Court in default of the performance of the trustees' duty to *select* objects. A definition of 'charity' is usual but not strictly necessary: see Section 22 of Chapter 7 (Charities as beneficiaries).

17 It is then possible that the property will revert to the settlor, under the will or intestacy of the default beneficiary. That does not matter for the purposes of the settlement provisions. This has never been judicially decided, but only because it has never been challenged: see *Barr's Trustees v IRC* 25 TC 72 (where this was assumed without argument) and *Glyn v IRC* 30 TC 321 at 329.

18 Assume this is a defined term.

15–040 This is no better. It is possible that none of the 'Beneficiaries' may then be living.

Subject as aforesaid the trust property shall be held on the trusts of [another] settlement.

15–041 This is only satisfactory if the second trust has an adequate default clause, and entirely excludes the settlor and spouse. Where the second trust is made later than the first, care must be taken that the arrangement does not breach the rules against perpetuities (if it is applicable)[19].

(b) *Unnecessary provisions in a default clause*

15–042 It is unnecessary to say that the trust fund should be held on trust for:

[a named individual] or his estate or assigns absolutely.

or [a named individual] or his personal representatives absolutely[20].

15–043 The clause is sometimes expanded to read:

Subject to that, and if and so far as not wholly disposed of by the above provisions the capital and income of the Trust Fund shall be held on trust for X absolutely.

15–044 The addition is harmless but plainly unnecessary.

(c) *Correcting errors in a default clause*

15–045 Where a default clause is not exhaustive, it is possible to set the matter right for the future. The settlor may assign his or her interest to some other person or the trustees may exercise their overriding powers.

(d) *An unnecessary default clause*

15–046 Where the provisions of a trust are exhaustive, a default clause is not strictly needed; but if the clause is included, no harm is done (save as to the reputation of the drafter). *Barclays Bank v McDougall*[21] rightly rejected a fanciful construction intended to give effect to an obviously redundant default clause.

19 As to the position if the trust has a different governing law, see para. 7–098 (Foreign charities as beneficiaries).

20 Authority is not needed for this proposition, but see *Commissioners of Stamp Duties v Bone* [1976] STC 145. For an example of a case where this was held to be the correct construction, see *Barclays Bank v McDougall* [2001] WTLR 23.

21 [2001] WTLR 23.

(e) *A provision to avoid*

15–047 A default provision which one occasionally sees is:

> *for the Beneficiaries living at the end of the Trust Period in equal shares per stirpes.*

15–048 The class of beneficiaries typically comprises the settlor's spouse and descendants. Often, *per stirpes* is not defined, which creates two potential ambiguities[22]. Even if it is defined[23], this can create problems. For example, if the beneficiaries comprise more than one generation, should descendants take while their parent or ancestor is still alive?

22 As to the inherent ambiguities in the term, see para. 7–116 (Use of default clause).

23 If it is defined, the usual provision is that the *stirps* is at the level of the deceased's children (even if they have all died) and that descendants do not take if an ancestor is living.

CHAPTER 16

LIFETIME INTEREST IN POSSESSION TRUSTS

1. INTRODUCTION

16–001 The Interest in Possession (IP) trust is one where trustees are to pay trust income to a particular beneficiary. In the discussion below that beneficiary is called "the life tenant"; in the drafting the life tenant is usually identified by name or given the title of "the Principal Beneficiary".

2. INTEREST IN POSSESSION INCOME CLAUSE

16–002 The income clause of an IP trust must give the life tenant the right to trust income as it arises.

16–003 Drafting the income clause seems a straightforward matter. English statutory precedents provide a range of forms:

> *The trustees shall stand possessed of the trust fund upon trust to pay the income thereof ...*
>
> *... to X during his life*[1]
>
> *... to X for life*[2]

16–004 The form adopted in this book is:

> *The Trustees shall pay the income of the Trust Fund to X during his or her life*[3].

3. STRUCTURE OF LIFETIME INTEREST IN POSSESSION TRUST

16–005 The form proposed in this book is as follows:

(1) income is paid to the life tenant for life;
(2) income is then paid to the spouse for life;
(3) there is then a discretionary trust over income, with a duty to accumulate the remainder;
(4) the trustees have the standard overriding powers which may override any of the above;
(5) lastly there is a standard default clause.

