Trustees and Fiduciaries: the Limits on Any 'No Fetter' Rule: Part 2

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Fetters and chains?

Introduction

This is the second part of a paper looking at the scope of any 'fetter' doctrine in relation to decisions or discretions of trustees, directors and other fiduciaries. In particular it looks at how it applies to trustees of pension schemes. Part 1 appeared in (2015) 28(3) TLI 105.

It is often said that a fiduciary (such as a trustee or a director) who holds a power or discretion must not 'fetter' the exercise of a relevant discretion that they have been given. This is quite an easy comment to make and often appears in judgments, articles and commentary. It is used in an incredibly wide way and, as we will see, does not in fact always apply. In some cases, parties are using it as a cover for a proposal or contract that they intrinsically do not like and are not prepared to agree. It sounds better or easier for them to object on a legal ground (no fetter) rather than just say they do not think it proper or appropriate.

- Part 1 of this paper looked at the statements of no fetter rule and discusses the modern approach. It also looked at the position of pension trustees and directors of companies
- Part 2 looks at the difference between outside parties and internal parties and specific issues on setting 'policies' and ways of avoiding any 'no fetter' issue.

The case law in this area suffers, from being:

- in most cases, not very modern (and so of doubtful authority in relation to more modern and wider trustee powers); and
- based on a surprisingly large number of unreserved judgments,[1] with, in one case, the judgment being unreported and 'unavailable'.[2]

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1 Eg *Weller v Ker* (1866) LR 1 Sc & Div 11, HL; *Moore v Clench* (1875) 1 Ch D 447 (Jessel MR); *Oceanic Steam Navigation Co v Sutherberry* (1880) 16 ChD 236, CA; *Greenwell v Porter* [1902] 1 Ch 530 (Swinfen Eady J); *Re Vestey's Settlement* [1950] 2 All ER 891, CA; and *Re Allen-Meyrick's Will Trusts* [1966] 1 All ER 740 (Buckley J).

2 *Re Gibson's Settlements*.

Summary

Repeating the summary from Part 1, this paper concludes that:

- There can be a no fetter rule or implication, but it is no more than a description of the need to comply with the terms of a relevant power or discretion (eg for the right person to exercise it at the 'right' time) combined with a duty on trustees when exercising a power to have considered the relevant factors, ie in light of the relevant facts and circumstances at that time. This is similar to the rule in public law.
- Any 'no fetter' implication depends on the terms of the power and the trust – it is subject to any express or implied provision to the contrary. For example, it does not apply to a change made by the exercise of a power of amendment.
- A fetter implication can be over-ridden by the exercise of a contrary power; for example, the exercise of a power of sale is valid, even though it 'fetters' the ability of the trustee to sell the same property later.
- This means that it is clear that any rule should be described as a 'no improper or unlawful fetter', rather than just 'no fetter'.[3]
- The courts are much more flexible in recent times, recognising the wider powers now given to trustees (under trust instruments and statute) and the need to be practical and flexible (particularly with larger trusts). There is some evidence that the courts are recognising that a restrictive no fetter rule would operate to prevent the trustees entering into advantageous bargains for the benefit of the trust.
- Any fetter rule or implication is primarily an 'internal' or 'intramural' issue to the trust. A restriction, even if infringed, is only relevant to the duty and exercise of the power by the trustee as against the beneficiaries of the trust. A third party dealing with the trustee is not bound by the fetter – if the trustee enters into a contract, it is no defence to a contractual damages action against the trustee by the third party that the contract amounted to a 'fetter'.[4] But this is subject to some concerns for third parties:
  - the trustee may seek to agree that the contract contains an express reservation of the position of the trustee to change its mind in the light of changed circumstances (it will be up to the third party whether it is willing to accept this);
  - such a reservation may be argued as being implied in any event (but this may be difficult to succeed);
  - equitable remedies (eg specific performance) may not be available to the third party, although a common law damages claim against the trustee should be possible; and
  - damages may not be an adequate remedy (eg the trustee may be unable to meet any damages claim out of its own resources) resulting in the third party being dependent on relying on the trustee's indemnity out of the assets of the trust. The availability of that indemnity will depend on the terms of the indemnity (express or implied under the Trustee Act 2000), whether the trustee acted properly (or if the

3 This is similar to comments that the law requires that employers should not discriminate. This is too wide. The legal position is that employers should not *unlawfully* discriminate, ie not discriminate on a protected ground (eg age, sex, race, etc) without a relevant excuse (eg objective justification or a defence under the Equality Act 2010). The New Zealand Law Commission's recent (2013) proposals to enact a general overriding 'no fetter' default rule falls into this trap.

4 This is a distinction between trust law and public law – contracts can be invalid and unenforceable under public law if the there is an inadmissible fetter, but this probably derives from the public interest in the need for a decision taker to exercise a public law power properly.

indemnity applies if the trustee was acting in 'good faith') in incurring any liability and potentially whether or not the trustee is in breach of trust (even if unrelated to the relevant contract).

Outside parties

Binding contracts with third parties will often be in the interests of the trust or company

In practice a trustee dealing with external third parties outside the company or trust (eg a contract of sale) is often likely to want to contract in advance. There will often be no rationale for saying that the contract time is not the right time for the decision. Otherwise, as the more recent cases point out, the trust or company may be particularly disadvantaged.[5] Fetters (and contracts) work both ways: the trustee/company is bound, but so is the third party. The third party may not be willing to deal in advance unless the trustee/company is also bound. So the net effect of the trustee/director reserving its right to re-decide later is that the third party is unwilling to deal on those terms (so the opportunity is lost) or imposes more onerous terms to compensate for the fiduciary retaining its option to change its mind.

For example on a sale of land to take place some time in the future, the trustee could be concerned that the value of the land may go up in the interim. But conversely it could go down. The price of the contract is the element of a binding obligation on both sides.

There seems to be no reason for imposing a restrictive 'no fetter' duty if it is at the expense of the beneficiaries (or the company in the case of directors).

L'Huillier v State of Victoria (1996)

For example in *L'Huillier v State of Victoria*[6] (a public law case) the Court of Appeal in Victoria dealt with an action for a breach of contract by Mr L'Huillier in relation to a contract between him and the State of Victoria for the appointment of him to an executive director post. The contract was made in early October 1989, with the appointment to take effect in October 1990, over a year later (Mr L'Huillier had a provision in his existing contract with the State for him to be given at least one year's notice).

Calloway JA (with whom Charles JA agreed) held (my emphasis):

> 'There are some common law powers, and many statutory powers, where a discretion is properly and finally exercised at the time a contract is made. The analogy in private law is with the consideration by directors of the interests of their company at the time they enter into a long-term contract. In the ordinary course it cannot be argued that the contract is voidable because they have impeded their freedom to act in the best interests of the company when the contract comes to be performed. See, for example, *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597 at 605. In the field of public law the time-frame will often be decisive. Granted that an appointment to high office involves the exercise of a discretion in the public interest, it does not follow that the Crown or the Executive cannot make a binding contract in the last week of June to

5 See in particular *Cabra Estates* (discussed in Part 1) and, from Australia: *Thorby* and *L'Huillier v State of Victoria* [1996] 2 VR 465, Vict CA.

