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Delegation of Trustees' Powers and Current Developments in Investment Funds Management

Abstract
[extract] It is well established that, provided that the trustee acts honestly and does not breach other duties (such as the duty to comply with the terms of the trust instrument and the duty to act with reasonable care), the determination of what serves the interests of the beneficiaries is very much, under general trust law, a matter for the subjective judgment of the trustee (though beneficiaries will be entitled to relief if what the trustee has done, or proposes to do, demonstrably cannot be justified as serving their interests.) In two important types of case, however, statute imposes what apparently is meant to be a higher, and presumably objective, standard.

Keywords
investment funds management, trusts, delegation of trustees' powers

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DELEGATION OF TRUSTEES' POWERS AND CURRENT DEVELOPMENTS IN INVESTMENT FUNDS MANAGEMENT

By
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The Context

It can be unhelpful, and misleading, to consider trustees' powers of delegation in isolation, divorced from more fundamental characteristics of trusts and more basic aspects of the duty of a trustee. Those characteristics and aspects are so well established - and elementary - that no elaborate citation of authority is necessary; but the justification for mentioning them is that they are easily overlooked in the course of analysing the subsidiary and specific.

1. It is of course of the essence of a trust that the trustee hold property not beneficially but for the benefit of beneficiaries (of whom the trustee may be one).

2. It is equally of the essence of a trust that the powers of the trustee (including those coupled with a duty - eg properly to invest the trust funds) are to be exercised having regard to the interests of the beneficiaries, not the interests of the trustee or other extraneous considerations.

3. The trustee has a duty to exercise reasonable care: the received formulation is that the trustee 'ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own'.[1] It may well be that a higher standard is applied to a trustee which acts for reward and holds itself out as having particular expertise in the administration of trusts.[2]

4. A trustee also has duties as to the fair treatment of beneficiaries among themselves, whether the beneficiaries form one class or several.[3]

An Interpolation: 'Best Interests' of Beneficiaries

An interpolation may be justified here. It is well established that, provided that the trustee acts honestly and does not breach other duties (such as the duty to comply with the terms of the trust instrument and the duty to act with reasonable care), the determination of what serves the interests of the beneficiaries is very

1 *Speight v Gaunt* (1883) 22 ChD 727 at 739 per Jessel MR.
2 *Bartlett v Barclays Trust Co* (No 1) [1980] 1 Ch 515 at 533.
3 See PD Finn, *Fiduciary Obligations*, (Sydney 1977), Chapters 12 and 13.

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much, under general trust law, a matter for the subjective judgment of the trustee (though beneficiaries will be entitled to relief if what the trustee has done, or proposes to do, demonstrably cannot be justified as serving their interests.)[4] In two important types of case, however, statute imposes what apparently is meant to be a higher, and presumably objective, standard. Where interests under a trust are prescribed interests to the offer or issue of which Division 5 of Part 7.12 of the *Corporations Law* applies, regulation 7.12.15(f)(i) of the *Corporations Regulations* imposes on both the manager and the trustee a covenant that they 'will perform their functions and exercise their powers under the deed in the best interests of all the holders of the prescribed interests and not in the interests of the [manager] or the trustee if those interests are not the same as those of the holders of the prescribed interests generally.' In the case of a superannuation fund, section 52(2)(c) of the *Superannuation Industry (Supervision) Act* 1993 ('*SIS*') imposes on the trustee a covenant 'to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries'.

It is, perhaps, possible that the *Corporations Regulations* covenant could be construed as adding little, if anything, to the general law: that is, that it merely draws the distinction between the beneficiaries' interests (to which the trustee must have regard) and an extraneous consideration (the one most commonly encountered) which the trustee must disregard. That limited construction does not, however, emerge very convincingly from the words used: a requirement to act 'in the best interests of ... holders' does not look like an obligation to act in a way which the trustee honestly considers to be in their interests (and is not demonstrably not in their interests); it looks much more like a positive obligation to act in what are, objectively, their interests, raises the intriguing question of what, if anything, 'best' adds to 'interests' and assumes a state of affairs which is by no means necessarily true, that the 'best interests' of 'all the holders' will be identical. Although the *SIS* covenant was inspired by its *Corporations Regulations* counterpart,[5] it does not draw the distinction between the beneficiaries' interests and those of the trustee and is therefore more difficult to construe in a limited way.