1 The Statutory Will Forms 1925, Form 7: *http://www.kessler.co.uk/wp-content/uploads/2013/09/Statutory-Will-Forms-1925.pdf.*
2 The Statutory Will Forms 1925, Form 9: *http://www.kessler.co.uk/wp-content/uploads/2013/09/Statutory-Will-Forms-1925.pdf.*
3 The form is loosely derived from s. 33 of the Trustee Ordinance (Cap 29).

16–006 These five limbs are contained in three clauses. The first deals with trust income. The second contains the overriding powers. The third is the default clause.

1. *Trust Income*
Subject to the overriding powers below:

(1) The Trustees shall pay the income of the Trust Fund to the Principal Beneficiary[4] *during his life.*
(2) Subject to that, if the Principal Beneficiary dies during the Trust Period, the Trustees shall pay the income of the Trust Fund to the Principal Beneficiary's surviving spouse during her life.
(3) Subject to that, during the Trust Period, the Trustees shall
(i) pay or apply the income of the Trust Fund to or for the benefit of any Beneficiaries as the Trustees think fit; and
(ii) the Trustee shall accumulate the remainder of the income of the Trust Fund, that income shall be added to the Trust Fund.

2. *Overriding Powers*
[Here set out the standard Overriding Powers of this book.]

3. *Default Trusts*
Subject to that, the Trust Fund shall be held on trust for the Principal Beneficiary absolutely.

4. INCOME TO THE PRINCIPAL BENEFICIARY FOR LIFE

16–007 The settlor may prefer that the beneficiary should become absolutely entitled to the trust property on attaining the age of (say) 25, 30, 40; as to which see para. 16–036 (Life tenant becomes absolutely entitled at specified age).

5. PROVISIONS AFTER DEATH OF THE PRINCIPAL BENEFICIARY

16–008 What should happen after the principal beneficiary dies?

16–009 The main choices are:

(1) Discretionary trusts.
(2) Life interest to the surviving spouse, or children.

4 The "Principal Beneficiary" will be defined in the definition clause. Where the Principal Beneficiary is female, replace "his" with "her" as appropriate in this clause.

16–010 If the life tenant relies on the income from the trust for their living expenditure, or resides in trust property, then their surviving spouse usually needs a similar interest after the survivor's death; otherwise they will face some financial difficulty.

16–011 The drafts in this book provide that the surviving spouse takes a life interest.

16–012 The reversionary interest of the spouse in the trust fund is actually a precarious one. It need confer no real or valuable rights as it may be revoked at any time before or after the death of the original life tenant, the principal beneficiary. The trustees can respond to the beneficiaries' needs and to changes in tax law.

6. An Alternative: Beneficiary's Power to Appoint to Widow

16–013 There is an alternative course which is quite common in practice. This is to give the principal beneficiary a power to confer (technically "to appoint") a life interest on the surviving spouse of the principal beneficiary. This is well enough in theory. The principal beneficiary can review the position and give the interest, or refrain from doing so, as thought best. This solution is less satisfactory in practice. The power is as likely as not to be overlooked. Assuming it is not overlooked the power will, in most cases, be exercised with concomitant expense. It is easier all round to start off as one means to go on: give the reversionary interest to the principal beneficiary's surviving spouse and not merely empower the principal beneficiary to do so. This alternative course might be adopted when a particular settlor has a rooted objection to giving the spouse an interest directly under the trust[5].

16–014 It is said that this power gives the life tenant a measure of power over his or her spouse. So it does; but just how conducive that may be to family harmony must be open to question.

7. Describing the Widow

> *Subject to the Principal Beneficiary's life interest] the Trustees shall pay the income of the Trust Fund to his or her surviving spouse during his or her life.*

16–015 In the event of divorce during the lifetime of the principal beneficiary, the ex-spouse will not take any interest under this clause. However a person who is the spouse of the principal beneficiary at the time of their death acquires an IP and will continue to receive the income even if the spouse later remarries or enters into a new relationship.

5 For a precedent see Statutory Will Forms 1925, form 7(6) *http://www.kessler.co.uk/wp-content/uploads/2013/09/Statutory-Will-Forms-1925.pdf.*

8. Three Bad Forms

16–016 The drafter should not identify the spouse of the principal beneficiary by name, saying:

> [Subject to Mr Laus' interest] the trustees shall pay the income of the Trust Fund to *Mrs Pauline Lau* during her life.

16–017 For then, if Mr Lau (the principal beneficiary) should divorce and remarry, the first Mrs Lau will still receive a life interest after his death; which will not at all be the intended result.