6 [1996] 2 VR 465, Vict CA.

> appoint a person to such an office on 1 July. Subject to any applicable statute, the question is whether the discretion was properly exercised at the time the contract was made, not whether the contract would impede the due exercise of the discretion a few days later. Whether a power is of that kind, and how far in advance it may be exercised, depend upon the nature of the power, its purpose and the terms of any relevant statute. The power exercised in *The Amphitrite*[7] is an example of a power that could be exercised only when the time arrived for the release of the ship. It is far removed from the appointment of a senior public servant. The ability to conclude a binding contract, which ex hypothesi is in the public interest or otherwise a proper exercise of power at the time, confers benefits not only on the other contracting party but also on the repository of the power. *If governments had no such capacity, it would often be impossible to secure the services of those best qualified. They would choose a binding and lucrative engagement in private enterprise in preference to an unenforceable promise by the Crown*.'

Ultimately, Calloway JA considered that the contract was subject to an implied limitation, with the Crown retaining the right not to take the discretionary necessary steps to arrange for Mr L'Huillier to be appointed. The Crown had not in fact taken those steps and so the contract came into full effect in October 1990 and so Mr L'Huillier was entitled to damages.

Brooking JA agreed with the result, but not with the reasoning of the majority, preferring to hold that the original contract was valid.

The older cases look to be much tougher here on advance exercises of discretion – see for example *Re Oceanic Steamship* (discussed in Part 1), but that case was dealing with a specific sort of trust where a sale was mandated and in the context of a limited (to modern eyes) investment power.

All exercises of a power fetter future use

Even with internal dealings, the exercise of a power will involve the trust or company not being able to change its mind. So sale of a property means that the beneficiary can no longer occupy the property.[8] The investment power includes a power of sale and exercising this is allowed, so this is the 'right time' even though it has the effect of removing the ability of the trustees/company to use the property in the future. Otherwise this would be inconsistent with the power of sale itself. See for example *Cabra Estates*[9] and the next section below.

In *Jones v Firkin-Flood*,[10] Briggs J (as he then was) dealt with an indemnity out of the assets of a scheme mandated as part of a contract with a third party. The trustee agreed not to distribute assets for a period pending a potential liability under a warranty claim in the future. Briggs J held that this was perfectly appropriate 'fetter'.

It is noticeable that in *Jones v Firkin-Flood*,[11] where Briggs J upheld the entry by the trustees into contractual restrictions as not being a breach of trust, that he was careful not to interfere with the terms of the agreement. So, for example, having decided that it would be appropriate for new trustees to be appointed, Briggs J was at pains to order that there needed to be a discussion (and hopefully agreement with) the third party on this.[12]

7 *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500 (Rowlatt J).
8 The example quoted in *Lewin on Trusts*. See now the 19th edition (Sweet & Maxwell, 2015) at 29-228. Also cited in *Stena v Merchant Navy* [2010] EWHC 1805 (Ch); [2010] PLR 411 (Briggs J) at [133].
9 *Fulham Football v Cabra Estates* [1994] 1 BCLC 363, CA.
10 [2008] EWHC 2417 (Ch) (Briggs J).
11 [2008] EWHC 2417 (Ch) (Briggs J).
12 See paras [297] to [300].

Briggs J also held that if there was to be any claim that the agreement with the third party was in some way ineffective (and not just a breach of trust), then it would be necessary to join the third party to any relevant proceedings.[13]

Contract claims against trustee

What is the effect if the entry by trustees or directors into a contract was at the wrong time and so contrary to the rule against fetters (even in its modern more relaxed form)?

Third party can claim damages

The fact that an agreement infringes the 'no fetter rule' does not affect the enforceability of the relevant agreement by a third party outside the trust, against the trustees in damages:[14] see *In Re Lander and Bagley's Contract*,[15] *Coronation Syndicate*,[16] and *Fitzwood Pty Ltd v Unique Goal Pty Ltd*.[17]

In *Fitzwood*, Finkelstein J held:

> '120. On the other hand, I do accept that there was an agreement between at least the trustee and manager and Fitzwood that the trustee and manager would not deal with the trust property without the consent of the committee, constituted by Mr Abrahams and Mr Cahill. There was consideration for that agreement, namely that Fitzwood would not take any step to remove the trustee in implementation of the resolution of unitholders. That the resolution for the removal of the trustee may not have been effective is not to the point: *Miles v New Zealand Alford Estate Company* (1886) 32 Ch D 266.
> 121. I should observe here that the trustee did not contend that an agreement to refrain from dealing with trust property without consent is contrary to public policy and therefore void. Speaking generally, a trustee is not entitled to fetter the exercise of a discretionary power (for example a power to sale) in advance: *Thacker v Key* (1869) LR 8 Eq 408; *In re Vestey's Settlement* [1951] Ch D 209. If the trustee makes a resolution to that effect, it will be unenforceable, and if the trustee enters into an agreement to that effect, the agreement will not be enforced (*Moore v Clench* (1875) 1 Ch D 447), though the trustee may be liable in damages for breach of contract (*Coronation Syndicate v Lilienfeld* [1903] TS 489, 497, (South Africa)).'

13 *Jones v Firkin Flood* at [216]. Cited in *Lewin on Trusts* at 29-230.

14 *Finn* at para 68. *Lewin on Trusts* (at para 29-230) comments that an undertaking to exercise a power in breach of the fetter rule cannot be enforced in damages, citing *Thacker v Key* (1869) LR 8 Eq 408 (James V-C); *Palmer v Locke* (1880) 15 ChD 294, CA; and *Re Evered* [1910] 2 Ch 147 at 156. This looks to be referring to an internal enforcement not an external one.

15 [1892] 3 Ch 41 (Chitty J) at p 50: 'because my decision will shew that there is a valid subsisting agreement, and an agreement upon which, if specific performance cannot go as a proper remedy, still an action at law can be brought against the Respondent, in which such damages as the law would allow could be recovered against him.' Cited in *Finn* (at p 31, para 68).

16 *Coronation Syndicate v Lilienfeld* [1903] TS 489, 497, (Supreme Court of Transvaal, South Africa), Solomon J (giving the judgment of the Court). Cited in *Finn* (at p 31, p 68) and *Fitzwood Pty Ltd v Unique Goal Pty Ltd* [2001] FCA 1628 (Finkelstein J).

17 [2001] FCA 1628 (Finkelstein J) at [121]. Not discussed on appeal. Cited on this point in *Dagenmont Pty Ltd v Lugton* [2007] QSC 272 (Chesterman J) at [17] and *Burns v Burns* [2008] QSC 173 (Chesterman J) at [51].

Coronation Syndicate (1903)

Coronation Syndicate Ltd v Lilienfeld[18] is a decision of the Supreme Court of Transvaal from 1903. The case involved an agreement between an investor (Coronation Syndicate Ltd) and a company and its majority shareholder (Lilienfeld) for the issue of new shares to the investor. Lilienfeld agreed to vote in favour of the relevant shareholder resolution, but when it came to the relevant meeting he voted against (and so the motion was lost).