There is no indication that any careful thought was given, in the drafting of the provisions, to the effect of applying an apparently purely objective test or of adding the word 'best' or, in the case of the *SIS* version, of omitting the distinction between the two sets of interests. Nor is it clear what the relationship is between the trustee's duty of care, or reasonable prudence, and the apparently absolute duty to act (in the case of *SIS*, ensure that the trustee acts) in the best interests of beneficiaries. It may be noted that *SIS* requires also (s 52(2)(b)) a covenant by the trustee 'to exercise ... the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide'.

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4 See the discussion in Finn, *op cit*, 38-44.

5 See the Report of the Law Reform Commission and the Companies and Securities Advisory Committee, *Collective Investments: Superannuation*, 1992, para 9.15).

It should be noted that the statutory terminology has the support of Sir Robert Megarry, who in *Cowan v Scargill* [6] said this:

> The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are usually their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investment in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

It seems reasonably clear from what follows that Sir Robert Megarry, in speaking of a duty to act in the best interests of beneficiaries, had in mind a combination of the established duties (a) to have regard, in exercising fiduciary powers, to the interests of the beneficiaries and not to extraneous considerations, and (b) to act with reasonable care and prudence. Perhaps that is all the statutory terminology is intended to mean. If so, it is a pity that the provisions are cast in a way calculated to suggest to courts that something different may have been intended.

Modification of Duties by Express Provision

The covenants required by the *Corporations Regulations* and by *SIS* cannot be excluded or modified: they are in any event deemed to be included in the deed.[7]

Such statutory provisions apart, there is scant authority as to the extent to which the instrument constituting a trust can exempt a trustee from obligations which the law would otherwise impose. It seems clear that an express provision may permit a trustee to enter into a transaction which would otherwise be prohibited because of a conflict between the personal interest and the duty of a trustee.[8] But it does not follow that an exemption clause could permit a trustee to exercise powers having regard to interests other than those of the beneficiaries, particularly the personal interests of the trustee: that, it is suggested, would be repugnant to an essential characteristic of a trust. It is of the essence of a trust that the trustee hold property subject to an obligation to administer it in the interests of others - the beneficiaries. Thus if a trustee is permitted by the trust instrument to enter into a transaction in which he or she has a personal interest, the trustee may nevertheless enter into a particular transaction only if, although the trustee is interested in it, it can nevertheless honestly be considered to be in the interest of the beneficiaries - and if the trustee enters into it because he or she considers it to be in the beneficiaries' interests, not because it advantages

6 [1985] Ch 270 at 288.
7 *Corporations Law*, s 1069(7); *SIS* s 52(1).
8 See, for example, *Re Efron's Tie and Knitting Mills Pty Ltd* [1932] VLR 8.

the trustee.

It is not clear to what extent - if at all - a trust instrument may limit the trustee's duty to act with reasonable care and prudence. The prevailing orthodoxy seems to be that a trustee may be exonerated from liability for 'ordinary' negligence but not from liability for recklessness or wilful breach of trust.[9] Again, to exonerate a trustee from liability for recklessness or wilful breach would be contrary to the same essential element of a trust.

Nevertheless, the scope and content of a trustee's duty may be significantly affected by the extent to which the trust instrument gives the trustee express powers. For instance, the deed may give the trustee a range of permitted investments which is considerably wider than the law would otherwise permit, and there seems to be no reason why the deed should not make it clear that an object of the trust is that the trust fund, or a portion of it, be employed in risky or speculative investments or ventures: in such a case, the trustee could - perhaps should - do that which the duty of prudence would otherwise forbid. Clearly, and of more direct relevance to the present topic, the extent of a trustee's duty to act personally, or not to delegate, can be affected by express provision in the instrument: this is dealt with below.