16–018 The use of the word "wife" (rather than "widow" or "surviving spouse") can introduce an element of doubt where the beneficiary remarries. Consider:

> *[Subject to the Principal Beneficiary's life interest] the trustees shall pay the income to his wife during her life.*

16–019 It may be doubtful whether a first or second wife is intended to benefit[6].

16–020 What is the position if the drafter combines the two forms above, and says:

> *[Subject to Mr. Laus' life interest] the trustees shall pay the income to his wife Mrs Pauline Lau during her life.*

16–021 If the Principal Beneficiary should divorce and remarry and then dies, there are three theoretical possibilities:

(1) Mrs Pauline Lau, the first wife, receives the income: since she is expressly named in the clause.
(2) The second wife receives the income, since she is the "wife" at the time of the Principal Beneficiary's death.
(3) The clause does not take effect, since there is no person who satisfies the description "his wife Mrs Pauline Lau" at the time of the death of the Principal Beneficiary.

16–022 There are rules of construction which can resolve such questions, but it is better that the drafter should not require beneficiaries (and their lawyers) to consider them.

9. A Perpetuity Problem

16–023 The reversionary life interest formerly raised perpetuity issues, but now the rule against perpetuities will not be applicable to new Hong Kong trusts[7].

6 For a case where such confusion arose, see *Re Drew* [1899] 1 Ch 336.
7 For a general discussion of the perpetuity rule, see Chapter 11 (The Rule against Perpetuities).

10. POSITION AFTER DEATH OF SURVIVING SPOUSE

16–024 The drafter must lastly make appropriate provision for the time after the death of the principal beneficiary and spouse. This is to look far into the future; it is impossible to decide what form the trust should best take.

16–025 A traditional solution is to direct the trust property to pass absolutely to the children of the principal beneficiary who attain 21. That course is too inflexible; it should be rejected out of hand. A refinement which allows some flexibility is to give the principal beneficiary power, during their lifetime, to appoint appropriate trusts for children and remoter issue. But this course would vest an important power in the beneficiary which is considered undesirable[8].

16–026 A discretionary trust over income offers the best solution. This — combined with the overriding powers in the trust — gives the trustees complete flexibility to do what seems best at the time. The drafting is pleasingly simple.

16–027 Alternatively the trust may provide that after the death of the life tenant and the spouse of the life tenant, the trust property is held on trust for the children who reach the age of (say) 18, absolutely, but subject to the trustees' overriding power of appointment. This is likely to be perfectly satisfactory, at least for smaller funds. It may be easier for clients to accept than the discretionary trusts preferred here.

11. IP FORMS FOR TWO LIFE TENANTS

16–028 The settlor may wish to make an IP trust for the benefit of two or more life tenants. One course is to create a separate trust, one for each; but it may be more convenient to create one trust for all the life tenants.

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8 See para. 9–071 (Giving powers of appointment to beneficiaries personally). If for some specific reason such a form is desired, the following form is proposed (to be inserted after the sub-clause giving the life tenant his interest and before the sub-clause giving his widow a reversionary life interest:

(1) Subject to that, the Principal Beneficiary may appoint that the Trustees shall hold the Trust Fund for the benefit of any Beneficiaries other than the Principal Beneficiary, on such terms as the Principal Beneficiary thinks fit.
(2) An appointment may create any provisions and in particular:
(a) discretionary trusts;
(b) dispositive or administrative powers;
(c) exercisable by any Person.
(3) An appointment shall be made by deed during the Trust Period and may be revocable or irrevocable.

The following is the structure of a straightforward and flexible form of trust: **16–029**

(1) trust fund to be divided into shares;
(2) income of each share to be paid:
  (a) to each life tenant for life,
  (b) subject to that, to his or her surviving spouse for life,
  (c) subject to that, there are discretionary trusts over income;
(3) the trustees have the standard overriding powers which may override any of the above.

The central parts of the draft are as follows. The two life tenants are here called Adam and Danny. **16–030**

1. Subject to the overriding powers below the Trustees shall divide the Trust Fund into two equal shares "Adam's Share" and "Danny's Share".

2. Adam's Share
Subject to the overriding powers below:

(1) The Trustees shall pay the income of Adam's Share to Adam during his life.
(2) Subject to that, if Adam dies during the Trust Period, the Trustees shall pay the income of Adam's Share to his surviving spouse during his or her life.
(3) Subject to that, during the Trust Period, the Trustees shall pay or apply the income of Adam's Share to or for the benefit of any of the Beneficiaries as the Trustees think fit.