The investor sued both the company and Lilienfeld seeking an injunction pending an action for specific performance. The court refused the injunction, holding that it would not force the directors to call a shareholder meeting if they considered that this was not 'best serve the interests of the shareholders' – citing James LJ in *Macdougall v Gardiner*.[19]

However, Solomon J (giving the judgment of the court) went on to hold:

> '... it appears that the directors have come to the conclusion that it is not in the interests of the company that the agreement made between them and the Coronation Syndicate, Ltd., should be carried out except upon certain terms to which the other party declines to consent. For this breach of contract they may be personally liable in damages, but if that is their honest conviction I do not see how we can compel them to perform their contract.'

There seems no reason why other common law claims (eg cancellation of the contract, claims for money had and received) should not apply where the trustee is unable to perform because of a fetter issue.

Directors and trustees: different effects

There is a fundamental distinction here between companies and trusts. In the case of trusts, the contract is with the trustee. In the case of companies, the contract (although authorised by the directors) is with the company. This is very clearly analysed by Matthew Conaglen and Richard Nolan in 'Contracts and knowing receipt: principles and application'.[20]

In the case of directors, they are not (usually) parties to the relevant contract themselves. Instead the contract is between the third party and the company. The contract is binding on the company unless the third party is not acting in good faith, ie has some knowledge that the contract is a breach of duty by the relevant directors.

In the case of a trustee it is clear that as between the trustee and the third party, the trustee is treated as having unlimited capacity when dealing with third parties. So a trustee entering into a contract with a third party is liable to the third party, even if under the trust the trustee had no power to enter into the contract or the entry or performance of it is a breach of duty by the trustee (under the trust, ie a duty owed to the beneficiaries). The trustee can be liable for common law claims for breach of contract, eg in damages, but equitable remedies, such as specific performance as noted below, may be an issue.

The difference between trustees and directors can also be relevant as the time at which knowledge of any breach of power/duty held by the third party is relevant. It is likely to be that a contract with a company will only be challengeable if the third party had the requisite

18 [1903] TS 489 (Sup Ct of the Transvaal). Cited in *Finn* 'Fiduciary Obligations' (at p 31, para 68) and in *Fitzwood Pty Ltd v Unique Goal Pty Ltd* [2001] FCA 1628 (Finkelstein J) at [121].

19 (1875) 10 LR Ch App 606, CA.

20 [2013] 129 LQR 359.

level of knowledge of the lack at the time of the contract. Later knowledge (after the time of the contract, but before it is performed) is not likely to be enough to allow the company to avoid the contract.[21] Conversely for trustees, it may well be that knowledge held by the third party at any time before the contract is performed (eg property passed to the third party) would be enough to found a 'dishonest assistance' claim by the beneficiaries (see further discussion below).

If breach, no specific performance

But if the act or decision by the trustees (or directors[22]) is contrary to a no fetter rule then the third party will not be able to compel specific performance (eg to purchase land or compel directors or fiduciaries to act). This is because specific performance is an equitable remedy and the third party will take subject to prior equitable interests. The courts will not compel a trustee or director to act in breach of duty, see eg *Oceanic Steamship* (discussed in Part 1); *Moore v Clench*,[23] *Coronation Syndicate*[24] and *Johnson v Clarke*.[25]

In *Moore v Clench*,[26] Jessel MR held that an agreement by charity trustees to grant an option to renew a lease was not enforceable as being contrary to a limit in the relevant statute (the Charitable Trusts Amendment Act 1855). Jessel MR commented:

> 'The last point was, that the covenant could be enforced when the proper time arrived. It was said that when a trustee, being donee of a power of leasing, has entered into a covenant for value to grant a lease in excess of his power, a Court of Equity would when the proper time arrived enforce the exercise of that power so as to bind the estate. But that, as a general proposition, cannot be maintained. You must look at the nature of the power. The cases referred to were those of powers vested in tenants for life who have powers to grant leases in possession. When a bare trustee has power to lease in possession, or, in other words, is prohibited from leasing in reversion, the meaning is, that he shall exercise his discretion in the choice of a tenant when the property falls into possession, and not many years before. In the present case the discretion would have been exercised nearly forty years ago. The principle is, that trustees shall find the best tenant when the time arrives for them so to dispose of the estate.'

Moore v Clench is authority that specific performance would not be granted – the agreement (being outside the powers of the trustee under the trust) did not bind the relevant trust estate. It says nothing about the position of the third party against the trustee.

The same is true in many of the older cases, eg *Weller v Ker*.[27] They are looking at the internal position of the trustees as against the beneficiaries. Where the third party is involved, this can be where they are seeking specific performance, ie an equitable remedy, and where they are seeking to bind the trust estate by taking the property. So the lack of power for the

21 See eg s 40(4) of the Companies Act 2006: members retain the right to bring proceedings to restrain acts outside the powers of the directors, but 'no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.'

22 Although the position of breach by directors may differ, given the 'good faith' protection for contracts under s 40 of the Companies Act 2006. See above.

23 (1875) 1 Ch D 447, CA, at p452/3. Cited in Finn, *Fiduciary Obligations* at [67], fn 27.

24 *Coronation Syndicate v Lilienfeld* [1903] TS 489 (Sup Ct of the Transvaal). See above.

25 [1928] Ch 847 (Maugham J).

26 (1875) 1 Ch D 447 (Jessel MR), another unreserved judgment.

27 (1866) LR 1 Sc & Div 11, HL, discussed above.

trustees is enough to confirm the prior claim of the beneficiaries and so not allow the specific performance claim, eg *Oceanic Steamship*.

Damages claim not satisfactory remedy or contract limits trustee liability?

In many cases a contract claim against the trustees (and their personal assets) will not be a satisfactory remedy for the third party. This can occur:

- if the trustee has only limited personal assets (eg is a trustee company with only £100 share capital – common in pension trusts[28]); or
- if the trustee requires the contract to include a limitation on its personal liability (eg to the assets under its control and against which it has an indemnity).

In both these cases, the third party will want to look for an ability for the trustee to meet its liability out of the assets of the trust, ie that the trustee has a right of indemnity out of the trust assets. Equity also gives such a third party the right to subrogate to the trustee's right of indemnity (relevant if the trustee enters insolvency).

An indemnity in favour of the trustee out of the trust assets is implied. From 1925, this was in the Trustee Act 1925, but since 2000, it is in s 31 of the Trustee Act 2000. The statutory indemnity is however limited:

- it only applies to liabilities which have been 'properly' incurred;[29] and
- it probably does not apply if the trustee is itself in breach of trust (even in an entirely unrelated area) and owes amounts to the trust.[30]

This means that a third party seeking to rely on the assets of the trust to back up the contract and obligations of the trustee will either want to take security over the trust fund or will want to know:

- that entry into the contract is not itself a breach of trust; and
- that the trustee does not have any other unrelated breaches of trust or sums owing to the trust; and

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28 A director of a trustee company will not usually be liable personally to the third party, absent a formal guarantee, but could incur some liability (to the trustee company) for wrongful trading or to the beneficiaries if dishonestly assisting a breach of trust.