The Duty of a Trustee to Act Personally, or Not to Delegate

(i) General Law

The point of commencement is undoubtedly that '[t]rustees ... have no right to shift their duties on other persons'.[10] But, when that was said, it was already well established that there were circumstances in which it was permissible for a trustee to appoint an agent but one must note, however, that *Ex p Belchier*[11] Lord Hardwicke LC said that 'where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses'. He proceeded to give the following examples:

> If trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable.

So in the employment of stewards and agents, the receiver of Lord Plymouth's estate took bills in the country, of persons who at the time were reputed of credit and substance, in order to return the rents to London: the bills were protested and the money lost, and yet the steward was excused. None of these cases are on account of necessity, but because the persons acted in the usual method of business.

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9 See, for example, RP Austin, 'The Role and Responsibilities of Trustees in Pension Plan Trusts: Some Problems of Trusts Law' in *Equity, Fiduciaries and Trusts*, (TG Youdan, ed, Carswell Toronto 1989), 111 at 128, 129; HAJ Ford and IJ Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in *Equity and Commercial Relationships*, (PD Finn, ed, Law Book Company, Sydney 1987), 48 at 56-58.

10 *Turner v Corney* (1841) 5 Beav 515 at 517 per Lord Langdale MR.

11 (1754) Amb 218 at 219 per Lord Hardwicke LC.

Ex p Belchier concerned an assignee in bankruptcy who had employed a broker to sell tobacco; the evidence established that 'it is the common method of business, to sell mercantile goods by auction, and to employ a broker, and for him to receive the money'.[12] The tobacco was sold, the broker received the proceeds and, having held them for ten days, himself became insolvent. The question was whether the assignee should bear the loss. Lord Hardwicke held that, as she had acted in accordance with usual business methods in appointing the broker and allowing him to receive the money, she should not be responsible for the loss.

Those principles enunciated in *Ex p Belchier* were affirmed, in virtually the same terms, by the Court of Appeal and the House of Lords in *Speight v Gaunt*.[13] The question there was whether a trustee had acted properly in employing a broker to invest in securities of local authorities, in paying to the broker the funds to be invested and in accepting the broker's explanation of delay in receipt of the securities. It was held on the facts that the trustee had acted as an ordinary prudent man of business would, and that that was the standard by which a trustee's conduct should be judged. It followed that the trustee was not liable for the loss suffered when the broker absconded.

The 'ordinary prudent man of business' test had some obvious and well-established corollaries. For instance, an ordinary prudent man of business does not employ an agent to undertake tasks for which the particular agent is not fitted by training or experience[14] or leave an agent, who may have been properly appointed in the first place, unsupervised.[15] What is, however, quite plain is that the delegation contemplated is the 'doing by other hands' of something - the performance of a task or entering into a transaction - which the trustee either could not, or would not in accordance with accepted commercial practice be expected to, do personally. It is not a surrender of discretion or a delegation of a power to make decisions, except perhaps some of a minor kind arising in the course of the transaction for which the agent is employed, about the administration of the trust or the exercise or the trustee's powers.

(ii) Trustee Acts

These principles are not, it is suggested, substantially affected by the provisions of the *Trustee* or *Trusts Acts* of the various states. Generally it may be said of those provisions that they, like the English provisions which they largely follow, are not distinguished either by clarity or by coherence; nor do the various changes made to the original (which themselves vary confusingly from state to state) obviously represent improvements. In all cases the provisions are capable of extension or limitation, in their application to a particular trust, by provision in the trust instrument.

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12 Ibid at 218.
13 (1883) 22 ChD 727; (1883) 9 App Cas 1.
14 For example, see: *Rowland v Witherden* (1851) 3 McN & G 568; *Fry v Tapson* (1884) 28 ChD 268.
15 For example see: *Matthew v Brise* (1843) 6 Beav 239; *Guazzini v Pateson* (1918) 18 SR(NSW) 275; *Re Lucking's Will Trusts* [1968] 1 WLR 866).

