

TRUSTEES OF PUBLIC UTILITY TRUSTS: NO JOB FOR THE FAINTHEARTED

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What there was before 1992

Until the early 1990s New Zealand electrical utilities were constituted either under the Electric Power Boards Act 1925, or under a local statute dealing with a particular district.² By its long title, the Electric Power Boards Act 1925 was a consolidation of earlier Acts “providing for the construction or purchase of works for the generation, transmission, and supply of electric power by Electric Power Boards.”

They were run by Power Boards elected by,³ and from among,⁴ the ratepayers of each locality.

The Boards had power to fund their operations by borrowing;⁵ and by levying rates⁶ which were enforceable as if they were to have been levied under the Rating Act 1925.

“Consumers of electric energy” had no claim against the Board in respect of any supply failure attributable to “accident, drought, or other *unavoidable* cause”.⁷ That left open the possibility of Board liability in respect of *avoidable* supply failures, and for other damage caused by collapsing power poles, or power lines.

However any liability stopped with the Board itself. It was a “body corporate.”⁸ It therefore was a legal entity distinct from its members. So, like directors of a company, the members of a Power Board had no personal liability for loss or

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² The Auckland Electric Power Board Act 1978, and the Waikato Electricity Authority Act 1988.

³ Electric Power Boards Act 1925 13.

⁴ Section 19. Cf s 50.

⁵ Section 53.

⁶ Section 56.

⁷ Section 125.

⁸ Section 9(2).

damage caused by the operations of the Board.

From this it followed that pretty much the only vulnerability, of those in control of the generation, reticulation, and supply of electricity in each district, was at the triennial⁹ elections for Board membership.

You will know much better than I do, that the generation—in particular—and the reticulation, of electricity involve very large amounts of capital.

With its captive consumer base, the Power Board structure provided little incentive to optimise the use of that capital. It was an economically inefficient model.

What there is now

The Energy Companies Act 1992 set out to change this. According to the first paragraph of its Long Title, it was a purpose of that Act:

To provide for the formation of energy companies, the vesting in such companies of the undertakings of Electric Power Boards and the electricity and gas undertakings of local authorities, and for the dissolution of Electric Power Boards.

The generation equipment and the reticulation networks owned by these boards were to be subjected to “Establishment Plans”.

The process involved the deeming¹⁰ of most¹¹ of the existing members of each Power Board to be “interim” and “bare” trustees whose function was simply to hold the property of the former board as nominal owner. They were not to be subject to the Trustee Act 1956, and were to have no other of the powers or duties that usually go with trusteeship.¹²

Simultaneously, the about-to-be dissolved Power Board was designated an “establishing authority”,¹³ and charged with settling the terms of an “establishment plan” to set the terms of the *conversion of its business into financially stable*¹⁴

⁹ Section 13(3), read with s 4 of the Local Elections and Polls Act 1953.

¹⁰ Energy Companies Act 1992 s 4.

¹¹ Section 4(2), read with ss 1(2) and 6.

¹² Section 14.

¹³ Section 2(1).

¹⁴ Sections 26, 27, and 28

*commercial corporate ownership*¹⁵ so that it “shall ... operate as a successful business”¹⁶ while having “regard, amongst other things, to the desirability of ensuring the efficient use of energy.”¹⁷

The establishment plan in each case was to include a share allocation plan.¹⁸ Many of these share allocation plans involved trust ownership of at least some of the share capital in the new energy company. That, of course, is why you are at this Conference.

The “principal objective” driving the regime change of 1992

So, while commercial incentives were conspicuous by their absence from the former Power Board structure, they are well to the fore nowadays.

It is *imperative* for those incentives to be kept well in mind. The High Court has held¹⁹ that:

The terms of [an Energy] Trust Deed must be interpreted in context and against the background knowledge which was available to the parties at the time the Trust Deed was entered into. *That knowledge obviously included the electricity industry reforms which were being implemented around 1992. The Trust was formed as part of an Establishment Plan.*

To repeat, because it is fundamental, the Energy Companies Act 1992 requires that each energy company “shall ... operate as a successful business”²⁰ while having “regard, amongst other things, to the desirability of ensuring the efficient use of energy.”²¹

That is clearly the intended statutory principal objective of an energy company. It is the intended pivotal achievement of the energy reforms since 1992. It is therefore the objective that must be always at the forefront of the directors’ thought processes. And it is therefore the objective that always must be in the

¹⁵ Section 18.

¹⁶ Section 36(1)

¹⁷ Section 36(2).

¹⁸ Section 22.

¹⁹ *Collinge v Kyd* (High Court, Auckland, Civ 2004-404-4828, 15 September 2004) at para 53 (Paterson J).

²⁰ Section 36(1)

²¹ Section 36(2).

minds of the trustees of any significant shareholding in an energy company.

In particular, it is critical that that objective be front and centre of the thinking of energy trustees whenever you have the opportunity to appoint, or to participate in the appointment of, directors of an energy company. The Act specifies as much:

The directors of an energy company shall be persons who, in the opinion of those appointing them, will assist the company to achieve its principal objective.²²

This is not to be taken lightly.

For example, what if a director or directors, appointed by a process in which energy trustees were involved, was pretty much a passenger on the board? Maybe he had no relevant industry, or commercial, experience. Or, if he was there ostensibly to provide professional input, he may have been out of his depth in matters vital to the interests of a company working in an industry overhung by the Commerce Act 1986.

The presence on the board of someone like that would not help the company achieve its statutorily-mandated “principal objective” of operating as a successful business while having regard to the efficient use of energy. It might well positively hinder the pursuit of that objective.

Evidence that the trustees were instrumental in appointing a dog or two like that to the board of the company conceivably could provide a foundation for an application to the High Court for an order removing them from the trusteeship: on the grounds that, if the trustees were prepared to flout in that way the express statutory foundation of the 1992 regime, they could not be trusted to act in the best interests of the trust estate in other ways.

First key to an intuitive understanding of trustee duties: the general rule, in contracts and in commerce, that self interest prevails and altruism is not to be expected

So the first critical message for energy trustees is that of the High Court in the passage I have cited: be awake to the implications of the statutory scheme for the

²² Energy Companies Act 1992 s 37(1).