29 The word 'properly' did not appear in the predecessor provision in s 30(2) of the Trustee Act 1925, but was, in effect, implied by the courts in any event: eg *Re Beddoe* [1893] 1 Ch 547, CA; *Re Spurling's Will Trusts* [1966] 1 WLR 920 (Ungoed-Thomas J); and *Gomba Holdings* [1993] Ch 171, CA. See David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) at 14.13 and Scott Donald 'The "proper" approach to a trustee's right to indemnity out of trust assets' (2014) 8 Journal of Equity 283.

30 *Re Johnson* (1880) 15 Ch D 548 (Jessel MR); *Doering v Doering* [1910] 2 Ch 470 (Stirling J) and *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 (Brooking J). These seems to be no reason why it is not possible for the trust instrument to exclude this principle, so that the indemnity continues to apply despite any unrelated breach (or where the trustee is acting in good faith). See eg *Fitzwood Pty Ltd v Unique Goal Pty Ltd* [2001] FCA 1628; (2002) 188 ALR 566 (Finkelstein J) at [151]: 'The trustee's right of indemnity may be improved by the terms of the trust. It is common to find provisions authorising a trustee to recover expenses incurred in respect of unauthorised transactions, provided they have been entered into in good faith.' See Hans Tjio, 'Lending to a Trust' (2005) 19 TLI 75 at 84.

There is dicta that the breach must be related to the subject matter of the indemnity in *Re Staff Benefits Pty Ltd* (1979) 1 NSWLR 207 (Needham J) at 214, (cited by H A J Ford, 'Trading Trusts and Creditors' Rights' (1981) 13(1) Melbourne University Law Review 1 at 14), but although this is mentioned, this does not seem to have been followed in *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 (Brooking J) at 397.

- that the trust assets are (and remain) sufficient; and
- that the trustee's indemnity out of the assets will remain and not be altered in a way adverse to the third party.

The most detailed discussion of this point for external creditors dealing with a trustee is in the Australian book *Commercial Trusts*[31] by Nuncio D'Angelo and the Report (from 1998) by the Trust Law Committee '*Rights of creditors against trustees and trust funds*'.[32] It may well be that the creditor seeks contractual restrictions on the trustee, limiting any amendments to the trust, change of trustee or distribution of assets to beneficiaries.[33]

If the trustee/director properly carries out the contract, no breach

If a trustee or director was to enter into an improper fetter, there may be consequences as regards the beneficiaries/company. But if the contract is in fact carried out (eg the trustees or directors consider the matter again at the proper time), then there will be no breach:[34] *Coffin v Cooper*;[35] *Bulteel v Plummer*;[36] *Palmer v Locke*;[37] *Re Evered*.[38]

Pension trust: employer as external party

In relation to an occupational pension scheme trust, an employer will count as an external party to the trust for some purposes, but as an internal party for others. For example:

- agreements on funding are probably external contracts in relation to the trust. Indicators of this are that statutory funding generally gives rise to a debt obligation[39] and that comprise of such debts has been held to be possible by a trustee under the implied compromise power now in s 15 of the Trustee Act 2000 – *Re Bradstock*.[40] This compromise power seems only to apply to external dealings (ie outside the trust) – see the recent decision to that effect (in relation to an investment power) of the High Court in Australia in *Wellington Capital Ltd v ASIC*.[41]
- However, the employer's interests as a beneficiary (eg surplus refunds, lien rights[42]) are probably internal matters.

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31 LexisNexis, 2014. See also Hans Tjio 'Lending to a Trust' (2005) 19 TLI 75.

32 Available on the Trust Law Committee website: http://www.kcl.ac.uk/law/research/centres/trustlawcommittee/otherpapersandreports/TLCCredRightsReport1404991.pdf.

33 See for example the terms suggested by Nuncio D'Angelo in his book. Interestingly the issue of whether the trustees would be fettering their powers or acting properly (or not) in agreeing to such restrictions is not discussed in the book.

34 See *Lewin on Trusts* at 29-206 and Finn, *Fiduciary Obligations* at [69] (p 32).

35 (1865) 2 Dr & Sm 365; (1865) 62 ER 660 (Kindersley V-C).

36 (1870) 6 Ch App 160, CA (Lord Hatherley LC and James LJ).

37 (1880) 15 Ch D 294, CA.

38 [1910] 2 Ch 147, CA, at 156–157.

39 See s 75(2) and (4) of the Pensions Act 1995 in relation to deficiencies in the assets on a winding-up of the scheme or an insolvency event occurring in relation to the employer and s 228(3) of the Pensions Act 2004 in relation to amounts due under a schedule of contributions or recovery plan.

40 *Re Bradstock Group Pension* [2002] EWHC 651 (Ch); [2002] PLR 327; [2002] OPLR 281; [2002] ICR 1427 (Charles Aldous QC).

41 [2014] HCA 43 at [13].

42 That is, a right to benefit from the pension scheme by recouping an amount owed by a member to the employer arising through a criminal, fraudulent or negligent act or omission of the member. Such a lien is authorised by s 91(5)(e) of the Pensions Act 1995. See Chapter 14.1 in *Freshfields on Corporate Pensions Law 2014* (Bloomsbury Professional, 2014).

Inside parties

A restriction or fetter can be valid as a proper exercise of a power by the trustee even as against insiders – ie beneficiaries (who are not third parties) – if it is within the terms of the power being exercised.

Some restrictions are valid

So, as mentioned in Part 1 of this article, in *Jones v Firkin Flood*,[43] Briggs J held that a restriction on distributions, agreed with a third party, was part of a proper exercise of a power of sale. Similarly in the Cayman case, *ATC (Cayman) v Rothschild Trust Cayman Limited*,[44] Smellie CJ upheld the exercise by a new trustee of the express power under the trust to grant indemnities to the retiring trustee (including a restriction on the new trustee making distributions for a period) was upheld.

It seems that a trustee can agree to limit his activities for a short time to enable the resolution of a dispute as to whether or not he or she holds office: Finkelstein J in *Fitzwood Pty Ltd v Unique Goal Pty Ltd*:[45]

> '121 I should observe here that the trustee did not contend that an agreement to refrain from dealing with trust property without consent is contrary to public policy and therefore void. Speaking generally, a trustee is not entitled to fetter the exercise of a discretionary power (for example a power to sale) in advance: *Thacker v Key* (1869) LR 8 Eq 408; *In re Vestey's Settlement* [1951] Ch D 209. . . .
> 122 In any event, in my view, the general rule has no application to the present case. It is not contrary to public policy for a trustee to agree to limit his activities for a short time to enable the resolution of a dispute as to whether the trustee still holds office. It often happens that, for example, a trustee will give an undertaking not to dispose of a trust property pending the completion of litigation concerning the trustee's powers to deal with that property. Indeed, in some cases if such an undertaking is not given, an injunction to that effect will go. Indeed, public policy will be advanced if the trustee is able to give the undertaking rather than force the parties to go to court. This case is no different.'