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The principal Victorian provision (which is closest to the original) is s 28(1) of the *Trustee Act* 1958. It reads:

> 28(1). Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a barrister and solicitor, banker, stockbroker, or other person, to transact any business or to do any act required to be transacted or done in the execution of the trust, or in the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

The Queensland provision[16] is similar but for the addition of the words 'and without negligence' after 'in good faith'. The New South Wales provision[17] does not include that addition, but does include two subsections which the others lack:

> (4) This section extends, in the case of a bank but not in any other case, to the receipt and payment of moneys.
> (5) Nothing in this section shall authorise a trustee to employ an agent in any case where a person acting with prudence would not employ an agent to transact the business or do the act, if the business or act was required to be transacted or done in such person's own affairs.

The Acts all include separate provisions for delegation where the trust property includes property outside the State or where the trustee either is, or proposes to be, outside the State. Those provisions have little direct relevance to the present topic, but are of some significance for the light they cast on the construction of the provisions for the appointment of agents to transact business or do acts. They are all substantially identical. The New South Wales versions[18] include the following:

> 55(1) Where any property subject to a trust ... is in any place outside New South Wales, the trustee may appoint any person to act as his agent or attorney for any of the following purposes:
>
> (b) executing or exercising any discretion trust or power vested in the trustee in relation to the property ...
>
> (3) The trustee shall not by reason only of having made the appointment, be responsible for any loss arising thereby.
>
> 64(1) Where a trustee is absent from New South Wales or is about to depart therefrom, he may by registered deed delegate the execution of the trust ...
>
> (5) The delegation shall not be made, whether to a co-trustee or to any other person, unless there will be remaining in New South Wales to perform the

16 *Trusts Act* 1973 (Qld) s 54(1).
17 *Trustee Act* 1925 (NSW) s 53.
18 *Trustee Act* 1925 (NSW) ss 55 and 64.

> trust either the public trustee or a trustee company or two persons whether as trustee or delegate ...
>
> (7) A trustee who delegates his trust shall remain answerable for all acts and omissions of the delegate within the scope of the delegation as if they were the acts and omissions of the trustee, and the delegate shall be subject to the jurisdiction and powers of any Court so far as respects the execution of the trust in the same manner as if he were the trustee.

Finally, the Acts imply in trust deeds an exoneration provision in favour of trustees. The Victorian version[19] reads:

> 36(1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss unless the same happens through his own wilful default.

The Queensland provision[20] is substantially identical; New South Wales version[21] substitutes 'wilful neglect or default' for 'wilful default'.

(iii) What Difference Do the Trustee Acts Make?

It has been said of the principal provision for the appointment of agents that:

> It is hardly too much to say that it revolutionises the position of a trustee or an executor so far as regards the appointment of agents. He is no longer required to do any actual work himself, but he may appoint a solicitor or other agent to do it, whether there is any real necessity for the appointment or not.[22]

Re Vickery involved the appointment, by an executor, of a solicitor who had - though the executor at the time he made the appointment was unaware of this - previously been suspended from practice, and his authorisation of the solicitor to collect money belonging to the estate. The solicitor absconded and the money was lost. Maugham J held that the executor was not liable to make the loss good. His Lordship held on the facts that the appointment had been made in good faith and that, because the loss had resulted from the default of the solicitor as a person with whom trust moneys had been deposited the exoneration provision[23] meant that the executor was not liable in the absence of his own wilful default. 'Wilful default' had, in this context, the same meaning given, in *Re City Equitable Fire Insurance Co*,[24] where the court held to have, in relation to directors, in an indemnity clause in articles of association: that is,

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19 *Trustee Act* 1958 (Vic) s 36(1).
20 *Trusts Act* 1972 (Qld) s 71.
21 *Trustee Act* 1925 (NSW) s 59.
22 *Re Vickery, Vickery v Stephens* [1931] 1 Ch 572 at 581 per Maugham J.
23 Section 30(1) of the *Trustee Act* 1925 (UK) .
24 [1925] Ch 407.

a default which was either deliberate (ie committed in the knowledge that it was a default) or reckless (ie careless whether it was a default or not). The executor, Maugham J held, was not guilty of wilful default in that sense, and therefore the claim against him failed.

Re Vickery has had both supporters and detractors.[25] On any view, the decision on the facts seems clearly supportable: there is not much to distinguish the executor's conduct from that of the trustee in *Speight v Gaunt*.[26] But is it really true that the statutory provisions, rather than substantially codifying, have actually 'revolutionised' the law about delegation by trustees? The answer is, it is suggested, clearly not; and that answer can be supported by a consideration of a number of aspects of the power to delegate.