1992 reform of the energy industry, and respect that scheme fully.

That still leaves the general, non-statutory, law. How is a trustee to understand it: because understand it a trustee must. Breach of trust can have implications for a trustee's personal assets.

Perhaps the best starting point is to explore the differences between the general non-statutory law applying to ordinary contractual and commercial dealing, on the one hand, and the general law applying to trustees, on the other hand. If we can see the differences, it helps to understand why they exist. If we both know those differences, and know why there are those differences, it can help to form our intuition in a way that will help us prosper the trusts while avoiding the traps that can snare the trustee who does not sufficiently understand the law surrounding trusteeship.

So let me outline briefly how the law functions in respect of honest dealings between people who are fully-independent and can deal with each other at arms length.

Say there is a person who owns a block of land in a rural area. It is a peaceful rural block in a peaceful rural environment.

She advertises it as "rural block for sale. \$3 million."

The block next door has been the subject of a successful planning application for use as a quarry. The seller knows that, within a few months, the land next door will have mechanical diggers, rock crushers, and blasting operators, working on it, noisily, 8 hours each day except Sunday; and that soon there will be 30-50 large truck movements in and out of that property each day of the week except Sunday.

Someone responds to the advertisement. The advertiser meets that person on the site. The respondent to the advertisement asks the advertiser about the rates, about the capacity of the water bore, and about the age and construction of the house.

The owner answers each question fully and truthfully.

Without checking the Title in the Land Transfer Office, the respondent to the advertisement then agrees to pay \$2.8 million.

They enter into an unconditional written contract the terms of which they agree on

the spot.

The buyer instructs his solicitor to prepare a Transfer. The solicitor searches the Title, and draws the attention of the buyer to the quarry zoning. The buyer hits the roof, but admits he never asked about the zoning of the adjacent land.

Had the seller been under a duty to tell the buyer?

If the buyer had told the seller that he was a writer, and that he was interested in the block for the quietness without which he could not write, it may well have been deceptive for the seller to have remained silent about the quarry zoning. In that situation, she probably should have been aware that her silence about the zoning of the adjacent property could have misled the buyer. Section 9 of the Fair Trading Act 1986—which outlaws misleading or deceptive commercial conduct—then could have given the buyer some remedial options.

But on the facts we are assuming, the seller has no idea that the respondent is interested in the land as a haven for writing. For all the seller knows, or cares, the buyer might be intent on establishing a pig farm; or, he might be a heavy earthmoving contractor interested in a site on which to park his machines when they are not out on worksites.

Independent, arms-length, parties, must avoid fraud, and they must avoid potentially misleading or deceptive conduct contrary to the Fair Trading Act 1986.

But that is all.

They have no *altruistic* obligations to each other when they contract.

Where there is neither fraud nor deception, each is entitled to look after his or her *own* interests; and after his or her interests *alone*.

The attitude of the law then is: “let the buyer beware.”

Interpolation: unwrapping the notion of “the law”

At this point it may be useful to explain what is meant when one speaks of “the attitude of *the law*.”

“The law” is an expression that covers at least three possibilities.

First, there is *statute law*. Acts of Parliament. I have already mentioned at least five examples: the Electric Power Boards Act 1925, the Rating Act 1925, the Energy Companies Act 1992, the Trustee Act 1956, and the Fair Trading Act 1986.

Then there is the *common law*. This refers to a legal tradition of dispute resolution dating from around the time of the Norman conquest of England in 1066; and particularly the form the tradition began to take during and after the reign of Henry II about a century later, when its procedures were set down systematically in written form by the first legal textbook writer.

England had all sorts of local legal systems, but the common law was distinct from them all. Its distinctive characteristic was that it was the law administered in the court of the king.

To begin with the common law was actually administered by the king himself. Initially this had been by the king himself. The king was “the fount of all justice” in his realm. (Even today, criminal cases in England, and in New Zealand also, are known as *The Queen v Smith (or whatever the defendant’s name is)*.)

As the king and his court travelled around the country, local people of sufficient importance to be able to catch the ear of the king would ask him to resolve their disputes over land or whatever other matters were troublesome.

No doubt the more of these disputes he resolved, the more of them were referred to him. Inevitably, the king reached a point at which he realised that he no longer had enough time to dally with all the mistresses he kept in each location. So he appointed royal deputies for the administration of justice: who soon became known as judges.

Even in those days, there were keen students of the law who listened to cases being argued, and who made notes of the arguments and of the judgments and of the reasons given for the judgments. These notes often were collected, bound, and published. These were the first law reports: forerunners of the huge number of law reports to which modern lawyers must subscribe, or to which they must have access, if they are going to be able to understand the law, and to advise on it, properly.

Thus the point was reached where decisions were being made by reference to the principles laid down by judges in earlier cases; and the common law was more or less in the form in which we have it today.

So that's statute and common law.

Finally, and for our purposes most significantly, there is *equity*. Sometimes the way the common law worked left one of the parties with a sense of having been dealt with unconscionably, even though the decision of the common law judge had unarguably been given according to law.

This litigant then would petition the king on the basis that, in the particular circumstances, the common law, even though applied correctly by the king's judge, had produced a result so contrary to conscience that it was an affront to justice.

As the fount of justice, the king could not tolerate that situation, so he began referring these petitions to his Lord Chancellor. Until the time of Sir Thomas More, the Chancellor was always a Catholic Bishop or Cardinal: someone trained in theology and philosophy and used to dealing with matters that fell in the realm of conscience.

Soon enough, the practice grew of these petitions being referred by the litigant's lawyers straight to the Chancellor. As with the common law courts, so with the Chancellor's court: principles began to emerge, and the decisions on matters of conscience also began to invoke decisions in earlier cases to help identify and shape the principles.

If the Chancellor found that the common law as applied by the king's judges had led to an injustice in a situation in which the conscience of the winner in the common law courts was afflicted, he could make orders that varied, or established exceptions to, or prevented the application of, the rules of the common law.