Trustee will be tested against the terms of the power

It is clear that trustees will be tested against the terms of the relevant power being exercised. If they are outside it then they may be acting in breach of trust and so may lose their indemnity out of the assets of the trust (with the third party also losing its right of subrogation into that indemnity), subject to any provisions of the trust to the contrary (eg an extended indemnity).

It is not clear if an extended indemnity in the trust instrument, eg one which covers all liabilities incurred 'in good faith' or other than one which the trustee know to be a breach of trust'[46] would be wide enough to cover particular contractual liabilities if they broke a 'no unlawful fetters' rule.

43 [2008] EWHC 2417 (Ch) (Briggs J).
44 (2005) 9 ITELR 36; [2007] WTLR 951 (Smellie CJ).
45 [2001] FCA 1628 (Finkelstein J) at [121].
46 Eg the indemnity for the Civil Aviation Authority Pension Scheme set out in SI 2001/853. See David Pollard '*The Law of Pension Trusts*' at 14.11 for other examples.

Effect of Pitt v Holt (2013)?

The position may have been changed by the recent decision of the Supreme Court in *Pitt v Holt*.[47] The Supreme Court (upholding the Court of Appeal) held that a decision could not be challenged merely because trustees had failed to take into account all relevant considerations. Where they had taken appropriate professional advice and had followed that advice, then the decision was not a breach of trust and so could not be set aside. This was unlike a particular jurisdiction to set aside a decision on the basis of mistake.

But Lord Walker (giving the judgment of the Supreme Court) distinguished this implied duty to consider against the rule of 'excessive execution',[48] ie an exercise of a power outside its terms. It seems unlikely that exercising a power at the wrong time would not be held to be outside the trustee's powers and a breach of trust, even if the trustee had taken reasonable legal advice and was acting upon it.[49] It looks likely that a breach of a 'no improper fetter' rule would be within the excessive execution category.

Improper fetter as a breach of trust?

As discussed above, the 'no fetter' rule is in fact merely a re-statement of the requirement to exercise a power in accordance with its terms, ie at the right time (and so considering the relevant factors at that time).

Breach of trust or pre-condition to a power?

There is much discussion in the cases that a decision or obligation entered into at the wrong time is 'void' and of no effect.[50] This seems to follow logically as an internal matter if the relevant pre-conditions for exercising a power or discretion have not been met. But is entering into an improper fetter *by itself* also a breach of duty by the trustee? It would seem arguably not, although later taking action based on the fetter (eg without reconsidering the matter) could be. If the fetter obligation is itself void, then what breach of trust is there?

Unlike contract law, it does not seem possible to consider that the trustee will be in 'anticipatory breach'.

This lack of breach by the trustee can be relevant in some cases, eg where the trustee enters into a contract with a third party and this is held to be an improper fetter,[51] could the third party potentially have some direct liability to the beneficiaries as being dishonestly party to a breach of trust? Or could the third party be forced to disgorge any trust property it had received because of a breach of trust and the exception for a third party purchaser for value of a legal estate without notice of the breach did not apply?

Damages against trustee?

P D Finn in *Fiduciary Obligations* commented at [66] to [69] that the effect of an improper fetter depends on what has been done. If there is a mere non-binding resolution, then nothing

47 [2013] UKSC 26; [2013] 2 AC 108.
48 At para [60].
49 See Lord Walker at para [78].
50 See the cases cited above about damages as a remedy. The fetter obligation is an 'excessive execution' to use the terminology of Lord Walker in *Pitt v Holt*.
51 In practice, given wide trustee and director powers and following *Cabra Estates* and *Firkin-Flood*, this will be a pretty rare occurrence.

happens – the trustee can simply exercise its discretion at the proper time.[52] If there is a contract, then if the trustee performs it (and it is still a breach of trust), the trustee may then be liable to the beneficiaries for any loss resulting.[53] Finn commented that:

> 'Doubtless it would be very difficult in most cases to prove such a loss. It would have to be shown by the beneficiary that the fiduciary, by exercising his discretion at the wrong time, caused a loss to his beneficiary by actually implementing that decision.'

Trustee in conflict?

There could perhaps be an argument that the trustee by fettering his discretion improperly and thereby becoming liable to a third party, then could not properly decide to carry out the contract as he would at that stage have a conflict of interest (in wanting to carry out the contract to avoid personal liability).[54] Or the existence of the previous resolution or indication means that the trustee (or director) does not approach the ultimate decision with an open mind (or for a director exercise independent judgement), eg *Re Englefield Colliery*[55] (directors entered into contract with promoter, this meant they later failed to exercise their discretion properly). This would be similar to a trustee blindly following an existing policy (eg *Cowan v Scargill*[56] and *Martin v Edinburgh Council*[57]).

Accessory liability on the third party?

There is a fundamental distinction here between companies and trusts. In the case of trusts, the contract is with the trustee. In the case of companies, the contract (although authorised by the directors) is with the company. This is very clearly analysed by Matthew Conaglen and Richard Nolan in 'Contracts and knowing receipt: principles and application'[58] discussing the differences in this case between:

- contracts with directors (where the relevant contract binds the company unless the third party was not acting in good faith,[59] ie has the requisite knowledge[60] of the breach of duty or want of authority *at the time of the contract*) and
- contracts with a trustee (where the contract is with the trustee as principal, although the trustee should usually have the benefit of an indemnity from the trust assets).

52 See also *Lewin on Trusts* at 29-230 (and fn 819).
53 Although not mentioned in Finn, *Fiduciary Obligations*, this will be subject to any exoneration clause or indemnity in the trust instrument.
54 See Jonathan Swil and Roger Forbes, 'Fettering the fiduciary discretion by agreement: Breach of duty or commercial reality?' (2010) 84 ALJ 32 at 45.
55 (1877) 8 Ch D 388, CA.
56 [1985] Ch 270 (Megarry V-C).
57 [1988] SLT 329; [1989] PLR 9, CSOH.
58 [2013] 129 LQR 359.
59 Contracts in favour of third parties 'dealing with a company in good faith' are deemed free of any limitation on the power of the directors under the company's constitution: s 40 of the Companies Act 2006 – discussed above.
60 The actual level of knowledge required is unclear. See eg *Rolled Steel Products v British Steel* [1986] Ch 246, CA and *Westpac Banking Corp v Bell Group (No 3)* [2012] WASCA 157. See *Lewin on Trusts* at Chap 40.

In both cases, if the third party does not have the requisite knowledge[61] of the fiduciary's breach or want of authority, then it seems that a claim (eg by the beneficiaries or a new trustee or the company) against the third party based on dishonest assistance or knowing receipt should fail. Conversely, if the third party does have such knowledge then a direct claim may succeed.