1. The *Re Belchier* doctrine permitted the delegation of acts or transactions which either the trustee could not, or in accordance with prudent commercial practice would not be expected to, do or enter into personally; it did not permit any broad delegation of discretionary or decision-making powers. The position under the statutes is no different, except for the delegation powers in relation to foreign property and absent trustees. The trustee may (generally) employ an agent to transact a business or do an act required in the execution of the trust; this is clearly different from - more limited than - exercising discretions trusts or powers in relation to foreign property, or delegating (in the case of an absent trustee) the execution of the trust. There is, of course, a question, equally under the statutes as under the general law, about the dividing line between those acts which are merely ministerial and those which involve a discretion: this is considered briefly below. The New South Wales provision narrows the permissible scope of a delegation by sub-section(4), which is to the effect that a trustee can, under the statute, delegate only to a bank the receipt and payment of money: that limitation is, of course, usually eliminated by a provision in the trust instrument.

2. The *Re Belchier* doctrine permitted delegation where it was necessary or where ('moral necessity') it was in accordance with ordinary prudent commercial practice. Is it really true, as Maugham J suggested (loc cit), that in this respect the statutes effected a revolution and that an agent may now be appointed whether it is necessary, including morally so, nor not? In New South Wales, the answer is clearly 'no' because of section 53(5). In the other states, it is suggested, the answer is equally 'no' although the statues do not expressly say so. There is no good reason to suppose that the duty of care and prudence[27] does not apply to the statutory power; and, more broadly, it may be suggested that to give the answer 'yes' is to confuse a trustee's formal power to do an act with the considerations relevant to a proper exercise of the power.

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25 See Gareth Jones (a detractor), 'Delegation by Trustees: a Reappraisal' (1959) 22 *MLR* 381; HAJ Ford and WA Lee (measured supporters) *Principles of the Law of Trusts* (2nd ed Law Book Co, 1990), 446, 447.

26 Ibid.

27 For which *Speight v Gaunt* above n 13 is an authority.

3. In accordance with the *Re Belchier* principle it was necessary to select an agent who had the appropriate skill and experience for the act or transaction in question.[28] For the reasons just given, that must still be so: Maugham J concedes as much when he says, immediately after the passage quoted above, 'No doubt [the trustee] should use his discretion in selecting an agent, and should employ him only to do acts within the scope of the usual business of the agent; ...'.

4. Under the general law a trustee was obliged to exercise reasonable oversight over the agent's performance of the delegated tasks. Subject to a question about the effect of the exoneration provision (see below), that is still the law: this emerges clearly from the decision of Cross J in *Re Lucking's Will Trusts*[29] in which a trustee was held liable to make good losses resulting from defalcations by the manager of a company in which the trust held a majority of the shares. The trustee, Cross J held, failed adequately to supervise the manger - to the extent, in an excess of trust, of signing blank cheques on the company's account sent to him by the manager.

5. There are two questions about exoneration. The first arises from the concluding words of the provision, 'and shall not be responsible for the default of any such agent if employed in good faith'.[30] It might be thought that this means that if the trustee only makes the appointment in good faith,[31] he or she will not in any circumstances be liable for what the agent then does: in other words, the duty of supervision is abolished. This seems to be the way in which Gareth Jones[32] - incorrectly, it is suggested, though the judgment is not completely clear - reads the judgment of Maugham J in *Re Vickery*.[33] Although, if the words do not have that meaning, it is not at all clear what meaning they have, it is plain[34] that they do not relieve a trustee of the duty to supervise an agent or of the duty of care in the selection of an agent. The second question arises from the exoneration provision:[35] the trustee is answerable only for his own acts and defaults, and not for those of any person with whom trust money or securities are deposited ' ... nor for any other loss unless the same happens through his own wilful default'.[36] Maugham J held in *Re Vickery* that the exoneration was restricted to cases where money or securities were deposited with the agent, but that in such cases[37] 'wilful default' meant conscious or reckless default.[38] This, if right, plainly does affect the duty of supervision where the provision applies. In *Lucking's Will Trusts*,[39] Cross J was able to distinguish *Re Vickery*, on the basis that the agent concerned was not one with