Because these orders were being made to restrict the unconscionable application of the common law, they were not part of that law. The Chancellor's supplementary jurisdiction was therefore called equity.

This brings us to the second key concept.

Second key concept: relationships of trust and confidence

Recall the problem of the sale of the land, where the common law doctrine that each party has to look after only his or her own interests might have left the buyer feeling that it was “not fair”.

There is a difference between “not fair” and unconscionable. The result we saw did not come about through any fault of the seller, but only because the buyer failed to look after himself. So, if it *wasn't* “fair,” he had no one to blame except himself. There was nothing to afflict the conscience of the seller.

But there are relationships in which, instead of the parties being independent, the inferences to be drawn from the facts indicate that:

one party [is entitled] to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.²³

This entitlement arises in equity where:

There are elements of reliance, confidence or trust between them often arising out of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests. Telling indications may be that persons having taken, or been entrusted with, opportunity to protect or benefit others stand in a position also to prefer their own interests.²⁴

In situations of this sort, the relationship between the parties is said to impose “fiduciary” duties on the person being relied on—duties, that is, not to take advantage of the person who is relying on you.

This is a key concept without which nothing related to trusts can be really understood. One of the last century's most distinguished equity judges, Lord Peter Millett, has said that:

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a

²³ *Chirnside v Fay* [2007] 1 NZLR 433 at para 80.

²⁴ *Chirnside v Fay* [2007] 1 NZLR 433 at para 83.

third person without the informed consent of his principal.²⁵

Here is where, finally, we get to the *trustee*.

The *trustee* is the paradigm fiduciary. Equity imposes the negative duties—*no* unauthorised profit; no stepping into a situation in which the trustee’s duty and interest may conflict; and no acting for his own benefit without the beneficiary’s fully informed consent—described by Lord Millett in the interests of promoting and protecting that “distinguishing obligation of loyalty” on the trustee.

These are the key principles that derive from the Chancellor’s jurisdiction in equity.

Since the equity jurisdiction originated with bishops and cardinals, it is sometimes said that these principles are just another way of expressing the petition in the Lord’s Prayer: “Lead us not into temptation.”

So a trustee must not buy trust property for herself. She must not sell it to, say, her spouse. A trustee who does these things infringes her fiduciary duty not to place herself in a position in which the interests of persons outside the trust are in conflict with the interests of the trust estate and its beneficiaries.

The spouse’s interest is to pay the lowest price for the land. This is clearly in conflict with the beneficiaries’ interest in the trust obtaining the highest price. Self interest of this sort can only get in the way of the requirement that the trustee act with altruistic loyalty.

It is clearly an affront to the conscience of the trustee for her to act when subject to conflicting loyalties, let alone to actually exploit her position. So equity will set the sale aside at the request of the beneficiaries, just as it will set aside any unauthorised profit made from the fiduciary relationship. Its power to reverse the transactions and strip the profits, made in breach of fiduciary duty, is a powerful way of protecting the distinguishing obligation of loyalty.

Are trustees the only persons subject to fiduciary duties?

What, if any, persons—other than trustees—are subject to this duty of loyalty, and

²⁵ *Bristol & West Building Society v Mothew* [1998] Ch 1, 16–18 per Millett LJ (CA).

to its protective negative duties not put oneself in a conflict situation, and not to make an unauthorised profit?

The answer is that anyone within the Supreme Court's test I have already mentioned:

one party [is entitled] to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.²⁶

That clearly includes company directors. A company is entitled to place trust and confidence in its directors. It is entitled to expect the undivided loyalty of the director. It is entitled to rely on the director not to act in any way that is contrary to the company's interests, and certainly not to act in his own interests, in a matter concerning the company, without its fully informed consent. For his part, the director:²⁷

first, as a member of the board, or perhaps a delegate of the board, ... may have control over property which in equity belongs²⁸ to the company; and, secondly, by the mere fact of accepting office—and *a fortiori* in carrying out the functions of his office—he holds himself out as undertaking to act in the interests of another, ie, the company.

This duty on a director is given statutory form by s 131 of the Companies Act 1993,²⁹ which requires the director to:

act in good faith and in what the director believes to be in the best interests of the company.

For the purposes of this rule, a director will not be believed if he maintains that he believed something to have been in the best interests of the company when no reasonable director could possibly have believed that. The High Court began its judgment in a recent case in this way:

²⁶ *Chirnside v Fay* [2007] 1 NZLR 433 at para 80.

²⁷ Sealy, "The Director as Trustee," (1967) *Cambridge Law Journal* 83, 91.

²⁸ At page 87 Professor Sealy had previously said: "In an incorporated body, the legal title is in the corporation itself; in an unincorporated company, it is in trustees who have no say at all in matters of management; while in the case of a trust, it is in the trustees themselves. But in each case *control* of the property—the power to dispose of the legal estate—is in the hands of the fiduciaries; the property may be applied for unauthorised as well as for authorised purposes, and the obligation to account for the due discharge of their responsibilities is the same. Accordingly, it is on trust principles that directors are accountable for their handling of the company's property and, like trust property, assets wrongfully alienated may be followed into other hands and even traced into other forms."

²⁹ Sections 132-149 also are relevant to this issue.

[1] This case is a timely reminder of a fundamental principle of the Companies Act 1993 (the Act) that company directors must take proper steps to place themselves in a position to guide and monitor the management of the company. The responsibility for the governance of the company is theirs. They cannot simply treat the appointment as a sinecure and then leave to management, or other advisers, the duties of running the company and ensuring compliance with legal obligations. Let delinquent directors beware.³⁰

The Court of Appeal agreed:

[82] It is not right to say that the Lewises could have done nothing in this case. They could have obtained advice about how to manage the dire financial position into which the company had fallen. They could have resolved that the company would stop trading. They could have taken steps to ensure further debts were not incurred in circumstances where the company was not able to pay them. The reality is they took no meaningful action at all. They cannot throw their hands in the air and say it was not their fault.³¹

In aid of that duty of good faith, and just like a trustee, a director is subject to the no-unauthorised profit rule, and is subject also to the rule against putting himself in a position in which his interests are in conflict with the interests of the company.