3. Danny's Share
[Text same as Adam's Share substituting "Danny" for "Adam".]

4. Overriding Powers
[Here come the overriding powers in this book. The objects of the Overriding Powers will be Adam and Danny and their families.]

12. COMMENTARY ON STRAIGHTFORWARD FLEXIBLE FORM

In the following discussion the two life tenants are called A and B. **16–031**

Under the straightforward flexible form, as the italicised words make clear, A's share could be used (if the trustees think fit) to benefit B and B's family; and vice versa. This may happen by exercise of the overriding powers, or after the death of a life tenant and spouse, when the discretionary trusts of income take effect. It may be the intention of the settlor that the trustees should have this flexibility. If not, a letter **16–032**

of wishes will guide the trustees against that course; but the wishes do not bind the trustees. This is a theoretical rather than a practical problem. In practice, trustees may be expected to act in accordance with the settlor's wishes so far as it is appropriate to do so. If that is thought to be insufficient then A's family and B's family may be represented as trustees, or a protector may be used.

13. AN INFLEXIBLE FORM

16–033 An alternative approach is to provide that A's share cannot be used for the benefit of B and B's family, and vice versa. The drafting is rather more complicated and the flexible form set out above is better. But it can be done. The central parts of the draft are as follows:

1. *Definitions*
   In clauses [2] to [5] below

   (1) *"Adam's Fund" means:*
   (a) *Adam's Share and*
   (b) *all property from time to time representing the above.*
   (2) *"Trust Property" means any property comprised in Adam's Fund.*
   (3) *"Adam's Family" means:*
   (a) *Adam and his descendants;*
   (b) *The Spouses of (a) above;*
   (c) *The Surviving Spouses of (a) above;*
   (d) *Any Person or class of Persons nominated to the Trustees by:*
   (i) *Adam, or*
   (ii) *two members of Adam's Family (after the death of Adam)*
   (4) *and whose nomination is accepted in writing by the Trustees.*
   (e) *At any time during which there are no members of Adam's Family within (a) above:*
   (i) *Danny and his descendants;*
   (ii) *the spouses and former spouses of (i) above; and*
   (iii) *any company body or trust established for charitable purposes only.*
   (5) *"Adam" means [full name].*
   (6) *"Danny" means [full name].*
   (7) *"Person" includes a person anywhere in the world and includes a Trustee.*

2. *Division of Trust Fund into Shares*
   The Trustees shall divide the Trust Fund into two equal shares ("Adam's Share" and "Danny's Share").

3. *Trust Income*
   Subject to the Overriding Powers below:

   (1) *The Trustees shall pay the income of Adam's Fund to Adam during his life.*
   (2) *Subject to that, if Adam dies during the Trust Period, the Trustees shall pay the income of Adam's Fund to Adam's surviving spouse during her life.*
   (3) *Subject to that, during the Trust Period, the Trustees shall pay or apply the income of Adam's Fund to or for the benefit of any of Adam's Family as the Trustees think fit.*

4. *Overriding Powers*
   [Here set out the standard overriding powers.]

5. *Default Clause*
   Subject to that, Adam's Fund shall be held on trust for Adam absolutely.

6. *Danny's Fund*[9]
   Clauses [1] to [5] shall apply to Danny's Share with the following modifications:

   (1) *"Danny" shall replace "Adam" wherever it occurs except in clause [1(4)] (definition of "Adam")*
   (2) *"Adam" shall replace "Danny" wherever it occurs except in clause [1(5)] (definition of "Danny")*

14. OBJECTION TO SIMPLE ACCRUER CLAUSE

A common form where there are two life tenants is to provide: **16–034**

(1) A's share to be held on trust for A for life, then A's widow for life, then for A's descendents;
(2) B's share to be held on trust for B for life, then B's widow for life, then for B's descendents;
(3) *In default each share will accrue to the other share.*

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9 There are three ways to deal with the drafting of trusts containing multiple funds for different primary beneficiaries. (1) One can set out each fund at length. That is best if the total length is not too great to bear. (2) One can use a substitution clause like the clause set out in the text. That becomes complicated if the beneficiaries are of both sexes as "his" and "her" becomes messy. (3) One can set out a single standard anonymised form:

1. *The Primary Beneficiaries means [specify]*
2. *The Trust Fund shall be divided into one share for each Primary Beneficiary.*
3. *Subject to the Overriding Powers below:*
   a. *The Trustees shall pay the income of the share of the Primary Beneficiary to the Primary Beneficiary during his life, etc.*

16–035 It is better to have a simple discretionary trust on the death of the spouse of A and B. Appropriate trusts can then be appointed, either before or after the time of the deaths, in the light of the then circumstances.