28 *Fry v Tapson*, ibid.
29 [1968] 1 WLR 866.
30 In Queensland, 'and without negligence' see: *Trusts Act* 1972 (Qld), s 71.
31 And, if in Queensland, without negligence.
32 See above n 25 at 389.
33 Above n 22.
34 Re *Lucking's Will Trusts*, [1968] 1 WLR 866.
35 See *Trustee Act* 1958 (Vic) s 36(1); *Trustee Act* 1925 (NSW) s 59; *Trustee Act* 1972 (Qld) s 71.
36 See, for example, *Trustee Act* 1915 (NSW) s 59: 'his own wilful neglect or default'.
37 Of which *Re Vickery* was one.
38 See *Re City Equitable Fire Insurance*, above n 24.
39 Above n 29.

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whom money or securities had been deposited. In his article cited above, Professor Gareth Jones makes a powerful argument for the proposition that, in the light of earlier cases, *City Equitable* should not have been applied in this context, where 'wilful default' should have been read as meaning, in effect, simply breach of duty.

Distinction between Delegable Acts and Non-Delegable Discretions

Ford and Lee[40] quote a comment of Professor Finn, that the 'relationship of the prohibition on delegation to the power to appoint agents has never been analysed satisfactorily in private law'.[41] There will be many cases in which the appointment of an agent to do an act or transact business will necessarily involve some exercise by the agent of judgment or discretion.[42] If satisfactory analysis requires the discovery of a clear dividing line, probably, as a matter of theory, it is impossible. Ford and Lee suggest[43] that a decision relates to the execution of the trust or to the exercise of the trustee's powers and discretions (and must therefore be made personally) 'where, in taking it, considerations relative to the trust as such ought to be borne in mind'. If a decision relative to the trust as such is one in making which it is relevant to bear in mind that the person making the decision (or the principal on whose behalf it is made) is a trustee and to consider the beneficiaries and their interests, then the suggested test may be a useful guide. It is not easy to think of a better. Certainly the list, suggested by Ford and Lee, of decisions which would fall into category[44] seems uncontroversial: it includes, for instance, decision which affect the entitlements of beneficiaries and significant administrative decisions, such as those relating to the trust's investment strategy.

Other Aspects of the Trustee's Duty to Act Personally

There are two such aspects which should be mentioned but do not require detailed discussion here. They are discussed in detail in Finn's *Fiduciary Obligations*.[45] One is the rule that trustees must not accept dictation (including dictation from beneficiaries absolutely entitled to the fund[46]) as to the way in which they will exercise their discretions. They may, however, and probably in many circumstances should, take account of wishes expressed by interested parties, including beneficiaries[47] and settlors in 'instigators'.[48]

The other is the rule against fettering discretions: a trustee must not decide, before the proper time, how a particular discretion is to be exercised in

40 Above n 25 at 430.
41 *Fiduciary Obligations*, (Law Book Co, Sydney 1977) at 20, n 6.
42 See RP Meagher and WMC Gummow, *Jacobs' Law of Trusts* (5th ed Butterworths 1986), at 404, 405.
43 Above n 25 at 431.
44 Ibid.
45 Above n 40, chapters 6 and 7
46 *Re Brockbank* [1948] Ch 206.
47 *Re Whitehouse* [1982] Qd R 196).
48 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405).

the future. Re *Vestey's Settlement*: *Lloyd's Bank v O'Meara* [49] is a very well known and good example: there the Court of Appeal held that trustees had acted improperly in determining, in advance, in what proportions they would distribute to which beneficiaries income of future years. It does not follow, of course, that trustees can never enter into a contract under which they undertake to do things in future; the proper time for exercising the discretions concerned may be the time at which the question, whether to enter into the contract, is considered, not the time when obligations under it are to be performed.[50]

Variation by Express Provision in Trust Instrument

Some suggested limits of a settlor's ability to exclude or modify, by express provision, certain fundamental duties of a trustee have already been discussed. And, as we have seen, the delegation provisions in the trustee legislation explicitly contemplate that they are subject to modification, for a particular trust, by the trust instrument. To what extent, then, is this possible?