So, if the director uses his position in an attempt to obtain personally a benefit or profit that he should have obtained for the company, equity requires him to account to the company for that profit or benefit.³²

A director, like a trustee, has control of property belonging to another—the company, in the former case, the beneficiaries in the latter. Each of them therefore has the opportunity to help themselves to it, or to apply it for the benefit of persons other than the proper persons. Each of them therefore is liable to account, on trust principles, in the same way—to the company or the shareholders in the former case, or the beneficiaries in the latter.

Distinctive duties of trustees

Those are the essential similarities between fiduciaries.

³⁰ *Mason v Lewis* High Court, Auckland, CIV 2003-404-0936, Stevens J, 1 October 2008.

³¹ *Lewis v Mason v Lewis* [2009] NZCA 306, 20 July 2009.

³² *Regal (Hastings) v Gulliver* [1967] 2 A.C. 134n, discussed in Pennington, *Directors' Personal Liability* (Collins Professional, London, 1987) 44-45.

The fiduciary who is a trustee however has many more obligations than the obligation of loyalty.

The first distinctive duty: intimate knowledge of the terms of the trust deed

The textbooks, and the judgments of the courts, are all agreed³³ that:

The first duty of trustees is to make himself thoroughly acquainted with the terms of the trust which he undertakes to carry out, and all documents, papers and deeds relating to or affecting the trust property as come into his possession and control.

It is necessary that trustees should know precisely the nature and circumstances of the trust property, and that they should know exactly what they are required to do with that property. It would seem the merest truism to set out this as the first duty of a trustee; but the reports show very clearly that people constantly undertake the office of trustee and yet neglect to inform themselves sufficiently as to the duties they are to perform. Every trustee should make himself acquainted with every instruction and direction contained in the instrument under which he is acting as trustee and should keep these constantly in mind. The trustee must not only acquire a full and exact knowledge of the contents of the trust instrument, ... but he must never forget it.

The second distinctive duty of the trustee: unbending adherence to the terms of the trust deed

Once having acquired that intimate and detailed knowledge of the trust terms:³⁴

It is the duty—perhaps the most important duty—of a trustee to adhere rigidly to the terms of the trust. A trustee undertakes a certain trust, that is, he or she undertakes to carry out the wishes of the settlor as expressed in a deed or a will, and having undertaken to do this he is bound by the undertaking.

The rule that the trustee must strictly conform to and carry out the terms of the trust modifies all other rules because these other rules are applied subject to any provisions contained in the trust instrument itself. However, where a statute or an order of the court warrants a departure from the terms of the trust instrument, the trustee may, of course, act in accordance with the statute or the order as the case may be. Subject to this, trustees who depart from the strict terms of the trust do so at their peril.

³³ Eg Meagher and Gummow, *Jacobs' Law of Trusts in Australia* (6th edn, 1997) 417. The corresponding passage in the 7th edn (2006) by Heydon and Leeming is to the same effect, but, in the rewriting, has lost some of the impact of the work of the previous editors of this important work.

³⁴ Heydon and Leeming, *Jacobs' Law of Trusts in Australia* (7th edn, 2006) 369.

“What about the promises I made during my election campaign? I have to stick to those, otherwise I am going to look like a damn fool?”

If you made promises without first having checked whether they were consistent with the powers of the trustees under the trust deed, then you might deserve to look like a bit of a dope.

Knowing the terms of the trust, and sticking rigidly to them, trump all other considerations. If a trustee is elected on a political platform, and that platform does not fit within the terms of the trust deed, that trustee had better forget the platform.

In one energy trust case, the learned judge firmly rejected the contrary argument in these terms:³⁵

[30] It was submitted that ... because the trustees of the Trust are the democratic representatives of the consumers, whose interest as income beneficiaries may be preferred over those of the capital beneficiaries, the trustees' roles are quite different from those of trustees under normal private trusts. This is because the trustees stood for election on individual political platforms based on philosophical and/or commercial approaches to the management of [the energy company] and the Trust. Accordingly, they do not have the normal discretion that a trustee of a private trust has and are entitled to take into account political views, together with a proper assessment of the commercial aspects of any proposal put to them for consideration. The submission was, in effect, that the trustees of the Trust come with a particular political platform and, because they have been elected by the consumers, they are entitled to allow that political platform to override the duties and obligations usually imposed by law upon trustees.

...

[52] I have difficulty with the proposition that the public interest nature of the Trust indicates that the term 'material interest' should be given a construction that will not disenfranchise those consumers who voted for [the trustee who had been elected after having campaigned on the platform in question]. The submission, if it were taken to its logical conclusion, and the submissions went a fair way towards that conclusion, is that a trustee who does have a conflicting interest, because of a political agenda, should nevertheless be entitled to vote notwithstanding the conflicting interest because to determine otherwise would disenfranchise the consumers who voted for that trustee. *In my view, the trustees, although elected by consumers, assume the duties imposed upon them by the Trust Deed and the law of equity relating to trustees. Political platforms do not allow them to breach duties imposed on them by law.* They have a very important role in approving certain major or significant transactions. Those transactions are on behalf of companies incorporated under the Energy Companies Act 1992 which states in s 36 that the principal objective of any energy company shall be to

³⁵ *Collinge v Kyd* (High Court, Auckland, Civ 2004-404-4828, 15 September 2004), Paterson J.

operate as a successful business. A trustee who fetters his or her discretion to act in the best interests of the Trust and [of the company], because of a particular policy on which he or she campaigned, may well be in breach of his or her duties as a trustee. Such a trustee may well be allowing interest to conflict with duty.

“I am perfectly reasonable, of course, but some of the other trustees are difficult. When I am doubtful about something, they get aggressive. So I just go along for the sake of peace. Surely that’s ok?”

The sooner you get that idea out of your head, the safer you will be.

Say two trusted friends of a common acquaintance agree to have the acquaintance’s land transferred into their names as legal owner, on the basis that they will transfer it to the transferor’s only child when that child reaches the age of, say, 30. Once the transfer goes through, the trustees become the owner of the land in the eyes of the law.