15. LIFE TENANT BECOMES ABSOLUTELY ENTITLED AT SPECIFIED AGE

16–036 A trust should usually be drafted so that it may continue for as long as possible. It is far preferable to arrange that beneficiaries need not become absolutely entitled to the trust property. This offers many advantages. Trust property is safe in the trust. It should be secure from creditors in the event of insolvency; and secure from a spouse in the event of divorce. The trust property may be better administered by the trustees than by the beneficiary, were the beneficiary to become absolutely entitled. There may be tax advantages.

16–037 On this point the views of the client may be far from those of the professional adviser. The client may prefer their children or grandchildren to become absolutely entitled to the trust property on attaining the age of 25, or 35 or 40. It should be pointed out that the trustees may transfer the trust fund to the beneficiaries at the desired age. There are many methods of controlling trustees to comfort a nervous or reluctant settlor. See para. 9–036 (Guidance and control of trustees). If that course is not acceptable to the settlor, one may resort to the following precedent.

1. *Trust Income*
   Subject to the following clauses:

   (1) The Trustees shall pay the income of the Trust Fund to the Principal Beneficiary[10] *until he attains the age of 40.*
   (2) Subject to that, if the Principal Beneficiary dies before attaining the age of 40, the Trustees shall pay the income of the Trust Fund to his surviving spouse during her life.
   (3) Subject to that, during the Trust Period, the Trustees shall pay or apply the income of the Trust Fund to or for the benefit of any Beneficiaries[11] *as the Trustees think fit.*

2. *Principal Beneficiary to receive Trust Fund at 40*
   Subject to any prior exercise of the overriding powers, the Trustees shall transfer the Trust Fund to the Principal Beneficiary when he attains the age of 40 free from the terms of this settlement.

10 The "Principal Beneficiary" will be defined in the definition clause. Where the principal beneficiary is female, replace his/her and he/she as appropriate.

11 The term "Beneficiaries" would of course be defined.

3. *Default Trusts*
   Subject to that, the Trust Fund shall be held on trust for the Principal Beneficiary [OR: specify default trusts as appropriate] absolutely.

16–038 The purpose of this form is that the trustees can review the position before the principal beneficiary attains the age of 40. If they consider that tax or other considerations make it desirable to do so, they can take action to prevent the principal beneficiary becoming entitled by exercising their overriding power.

16. LIFE TENANT A MINOR

16–039 To give a minor an interest in possession, the following form is proposed:

The Trustees shall pay or apply the income of the Trust Fund to or for the benefit of [Georgina] during her life. Section 33 of the Trustee Ordinance (Cap 29) shall not apply to this Settlement[12].

16–040 No other amendment is needed to the standard IP form.

17. INTEREST IN POSSESSION FOR SETTLOR

16–041 There are various reasons why a settlor might transfer their assets to a trust under which they have an IP, rather than retaining them in their absolute ownership:

(1) Anticipation of mental incapacity of the settlor (avoiding the need to invoke the rather more restricted regime under the Mental Health Ordinance (Cap 136)).
(2) Avoidance of the Inheritance (Provision for Family and Dependants) Ordinance (Cap 481).

12 The second sentence is arguably unnecessary since the first sentence by implication excludes the operation of s.33 of the Trustee Ordinance (Cap 29). There are arguments to the contrary. The section applies to vested annuities "as if the annuity were the income of property held by trustees in trust to pay the income thereof" to the annuitant. This (arguably) suggests that s.33 is intended to apply to trusts to pay income to a minor and that the words "to pay the income" are insufficient to exclude the operation of that section. It has also been held in *Fine v Fine* [2012] EWHC 1811 (Ch) that the words "notwithstanding that such person had a vested interest in such income" (found in s.33(2)(b) in the context of s.31 of the Trustee Act 1925 makes it clear that the mere fact that there is a vested interest in any income accumulated during minority cannot suffice as an implicit exclusion. On any view, it should be included for the avoidance of doubt. "The drafter may be well advised out of caution either expressly to provide that s.31 is to apply, or expressly to exclude its application altogether": *Re Delamere* [1984] 1 WLR 813 at 823.