The actual level of knowledge or notice required is unclear:

- In accessory liability cases, the accessory must have been dishonest – *Barnes v Addy*[62] and *Royal Brunei Airlines Sdn Bhd v Tan*.[63] But what is 'dishonest' in any particular set of facts can be difficult to decide.[64]
- In knowing receipt cases, the third party will not have to return trust property received in breach of trust if the third party was a bona fide purchaser for value without notice.[65]

In all of these cases some degree of knowledge or notice of the third party of the fact that the contract (or its performance) was in breach of trust (or breach of duty for a director) is needed. Absent knowledge (or perhaps, in knowing receipt cases, notice) of the breach, ie of the terms of the relevant power and the 'fetter', the third party will usually not have been dishonest (or acting in bad faith etc).

Often the third party will be aware that it is contracting with a trustee, but may not be aware of the terms of the trust. It would need to ask the trustee for copies of the trust deeds and instruments (there is no public register). The third party may prefer to rely on a warranty from the trustee that the transaction is authorised (and that the trustee has an indemnity from the trust assets) etc.

It is not clear whether knowledge of the terms of a particular power or clause, but an honest failure to appreciate its legal effect ie that it imposed a fetter on the power, would be enough to make the third party liable as being dishonest.[66]

Occupational pension schemes and employer knowledge

In practice, in cases involving a pension scheme, it is likely to be easier for the employer (as the third party) to be shown to have had the requisite knowledge, compared to a true third party not connected with the employer or the trustees (eg a bank or insurer).

This is because an employer is likely to have access to more information about the pension trust (eg copies of the trust deeds, discussions with the trustee board).

However, it is likely that an employer is not deemed to have the same knowledge as the trustee board merely because one or more of the trustees (or directors of a trustee company)

61 The actual level of knowledge required is unclear. In accessory liability cases, the accessory must have been dishonest – *Barnes v Addy* (1874) 9 Ch App 244, CA and *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, PC. See further *Rolled Steel Products v British Steel* [1986] Ch 246, CA and *Westpac Banking Corp v Bell Group (No 3)* [2012] WASCA 157. See *Lewin on Trusts* at Chap 40. In knowing receipt cases, the third party will not have to return trust property received in breach of trust if the third party was a bona fide purchaser for value without notice.

62 (1874) 9 Ch App 244, CA.

63 [1995] 2 AC 378, PC.

64 Contrast *Twinsectra v Yardley* [2002] UKHL 12; [2002] 2 AC 164 with *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, PC and see *Lewin on Trusts* at 40-036 on.

65 Eg *Lewin on Trusts* at 41-004 and 41-041 stating that notice is the same as knowledge under this head and citing *Re Diplock* [1948] Ch 465, CA at 477–479.

66 *Lewin on Trusts* thinks not, at least for dishonest assistance, but draws a distinction with knowing receipt: see 40-046 at fn 156.

are appointed by the employer (which is a common situation). Once appointed, trustees (or directors of a trustee company) owe separate duties to the trust (or trustee company). So just as the employer is not automatically vicariously liable for the acts of the appointee,[67] it seems right that the employer should not be automatically deemed to have the same level of knowledge as the appointee.

But if the decision maker in the employer (eg director A) is also a trustee (or director of the trustee company), then it seems likely that it is more difficult for the employer not to be fixed with the same knowledge as the director.

Exceptions and qualifications

All of the 'duties' mentioned above are subject to qualifications. Sometimes they are called 'exceptions',[68] but in practice the exceptions often overwhelm the 'duty'. Some examples are set out here.

Duty to act personally (and not delegate)

The requirement to act personally will not apply if there is an express power to delegate. Indeed, it will not apply if there is an implied power to delegate. Delegation powers used to need to be expressed in a trust, but a provision was commonly included and statutory powers are now implied: see the Trustee Act 1925 and the Trustee Act 2000.[69]

Indeed, a delegation power for anything other than the smallest companies is in practice required. There are two reasons for this:

(1) A company can only act through individuals – its officers, employees or agents. The company constitution may make the board of directors (or in some cases a shareholder meeting) the primary decision-making body, but it is almost universal for a company's articles expressly to allow delegation[70] or to provide for other bodies to act (eg a sub committee). Use of a sub-committee is not a delegation so much as the company's way of having a decision made.[71]

See for example Henderson J in the second (December) *Entrust* judgment:[72]

> '[35] First, it is agreed in principle that the Previous Trustee could have validly exercised the relevant discretion without there being a record of it in a formal minute of a board or trustee meeting. It would suffice if a suitable officer or employee, with

67 *Kuwait Asia v National Mutual Life Nominees* [1991] 1 AC 187, PC.

68 See eg Thomas Courtenay, 'Fettering directors' discretion' (1995) 16 Company Lawyer 227 at 231 and Andrew Keay, *Directors' Duties* 2nd ed (Jordans, 2014) at 7.16.

69 See trust deed; Trustee Delegation Act 1999 and Trustee Act 2000. For investment decisions under occupational pension schemes a power to delegate is contained in s 34(2)(a) of the Pensions Act 1995 to a fund manager authorised under the financial services legislation. Section 34(2)(b) goes on to prohibit other forms of delegation on investment decisions by pension scheme trustees, save (a) under s 25 of the Trustee Act 1925 (delegation of trusts for period not exceeding 12 months); (b) to a committee of the trustees; or (c) to a fund manager who is not authorised by the financial services legislation where this would not constitute a regulated activity in the UK.

70 See eg arts 5 (Directors may delegate) and 6 (Committees) in the 2006 Act model articles for private companies (SI 2008/3229). Previously see regs 71 and 72 in the 1985 Table A (SI 1985/805) and regs 81 and 102 in the 1948 Table A (First Schedule to the Companies Act 1948).

71 So for example the limitations on delegation of investment decisions under s 34(2)(b) of the Pensions Act 1995 will not then apply.

72 *Entrust Pension Ltd v Prospect Hospice Ltd* [2012] EWHC 3640 (Ch) (Henderson J) at para [35]. See further below.

the appropriate authority to represent the 'controlling mind' of the Previous Trustee for this purpose, took the decision to exercise the discretion. Such authority could, if necessary, have been delegated by the board either formally or informally.'

(2) It cannot realistically be the case that because the board of directors are the ones who are empowered to enter into contracts on behalf of the company, that they cannot delegate the management of a business (including entry to contracts) to parties other than the board. Any large company would cease to operate if every contract decision had to be made by the board of directors and not (say) by an individual shop assistant.

Delegation is accepted in pension schemes. Usually, there is an express power in the scheme trust deed. For an example, see *Kelly v Fraser*,[73] where the Privy Council held that pension scheme trustees had delegated administrative functions to the employer, so that they had given ostensible authority to the employer to agree that the member could make a transfer-in to the scheme.

What is the right time?

The duty to make a decision at the right time begs the question of what is the right time.

The trust may specify when this is.[74] The right time may be only when the power is exercised (rather than in advance). But there will often be cases where this is less clear.

Paul Finn discussed this in his 1977 book *Fiduciary Obligations*,[75] suggesting:

'57. But difficulties emerge where no actual time is specified. The cases do however suggest that in such circumstances the proper time at which a discretion can be exercised, can be ascertained by considering –

(1) what is the nature and purpose of the particular power being used by the fiduciary? or,
(2) what is its relationship to other powers and duties of the fiduciary? or,
(3) what is the nature of the transaction in which the fiduciary intends to commit himself as to his future action?'