On that state of things, the trustees’ consciences would be severely affected if they were to sell the land at a giveaway to the toyboy lover of one of them. When that trustee wants to do that, the other trustee timidly complains that it “doesn’t seem right”. But he is scared to say it too loudly, because the trustee with the toyboy is a domineering woman who he finds extremely intimidating. So he gives in and signs the transfer. The toyboy soon sells the land at a large profit, and decamps to South America with his trustee paramour.

You will recall that I mentioned that this idea of the trust is a product of equity: the body of doctrine devised by the Lord Chancellors to prevent the common law being used to achieve unconscionable results. I mentioned that, until Sir Thomas More, the Chancellors had all be Bishops or Cardinals. More himself took over from Cardinal Wolsey.

Henry VIII was the king at that time. He wasn’t averse to bedroom workouts himself. When his lawful wife no longer attracted him as much as a new mistress whom he wanted to make his Queen, he wanted to have his existing marriage declared to have been invalid. He naturally turned to More, as his chief legal adviser, and as his conscience, and asked him to sign off on the idea that the marriage had definitely been illegal and ineffective, so that the King was entitled

to treat it as if it had never happened and was free to marry whom he liked.

More's integrity wasn't for sale. He told the king that his argument for the marriage having been illegal and void wouldn't hold water, and that he was indeed truly wedded to the wife he wanted to be rid of.

Henry said "see it my way or I'll have your head cut off," More said that his conscience would be afflicted if he was to yield to the king in this matter, because the law was clear and he could not, with integrity, sell it short.

So his head was cut off: thereby indicating the strength of character a Lord Chancellor took to be required. That principle applies equally to the trustee in my example, even though it is not his *head* that his toyboy-loving co trustee is threatening to sever if he doesn't go along with her plans.

What do you do if you think the other trustees are doing something that doesn't stack up, and in which you feel you should not be participating?

Doing nothing is not an option. If their proposed action was a breach of trust, and the beneficiaries sued all of you and got an award of \$20 million, you would be fully liable with the rest of them if you had gone along and signed up. You would still be fully liable if you were to have absented yourself from the critical meeting, and left them to do the deed.

It is elementary trust law that trustees must act jointly. This applies even where the trust instrument provides for majority voting. It is the consideration that must be joint: the trust is entitled to the trustees' collective wisdom.

It is also elementary that trustees may not delegate. Put in other ways, this means that they can't pass the buck to someone else—and, for a minority trustee, that means that she can't pass the buck to the majority.

Each trustee must think about the matter individually, and not allow himself or herself to be sandbagged by a domineering trustee or trustees. That happened in *Re Mulligan (Deceased)*³⁶ with disastrous effects for the other trustees, who were personally liable for some very serious financial consequences.

³⁶ [1998] 1 NZLR 481.

“We’ve got legal advice: *that’ll* protect us.”

Well it could: provided it is sound advice on which it is reasonable to rely.

The other trustees in *Re Mulligan (Deceased)*³⁷ had been acting on legal advice, but it didn’t save them, because a trustee does not act properly by relying on advice the source or nature of which would not have satisfied a person of ordinary prudence.

In paying out the trust estate, the trustee in *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd*³⁸ relied on what the Privy Council described³⁹ as “a [law] firm of high standing at Melbourne”. Their Lordships found also that the advice of that firm involved an “extraordinary slip”.⁴⁰ They began their Advice with the first bad news for the trustee.⁴¹

The fact that such payment was made through the bad advice of the solicitors of the trust company is no defence. In *Doyle v Blake* [2 Sch & Lef 231, 243] Lord Bedesdale said: ‘I have no doubt that they’ (the executors) ‘meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer.’ And there are many similar decisions in the books.

Their Lordships proceeded to deal with the Victorian counterpart of the provision that now is s 73 of the Trustee Act 1956 and which provides:

Power to relieve trustee from personal liability— If it appears to the Court that a trustee ... is or may be personally liable for any breach of trust, ... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for the same.

³⁷ [1998] 1 NZLR 481.

³⁸ [1905] AC 373.

³⁹ At page 377.

⁴⁰ At page 377.

⁴¹ At page 379.

At pages 380-382, their Lordships completed the bad news for the trustee in this way:⁴²

The third point raised on the appellants' behalf was that, even if there was a breach of trust, they should be relieved therefrom by virtue of s 3 of the Trusts Act, 1901, which corresponds with s. 3 of the English Act, 59 & 60 Vict c 35. That section is as follows: 'If it appears to the Supreme Court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.' The Courts in the Colony have found that the appellants acted honestly and reasonably, and their Lordships are prepared to deal with the case upon that footing. Mr Terrell contended that ... the right to relief followed as a matter of course [from the finding below that the trustee had taken the apparently competent legal advice both 'honestly' and 'reasonably']; but that is clearly not the construction of the Act.

Unless both are proved the Court cannot help the trustees ; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances. ... And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants [ie a professional trustee], their Lordships think it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents [beneficiaries], who have committed no fault, should lose their money to relieve the appellants, who have done a wrong and have denied the respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their cestui que trusts [an old term for 'beneficiaries']. In the present case there seems to be some ground for thinking that other proceedings were open to the trust company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the trust company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss ; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss, if the trust company should find they cannot obtain relief elsewhere. The Courts in the Colony held that under these circumstances the appellants had not made out any case for relief under the Act; and their Lordships agree with them.

So get recognized, specialist, advice: or act at your peril.

And when you have got that advice, think it through yourselves. This is critical. A

⁴² At pages 380-382.

trustee can't pass the buck to anyone: the buck stops with each of you. You can't pass the buck to the others. You certainly can't pass it to your advisers. The court in *Scott v National Trust*⁴³ put it well when it said that trustees must:

inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. *It is however for advisers to advise and trustees to decide.*

Advice from the Court

For this purpose, advice does not get to be more protective of the trustee than when it is given by the High Court. Section 66(1) of the Trustee Act 1956 ought to be known to every trustee. It provides that:

Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.