1. There is no doubt that is possible to extend the scope of the trustee's formal power to delegate. For instance, in New South Wales a trust deed may empower a trustee to delegate the receipt and payment of money to an agent other than a bank. Other specific extensions are commonplace in practice. For instance, the deed may empower the trustee specifically to appoint a professional investment manager to manage the trust's investments (raising an obvious question about the degree of discretion which may be delegated to such a manager[51]), or to appoint a custodian trustee, or nominee, to hold securities belonging to the trust.

2. As with all fiduciary powers, possession of formal power to delegate particular acts or transactions does not authorise any delegation falling within the literal scope of the power. A particular exercise of the power will be proper (ie not a breach of trust) only if it is possible honestly to justify it having regard to the interests of the beneficiaries and having regard also to the other duties of the trustee: particularly, of course, the duty to act with reasonable care. As we have seen, it seems clear that a deed cannot dispense with the requirement that an exercise of power be justified having regard to the beneficiaries' interests and that at most there are limited possibilities of attenuating the duty of care.

3. Clearly there is no rule or principle which requires that, for every trust, there must be one trustee (or group of trustees) in whom are reposed all powers and discretions relating to the trust. Three examples may suffice. First, property may be vested in trustee A subject to a power, vested in B, to appoint, for example, the annual income among a class of beneficiaries; secondly, there is the 'custodian' trustee, who may come in numerous guises from trustees of

49 [1950] 2 All ER 891.
50 *Thorby v Goldberg* (1964) 112 CLR 597.
51 See discussion below.

the property of a club (where powers and discretions may be exercised not by the trustees but by a committee) to a nominee company holding on a bare trust either directly for a beneficial owner or, more relevantly for present purposes, for an 'active' trustee; thirdly, in the case of prescribed interests, the offer or issue of which is regulated by Part 7.12 of the *Corporations Law*, there is a necessary division of functions (and a well established one in practice) between management company and trustee.[52] Two features are common in divisions of function of those kinds: one (which, it is suggested, is essential) is that, whatever the division may be, in all such cases where property is held by trustees, ultimately, for beneficiaries, all powers and discretions are to be exercised in accordance with fiduciary standards; the other is that where the trust instrument apportions the functions it is not to be expected that A, in whom one function or power is reposed, will be responsible for the performance of the duties of B, who is given other functions or powers - unless, of course, A participates with knowledge of B's breach.[53]

Thus, particular statute apart,[54] if a trust instrument may divide functions, there seems to be no good reason why a deed should not empower a trustee (vested initially with all the relevant functions) to delegate some (perhaps any) of them, although that is likely to involve delegating discretions. But, consistently with the principles already discussed, such a delegation could not be a means of enabling powers to be exercised otherwise than in accordance with fiduciary standards: ' ... the trust instrument may effectively permit delegation on terms which entail that the delegate accepts the responsibilities of a trustee or that the trustees retain responsibility for the acts of the delegate, but an abdication of responsibility by the existing trustees without any concurrent undertaking of responsibility seems to be inconsistent with the trustees' office and would probably be treated as an invalid attempt to exonerate'.[55]

The implications of this for, for instance, the appointment of an investment manager are clear. Unless (as must be highly unlikely) discretions as to investment strategy may be delegated under the deed, and are delegated, on terms that the manager assumes fiduciary responsibility to the beneficiaries, the trustee does not, by the appointment, shed the duty to determine investment policy and to supervise the manager's performance of the acts, and entry into the transactions, delegated to it.