There may well be cases where the right time to exercise a power is not when the action is carried out, but instead with when the underlying agreement is made, particularly where there is an agreement with a third party. For examples of this see *Cabra Estates* and *Thorby* (also the public law case on contracts: *L'Huillier v Victoria*[76]).

For example an undertaking by an executor on how to vote shares as part of a sale contract has been upheld, even in 1903, see *Greenwell v Porter*.[77] Similarly in *Jones v Firkin-Flood*,[78] Briggs J upheld a sale contract by trustees including warranties and a limitation on the trustees using the sale proceeds to make a distribution to the beneficiaries (while any potential claim on the warranties remained outstanding).

A contract entered into in advance of the actual purchase/sale will be valid. In effect it

73 [2012] UKPC 25; [2013] 1 AC 450, PC.
74 Eg *Weller v Ker* (1866) LR 1 Sc & Div 11, HL (on the son reaching age 25).
75 P D Finn *Fiduciary Obligations* (Sydney, Law Book Co, 1977), Chap 7.
76 [1996] 2 VR 465, Vict CA. See discussion above.
77 [1902] 1 Ch 530 (Swinfen Eady J). Cited in Finn, *Fiduciary Obligations* at p 29 (para 61); by Hugh Arthur in 'Can Trustees fetter their Powers' (1993) 7 TLI 69 at p 71 and in *Lewin on Trusts* at 29-227.
78 [2008] EWHC 2417 (Ch) (Briggs J).

will be an appropriate exercise of the investment power. To argue that a contract cannot be entered into in advance would operate to the detriment of the trust. However, the cases indicated that there could be a difference depending on how long the gap was between contract and completion – thus a month before a sale of land is completed seems unexceptionable.[79] But an option over seven years may be more difficult to fall within a restrictive sale power.[80] Thus Dowsett J commented in *Gibson v Rivers-McCombs*.[81]

> 'Assuming that [the trustee] is so bound, the submission is flawed because it implicitly assumes that a trustee cannot commit itself, in that capacity, to act in the future, in a particular way which, in the trustee's view, at the time of such commitment, is in the best interests of the trust. In effect, the submission implies that a trustee cannot sign a contract for sale or an agreement for lease which is to be performed at a later date. That proposition is clearly wrong. A trustee must act in accordance with its view as to the best interests of the trust, but such view may lead it to commit itself as to particular transactions which will involve performance at a later stage.'

However, clearly there can still be worries. For example, in 1975 Wellcome Trust when asked to give an irrevocable undertaking in relation to the sale of its shares in Wellcome PLC considered it necessary to apply to court. A note is on *Practical Law for Companies*:[82]

> 'Question: When can an irrevocable commitment be revocable?
> Answer: When it is given by a trust.
> That at least is the result of the High Court proceedings relating to the irrevocable commitment given by the Wellcome Trust to Glaxo.
> Glaxo insisted on the Trust executing an undertaking to give an irrevocable commitment before it announced its offer for Glaxo. The Undertaking had annexed to it a form of irrevocable commitment, which the Trust agreed to execute subject to Court approval.
> The Trust needed permission from the High Court under its inherent charitable jurisdiction to dispose of its entire interest in Wellcome plc and it also sought permission from the Court to enter into the irrevocable commitment.
> The Court sanctioned the sale of the Trust's holding and also sanctioned the giving of the irrevocable commitment to accept the offer subject to two changes: First the Court extended the last date by which the Trust has to accept the offer from 28th February to 8th March (the first closing date). Secondly, the Court ruled that the Trust should have a right to withdraw any acceptance put in at any time up until the Glaxo offer becomes wholly unconditional if an offer of higher overall value is made for Wellcome plc by another bidder.
> All parties were reported to be pleased with the outcome of the hearing. But it significantly dilutes the benefits of the irrevocable commitment to Glaxo; irrevocable

79 In an old case, *Dowell v Dew* (1843) 62 ER 918, [1843-60] All ER Rep 1084, granting an option to renew a farming lease 18 months before its expiry was held to be 'nothing beyond that which is ordinary and reasonable' per Knight-Bruce V-C (at 1086) and upheld on appeal as being a considerable interval 'but the reasons assigned to it appear to me to be satisfactory' per Lord Lyndhurst LC (at 1091), assuming that the best and most improved yearly rent was obtained. Cited in *Lewin* at 29-227.

80 Eg *Oceanic Steamship* and *Moore v Clench*, discussed above.

81 [2014] FCA 144 at [60], cited in *Lewin* at 29-227.

82 Published 1 March 1995.

commitments are normally procured to prevent a shareholder from accepting an offer from another bidder.'

See also extract from a piece on the Wellcome website[83] on Sir Roger Gibbs:

'The company did launch a legal challenge, in an attempt to enforce a Memorandum of Understanding that had been drawn up between it and the Trust after the second share sale. Under the Memorandum, the Trust had agreed not to sell further shares without first consulting the company, but the Trustees had later been advised that their fiduciary duty should override that. The challenge to the sale failed and notwithstanding the slim chance of a rival offer it was effectively a done deal.'

Power of amendment

The courts have held that the exercise of a power of amendment allows a trust to be amended to change how a particular discretion will be exercised in the future. This does not amount to an invalid fetter. In effect the right time at which to exercise the power of amendment is the time of exercise, even if the effect is to remove a future discretion. In a sense this is obvious – otherwise a power of amendment could never be used to change the benefits under the scheme or the powers of the trustee.

This is clearly supported by the pension cases of *Mettoy* and *Stena* and the Australian private trust case of *Dagenmont*.

Mettoy

In *Mettoy*,[84] Warner J was dealing with an amending deed, which had the effect of moving the discretion about how to use any surplus on a winding-up from the trustees to the employer. Warner J held that this was effective, mainly because he held that on the facts the discretion given to the employer was held in a fiduciary capacity.[85]

He went on to consider what was in effect a fetter argument (but called an 'unauthorised release') (at p 561):

'The other ground on which Mr Inglis-Jones submitted that the transfer of the discretion over surplus from the trustees to the employer was invalid was that it constituted an unauthorised release by the trustees of a power vested in them. Mr Nugee's answer to that was that the power of amendment contained in cl 6 of the 1969 deed was wide enough to authorise the substitution for the existing provisions governing the scheme of new provisions which did not include that discretion. He referred to *Muir v IRC* [1966] 3 All ER 38, [1966] 1 WLR 1269 and *Blausten v IRC* [1972] 1 All ER 41, [1972] Ch 256, which show that a resettlement made by trustees in exercise of a power

83 http://www.wellcome.ac.uk/About-us/75th-anniversary/WTVM051908.htm.

84 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 (Warner J).