Section 69 sets out the advantage of the s 66 procedure:

Protection of trustee while acting under direction of Court—Any trustee acting under any direction of the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the direction, notwithstanding that the order giving the direction is [subsequently] invalidated, overruled, set aside, or otherwise rendered of no effect:

Provided that this subsection shall not extend to indemnify any trustee in respect of any act done in accordance with any such direction if he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the Court making the order giving the direction.

A trustee is always entitled to an indemnity from the trust estate for costs reasonably incurred in discharging their duties, and a trustee who, with sound grounds, approaches the court for advice in situations of real doubt or concern, will always be given consideration.⁴⁴ They will lose the right to indemnification

⁴³ [1998] 2 All ER 705, 717.

⁴⁴ In *Re The Auckland Energy Consumer Trust, Winter & Ors v A-G* (High Court, Auckland Registry M333-IM01) Fisher J, 21 December 2001 a trustee became concerned that an application the trustees were making may have been proceeding on the basis of a serious misconception attributable to inadequate advice being received by the trustees. She then sought and received independent advice. When that advice confirmed that the other trustees were off-beam, and were confusing the court, the court gave leave for her to be separately represented. The matter was quickly cleared up, a judgment obtained, and her individual costs ordered to be paid from the trust estate. In *Re John Doe* (High Court, Auckland Registry, M 985-

only by misconduct leading, say, to unnecessary applications being made to the court, or by taking an unreasonable stance which caused litigation. In those circumstances they may not only be denied their costs, but may be ordered to pay the costs of the other parties.

Additional duties of Trustees with a major shareholding in an energy company

Special principles apply where the trust estate includes a controlling shareholding in a company, or even a minority interest of sufficient size to give the trustees effective power to intervene in the company's business. In cases of this sort, the trustees' duty is to keep a close eye on the company's activities.

A leading case is *Bartlett v Barclays Bank Trust Co Ltd*.⁴⁵

It started in the 1920s with the creation of a family property investment company. The shares in its capital [at least as to 99.8%] were transferred to a trustee. In 1961 the board of the company decided to switch the company's business from property investment to speculative property development. The idea was that, if the development was successful, the company's shares could become sufficiently attractive to make a Stock Exchange listing a possibility.

The company set about buying up properties for prices in excess of their investment value, in the hope that, once a sufficiently large block has been put together, it would be possible to obtain planning permission for a financially viable redevelopment.

In 1974 the property market crashed. The value of the trust estate crashed with it. The properties that had been purchased in pursuit of this approach had to be sold off at fire-sale prices.

The beneficiaries sued the trustee. The learned judge began the vital part of his reasons for judgment with a very important point:⁴⁶

IMO2) Patterson J, 9 August 2002, the other trustees made the application for an order under s 66 clearing up the doubts that had been preventing a trustee from agreeing to proceed with an important commercial due diligence.

⁴⁵ [1980] Ch 515.

⁴⁶ Page 530.

It does not follow that because a trustee could have prevented a loss it is therefore liable for the loss.

This is well settled. A trustee is not a surety or insurer. Honest acts done with reasonable prudence, and within the limits of the trust deed, will not incur trustee liability even if the trustees made an error of judgment.

Against that background, in *Bartlett v Barclays Bank Trust Co Ltd*⁴⁷, Brightman LJ proceeded to quote from the decision of Cross J in *Re Lucking's Will Trusts*:⁴⁸

‘The conduct of the defendant trustees is, I think, to be judged by the standard applied in *Speight v Gaunt*, namely, that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man would conduct a business of his own. *Now what steps, if any, does a reasonably prudent man who finds himself a majority shareholder in a private company take with regard to the management of the company's affairs? He does not, I think, content himself with such information as to the management of the company's affairs as he is entitled to as shareholder, but ensures that he is represented on the board. He may be prepared to run the business himself as managing director or, at least, to become a non-executive director while having the business managed by someone else. Alternatively, he may find someone who will act as his nominee on the board and report to him from time to time as to the company's affairs. In the same way, as it seems to me, trustees holding a controlling interest ought to ensure so far as they can that they have such information as to the progress of the company's affairs as directors would have. If they sit back and allow the company to be run by the minority shareholder and receive no more information than shareholders are entitled to, they do so at their risk if things go wrong.*’

I do not understand Cross J to have been saying that in every case where trustees have a controlling interest in a company it is their duty to ensure that one of their number is a director or that they have a nominee on the board who will report from time to time on the affairs of the company. He was merely outlining convenient methods by which a prudent man of business (as also a trustee) with a controlling interest in a private company, can place himself in a position to make an informed decision whether, any action is appropriate to be taken for the protection of his asset. *Other methods may be equally satisfactory and convenient, depending upon the circumstances of the individual case. Alternatives which spring to mind are the receipt of copies of the agenda and minutes of board meetings if regularly held, the receipt of monthly management accounts in the case of a trading concern, or quarterly reports.* Every case will depend on its own facts. The possibilities are endless. It would be useless, indeed misleading, to seek to lay down a general rule. *The purpose to be achieved is not that of monitoring every move of the directors, but of making it reasonably probable, so far as*

⁴⁷ Pages 523-524.

⁴⁸ [1968] 1 WLR 866.

circumstances permit, that the trustee or (as in the Lucking case) one of them will receive an adequate flow of information in time to enable the trustees to make use of their controlling interest should this be necessary for the protection of their trust asset, namely, the shareholding. The obtaining of information is not an end in itself, but merely a means of enabling the trustees to safeguard the interests of their beneficiaries.

So where the trust estate comprises, or includes, a shareholding sufficiently large to enable trustees to intervene in the company's business, it is not open to any trustee to sit back, allow the company to be run by its directors, and be content with receiving no more than statutory accounts.

Just a word of caution here: a person acting as or occupying the position of, a director, though not actually appointed as a director, can be treated, and may be liable, as a director. So trustees who do not have themselves appointed to the board, but who call the tune, may find themselves regarded as *de facto*,⁴⁹ or *shadow*, directors in any event.⁵⁰ In which case, and in addition to paying close attention to their duties as trustees, they need to keep a careful eye on the provisions of the Companies Act 1993 dealing with the duties and powers of directors.