Superannuation Trusts: Some Aspects of the Effect of *Superannuation Industry (Supervision) Act* 1993 (Cth) ('*SIS*')

The requirement that a superannuation trustee ensure that it acts in the best

52 See ss 1064(1) and 1067 and the definition of 'management company' in s 9 of the *Corporations Law*.
53 *Barnes v Addy* (1874) 9 Ch App 244.
54 Notably the *Superannuation Industry (Supervision) Act*, 1993 (Cth): see below.
55 RP Austin, 'The Role and Responsibilities of Trustees in Pension Plan Trusts' in *Equity, Fiduciaries and Trusts*, (TG Youdan ed, Carswell Toronto 1989) 111 at 126.

interests of the beneficiaries has already been discussed. More generally, the *SIS* gives effect to the recommendation of the Law Reform Commission and the Companies and Securities Advisory Committee that, if a fund is to enjoy tax concessions, there must be one responsible entity, fully accountable to the beneficiaries:[56] that responsible entity will be the trustee. This has a number of consequences:

1. The rule against accepting dictation is embedded in the legislation: subject to limited exceptions, 'the governing rules of a superannuation entity ... must not permit the trustee to be subject, in the exercise of any of the trustee's powers under those rules, to direction by any other person';[57] a rule which contravenes that requirement is void.[58]

2. Again, subject to the limited exceptions in the case of an employer-sponsored fund, the governing rules must not permit a discretion that is exercisable by a person other than the trustee to be exercised unless the rules require the trustee's consent to the exercise: s 59(1). A rule which contravenes this prohibition also is void.[59] *SIS* does not tell us what it means by a 'discretion': presumably the principles discussed above are relevant.

3. The fettering of a trustee's discretion is prohibited. The governing rules must (or are deemed to) include a covenant 'not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers'.[60] That, however, 'does not prevent the trustee from engaging or authorising persons to do acts or things on behalf of the trustee'.[61]

4. The rules must require the trustee to 'formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the entity ...'.[62]

The *Superannuation Industry (Supervision) Act* 1993 (Cth) was, apparently, not intended as a means of ensuring the continued employment of specialist funds manager.[63] However, there is no doubt that a trustee, provided that it determines investment strategy and does not delegate discretions, may

56 Loc cit, recommendation 8.1.
57 See s 58(1) of the *SIS*.
58 Section 58(3) of the *SIS*.
59 Section 59(2) of the *SIS*.
60 Section 52(2)(e) of the *SIS*.
61 Section 52(3) of the *SIS*.
62 Section 52(2)(g) of the *SIS*.
63 In his speech to the Australian Investment Managers' Group on 10 March 1994, the Hon Paul Elliott MP said: '... it is <u>not</u> the Government's intention that trustees, whatever the size of the fund, should need to engage the services of specialist advisers and managers. The SIS requirements are not so complex as to force trustees into the arms of service providers. For example, in many cases, the SIS investment standards would be readily met by investment in a balanced portfolio which aimed to generate, say, two or three per cent above inflation over the long-term'.

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appoint an investment manager (and, if the deed allows it, a custodian trustee) and may delegate to the manager power to receive money and to make investments for the fund, consistently with the decided strategy. If so much is not already clear from the provisions quoted above, it is made clear by section 102, which deals with the requirement to obtain from an investment manager under whose control 'money of the entity would be placed' information 'as to the making of, and return on, the investments' and (emphasising the trustee's continuing duty of supervision) 'such information as is necessary to enable the trustee to assess the capability of the investment manager to manage the investments of the entity'. It is evident that the ability, recognised by s 52(3), to delegate the doing of acts and things is not to be read unduly narrowly. Indeed, the result of the prohibition against the delegation of 'discretions', combined with the permission to delegate the doing of 'acts and things', is probably a situation substantially identical to that of a trustee whose duties and powers are derived entirely from the general law and the Trustee Acts.

The Government is, apparently, of the view that superannuation trustees should be encourage to exercise voting rights which they have as holders of fund investments.[64] Obviously, although the actual casting of a vote at a meeting is an act or thing the doing of which may be delegated, the decision as to how votes are to be cast, particularly in a matter of any controversy, is likely to involve a discretion which the trustee must exercise itself and which certainly it cannot fetter in advance. Equally obviously, in the light of *Bartlett v Barclays Trust Co (No 1) Ltd*,[65] a trustee who holds a controlling interest, or one of such a size that it is capable of commanding substantial influence, is likely to be required personally to take a much closer interest in the affairs of the company concerned.

64 Hon Paul Elliott, loc cit.
65 [1980] 1 Ch 515.