Further key concept: relationships and entities

Some of the questions that have been asked (eg questions 4 and 6 below) refer to “the” trust. The implication is that there is an entity called “a trust”, just as there is an entity called “a company”.

This is not so. A trust is the *relationship* that arises where one person, or a group of them, hold property that is for the benefit of others. As the Supreme Court held in one of the passages I have mentioned already:

Telling indications [of the existence of fiduciary obligations] may be that persons having taken, or been entrusted with, opportunity to protect or benefit others stand in a position also to prefer their own interests.⁵¹

⁴⁹ Companies Act 1993 s 126.

⁵⁰ Sections 132-149 could then become relevant. See Watts, *Directors' Powers and Duties*, (LexisNexis NZ Ltd, Wellington, 2009) 2-15. See also “Veil Piercing and Corporate Groups—An Australian Perspective,” [2010] *New Zealand Law Review* 1 for further recent discussion of this issue.

⁵¹ *Chirnside v Fay* [2007] 1 NZLR 433 at para 83.

That is a description of trustees: who are *the* example of persons owing fiduciary duties. The legal title to the property is in *their* names. So, if they are not people of conscience, they could sell it off cheaply to their wives; or charge huge “management fees” in respect of it: in either case, thwarting, at least partially, the settlor’s intention in transferring the property to them for the benefit of his intended beneficiaries. Because they have been “entrusted with the opportunity to protect” the trust estate for the benefit of the beneficiaries, and because their ownership of the legal title means that they “stand in apposition to prefer their own interests” over the interests of those beneficiaries, equity imposes on them the fiduciary duties not act in a position of conflict with those interests, and not to make any unauthorised profit from the trust.

So trusts are *relationships* (with beneficiaries and with the trust estate—ie with the trust property) carrying obligations. They are *not* entities.

Trustees’ personal liability

In the eyes of the common law, and of most statute law, it is the *trustees personally*—and not an entity called “a trust”—who are the legal owners of the trust property. So if they are sued for the rates on the property, and there are no trust funds available to pay the rates, the trustees must pay them out of their own pockets. If there *are* trust funds, of course, the trustees are entitled to an indemnity for any legitimate trust expenses they pay out of their own pockets.

But the important point is that, in the eyes of the law, *they* are the debtors: not “the trust” because there is no such thing as “the trust”. The only reality is the *relationship of trust* between the trustees and the beneficiaries.

So, if trustees are going to enter into contracts connected with the trust property, they are at risk if there is ever a shortfall of trust funds to meet the financial commitments for which, as owners in the eyes of the law, they are personally responsible to the full extent of their own assets: *unless* they have contracted on the basis of an express provision *in the contract* to the effect that the trustees are

trustees of the particular trust estate,⁵² *and* that the other contracting party acknowledges that the trustees' liability in respect of the contract shall be limited to the assets of the trust at their disposition at the date of any demand being made on them.⁵³

It is of no use, however, to include, *in the trust deed*, a provision to the effect that the trustees' liabilities shall be limited to the trust assets: for that is a provision which (unless it shall be expressly adopted by the other contracting party) will not have been made with the other contracting party and therefore will not bind that party.

Again, if a trustee pays out trust money on an unauthorised investment, which then drops in value, or distributes trust funds to someone not entitled to receive them: the trustee will have to replace the entire sum invested or paid away.

The beneficiaries are in the box seat in these cases. If that unauthorised investment *rises* in value, the beneficiaries can elect not to complain: in which case the investment which has turned out so well will be treated as trust property.

All the upside goes to the trust if the unauthorised investment turns out well, but if it turns out badly the trustee is bound to restore to the trust fund the entire amount paid out in breach of trust and not just the amount of the loss.

Burning questions

I have been asked to deal with some specific questions raised by trustees of various Energy Trusts. These are:

- 1 Whether trustees have the same responsibilities as company directors, or, as another question put it, would I comment on the practice of some "well-meaning trustees" who pick up a list of duties from the Institute of Directors and then read "trustee" whenever "director" is

⁵² *Eg in Muir v City of Glasgow Bank* (1879) 4 App Cas 337 it was held to have been a waste of time for trustees to have subscribed for a share of a partnership "as trust disponees". That phrase did not convey the necessary intent that the trustees were not to be liable to the extent any claims against them were to exceed the available trust assets. Even if an otherwise more effective form was to have been used, it still would have done no good because it is not possible to become a member of a partnership on a basis other than full liability.

⁵³ *McLean v Burns Philp Trustee Pty Ltd* (1985) 2 NSWLR 623, 640.

mentioned.

- 2 Can trustees be held legally responsible for their actions as company directors can be held?
- 3 Whether it is relevant to question 1 that a trust does not issue a prospectus.
- 4 Some Deeds refer “to an ‘officer’ of the Trust in relation to an indemnity, an ‘officer’ is not defined. Other than a Trustee or an employee of the Trust, what are examples of such an ‘officer’?”
- 5 “Are there any specific responsibilities a Trustee faces towards such an ‘officer’?”
- 6 Should “the Trusts carry liability insurance for the Trustees, or are they somehow covered by the law?”

Thoughts on those questions

The following thoughts may be helpful:

- 1 As appears from pages 11-12 above, directors have trustee-like duties. There was a time when court decisions actually referred to them as trustees, but this was really only as a basis for subjecting them to fiduciary duties. Professor Pennington⁵⁴ writes that:

In more recent cases the court has been less inclined to draw analogies between the duties of trustees and those of directors. This is because there is now a substantial body of case law on directors’ fiduciary duties to which the court can refer for guidance, and it is now rarely necessary to refer to judicial rulings on trustees’ duties. *Nevertheless, the basic, unifying feature of the fiduciary duties of all persons acting in a representative capacity for the benefit of others, that the interests of those others must be the paramount, and often, the only consideration, is still present, and this makes the fiduciary duties of representatives a distinctive and self-contained part of the law.*

It would be dangerous for a trustee to adopt the practice described in the question. For one thing the trustee is under a number of additional duties that are described at pages 12-16 above, but that would not be on a list of directors’ duties.

For another thing, the director’s duty is to take and manage commercial risk. A company cannot hope to prosper otherwise. But a

⁵⁴ *Directors’ Personal Liability* (Collins Professional, London, 1987) 36.

famous judge, Lindley LJ, famously said:⁵⁵

The principle applicable to cases of this description was stated by the late Master of the Rolls in *Speight v Gaunt* to be that a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. I accept this principle; but in applying it care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in; and unless this is borne in mind the standard of a trustee's duty will be fixed too low ...

That is to say, while the company sets out to *risk* its capital on the particular business in which it is engaged, the trustees have to *preserve*⁵⁶ the capital so that it will be there for the capital beneficiaries when the interests of the income beneficiaries shall have expired.⁵⁷

There are a number of other differences, some of the most important of which were pointed out by Professor Sealy in a famous article [the

⁵⁵ *Re Whiteley, Whiteley v Learoyd* (1886) 33 Ch D 347.

⁵⁶ Molloy, "I am a trustee. I cannot make head or tail of $P_0 = S_0N(d_1) - Xe^{-rt}N(d_2)$, where $d_1 = (Ln(S_0/X) + (r + \sigma^2/2)t) / (\sigma\sqrt{t})$ and $d_2 = d_1 - (\sigma\sqrt{t})$. Am I at risk?" (2009) 15 *Trusts & Trustees* 524.

⁵⁷ In "The Director as Trustee," (1967) *Cambridge Law Journal* 83, 89, Professor Sealy wrote [the interpolation is mine] that: "The normal function of trustees is to conserve a fund and to dispose of it in accordance with the directions of the settlor. The law of trusts does not [although, of course, a trust deed might] allow a trustee a very wide discretion in what he does: often fixed rules, either of law or of court practice, fetter his activities and prescribe within close limits the proper course for him to take. He must be careful to preserve the trust property and avoid exposing it to unnecessary risks, and here he can look to the law to direct him as to the kind of investments a trustee may make. If he wishes to realise trust property, the law will dictate for him the conditions of sale. In these matters, the courts have the experience and the facilities to supervise his activities. But it has always been recognised that none of these rules applies to company directors. The conduct of their enterprise is entirely a matter for their judgment as business men, and the courts have never been willing or competent to review the exercise of this kind of discretion on the merits of the case. Commercial ventures are all in some degree speculative, and companies must encounter risks. It is not the director's concern to avoid risks, but to decide whether a risk is worth taking, and what the risk is worth. Again, a trustee's primary duties are imperative: only when he has carried them out to the court's satisfaction can he claim to be quit. But a director's role is almost wholly discretionary: on the one hand, it is up to him to decide whether his company shall undertake any venture at all; on the other hand, so long as his company's business continues, he can never claim that his work is done. These differences of function have meant that the trust rules cannot be applied literally to the director. It has been possible in some cases to modify them to fit his different situation; but all too often, where they have been abandoned as wholly inappropriate, no clear alternative rules have been developed in their place."

interpolated comment is my own].⁵⁸

In one respect, the comparison between trustees and directors soon breaks down. Trustees [other than charitable trustees] must ordinarily [but not where there is express provision in the trust deed to act by majority or by quorum] act unanimously: if they differ, they must either not act, or seek a ruling from the court [under, say s 66 of the Trustee Act 1956]. In strict theory, a trustee may perhaps be said not to be liable for the acts of a co-trustee; but in practice he is invariably treated as being personally responsible for the due discharge of his trust, and accountable for a misapplication whether or not he has been directly implicated. No dealing with the trust property is possible without his intervention, and so his part in a breach of trust can never be purely passive: to part with his share of control, to delegate responsibility or the duty of making a decision, whether to his fellows or to an outsider, is to be guilty of an act which itself prejudices the trust, so that he is always, in principle, liable. It is necessary only to prove the receipt of trust property, or the obligation to get it in, to render a trustee accountable for its due disposal.

In contrast, under the constitution of a typical company, “control” of the property may be exercised by fewer than the total number of directors. The board may act by a quorum, and the vote of a majority prevails. An individual director is not a necessary party to a transaction involving the company’s property: he is permitted not to be implicated. Unlike a trustee, he has no obligation to assume control over the property and to retain it in his hands. If he lets his colleagues act, he is not wrongfully delegating his share of control, for it is within their authority and competence to act without him. There is no question of his trusting their judgment, for the constitution trusts it. Furthermore, if he disagrees with them, he must accept the decision of a majority—at least in any *intra vires* matter—and he will not be heard if he attempts to bring the matter before the court. It follows that only those directors who are active parties to any particular dealing with the company’s property ought, *prima facie*, to be liable as fiduciaries for the propriety of their act; and this is generally so.

- 2 Trustees have a higher level of liability than directors: partly because they may take less risk, but also because they have the additional duties described at pages 12-16 above.
- 3 On the other hand, directors who sign off on a prospectus undertake a serious potential liability that is not faced by trustees. This obviously does not diminish the danger of trustee reliance on “lists of director duties”.
- 4 Because, as appears from pages 9-10 above, trust is a relationship between the trustees and the beneficiaries, there is strictly no such thing as “a trust”. So an “officer”—who could, for example, be the

⁵⁸ “The Director as Trustee,” (1967) *Cambridge Law Journal* 83, 87-88.

secretary—is an employee of the trustees (who are liable to pay his salary from their own pockets if the trust funds run out), and not of “the trust”.

- 5 The trustees’ responsibility towards the “officer” is the usual employer responsibility: which falls on the trustees personally.
- 6 From the references to trustee liability throughout this paper it will be clear that the trustees must have insurance. The only insurance power in the Trustee Act 1956 is in respect of trust property, not in respect of trustee liability. Trustees have their indemnity against the trust estate, but that will not help if the trust estate shall have been exhausted—leaving the trustees to carry the can.

If the trust deed does not give the trustees power to insure themselves, they would be in a position in which their own interests in getting cover would be in play. Rather than risk beneficiary attack for acting in a conflict situation, trustees would be following the safe course if they were to apply to the court for an order amending the trust deed to confer on the trustees a power to insure themselves.

5 November 2010