85 *Mettoy* has been overruled and criticised in later years, but not this part about the amendment power. The decision that the employer power was fiduciary looks to be exceptional and (at best) confined to its own facts: see Robert Walker J in *National Grid* [1997] OPLR 207 at 227; Matthew Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010) and David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) at 11.34. The decision in *Mettoy* on the nature of the test for invalidating a decision based on 'Hastings-Bass' arguments has now been overturned by the Supreme Court in *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 at [32].

of appointment may be valid even though its only effect is to exclude a power previously vested in the trustees. Whether such a resettlement is valid or not depends on whether the power of appointment on its true construction authorises it. Mr Inglis-Jones retorted that here the power of amendment did not authorise what had been done, not only because of the words in proviso (i) to cl 6 prohibiting any alteration which changed the purpose of the pension fund as stated in para (i) of the preamble to the 1967 deed, but also because, even without those words, it was implicit that the power of amendment could be exercised only for the purpose of promoting the purposes of the scheme, not altering them (see per Millett J in the *Courage case* [1987] 1 All ER 528 at 537, [1987] 1 WLR 495 at 505).

The main purpose of the scheme as stated in para (i) of the preamble to the 1967 deed was, briefly stated, the provision of pensions on retirement at a specified age for the members of the scheme. The view is tenable that that purpose was enlarged by the 1973 and 1978 revisions of the scheme (see the observations of Millett J in the *Courage case* [1987] 1 All ER 528 at 537–538, [1987] 1 WLR 495 at 505–506 about the possible enlargement of the purposes of a pension scheme by amendments to the rules). Be that as it may, it does not seem to me that it can be said that the purposes, much less the main purpose, of the scheme were changed by the transfer of the discretion to augment benefits out of surplus on a winding up from the trustees to the employer. Those purposes remained the same. I think that Mr Nugee was right in saying that the power of amendment in cl 6 of the deed of 1969 was wide enough to authorise what was done.'

Stena

Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd[86] concerned an issue about the power of trustees to amend an industry-wide pension scheme to vary the liability of employers and past employers to fund the scheme. Briggs J held that this was allowed despite previous amendments.

Briggs J was very much aware of the position on fetter issues, having two years earlier decided the private trust case of *Jones v Firkin-Flood*,[87] dealing squarely with fetter arguments (see above). In *Stena*, Briggs J held that, as a matter of interpretation, the trustee power on contributions was not released by a new deed. One of the current employers was arguing against any narrowing of the scope of the amendment power. Its counsel had raised two further submissions (if the interpretation argument had failed) against any narrowing of the scope of the amendment power. The second submission was in effect a fetter argument.

Briggs J briefly disposed of this argument (without referring to *Jones v Firkin-Flood*):

'131. The second submission was that a restriction in their amendment power made in 2001 would have involved the Trustee in an illegitimate release of a discretionary power, such that a reasonable interpretation of the 2001 Deed and Rules could not conclude that this is what the Trustee had done.

132. Again, I respectfully disagree. If I had concluded that, as a matter of interpretation, the 2001 Deed and Rules did forever release a previous power of the Trustee to extend the class of those liable to make deficit repair contributions so as to

86 [2010] EWHC 1805 (Ch) (Briggs J). Upheld on appeal [2011] EWCA Civ 543 (the fetter or release point was not considered).

87 [2008] EWHC 2417 (Ch) (Briggs J).

include the Specified Employers (for example, if that had been spelt out expressly), that would have been a release necessitated by the Trustee's view that it was in the interests of the beneficiaries to attempt to stave off the winding up of the Scheme, the permanent release of the Specified Employers being a necessary quid pro quo. If the 2001 Regime had been approved by the court on that basis, then it would in my judgment have been binding on the members by virtue of the representation orders made in those proceedings.

133. There is nothing inevitably improper about the release of a discretionary power by a trustee. For example, a will trustee may sell the testator's matrimonial home and thereby necessarily release a discretionary power to permit the testator's children to live in it: see *Lewin on Trusts* (18th ed) paragraph 29-205. Nonetheless, for other reasons as set out above, the Trustee did not in the present case release or restrict its power of amendment under clause 30.'

Dagenmont

In Queensland, in *Dagenmont Pty Ltd v Lugton*,[88] Chesterman J held that a deed did not amount to an invalid fetter where there was an implied use of an amendment power. This case involved a discretionary family trust and the validity of a deed (the October deed) executed by the trustees providing for a payment for life to one of the beneficiaries (in effect as a settlement of a dispute). Chesterman J referred to the fetters rule and cited Finkelstein J in *Fitzwood Pty Ltd v Unique Goal Pty Ltd* (see above).

Chesterman J continued:

'[18] There can be no doubt that the terms of the October deed constrain the trustee's discretion as to the application of the income in each accounting period. It has bound itself to pay the first respondent $150,000 annually, indexed for inflation, for the rest of his life. To the extent that the trustee complies with that obligation its discretion to apply as much or as little of the income of the trust fund as it chooses in each financial year and, if it chooses to distribute income, to select which beneficiary or beneficiaries should be paid and the amount of the payment to the chosen beneficiaries, its discretion is restricted, or fettered. Instead, during Mr Lugton's life, the trustee must choose, in each year, to pay the agreed amount.

[. . .]

[21] The applicant is correct that the October deed operates to restrict the trustee's exercise of discretion conferred by clause 3. If matters rested there the applicant would be entitled to the declaration it sought.

[22] The consequences for the respondents would be serious. The October deed would be ineffectual to control the trustee's choice as to the recipients of trust income and the amounts to be received. Mr Lugton is neither a shareholder nor director of the trustee and can have no influence over the manner in which it makes those choices; the manner in which the trustee exercises its discretion. The applicant is controlled by Mr Pal and his family who, wherever the fault may lie, enjoy a distant relationship with the respondents. The fact that Mr Pal has caused the applicant to bring this proceeding is an indication that it is not disposed in the respondent's favour.

[23] Matters, however, do not rest there. There are other clauses in the trust deed

88 [2007] QSC 272 (Chesterman J).

which are relevant. Clause 9 confers on the applicant a general power of variation. It provides:

> ''Notwithstanding the trusts ... herein contained ... concerning the trust fund the trustee shall ... have power in its absolute discretion to declare such trusts ... concerning ... the income ... for the benefit of ... one ... or other of any of the persons benefiting ... under the trust ... for such interests ... or upon and subject to such trusts ... and generally ... for the benefit of such persons as the trustee shall ... by any deed ... appoint and if ... the trustee shall exercise the power hereby conferred in relation to part only of the trust fund the trust's powers ... herein contained shall remain in effect in relation to the remaining part of the trust fund.''

[24] Clause 10 regulates the powers of the trustee in relation to separate trust funds which it declares for any beneficiary during infancy or other incapacity. It has no present relevance and does not, in any way, affect the scope or operation of clause 9.

[25] I do not see why the October deed is not a valid exercise of the power conferred by clause 9 to vary the trust deed and, with respect to part of the income of the trust, to make a separate trust for the benefit of a member of either class of beneficiary. The power is to be exercised by the trustee in such manner for the benefit of the chosen beneficiary as the trustee shall by deed appoint. On its face the October deed is an appointment by the trustee of part of the trust income. This is, in my opinion, the effect of the October deed.

[26] The applicant objects to this construction. It is pointed out that the October deed makes no specific reference to clause 9, or to the variation power contained in the trust deed, and that the deed does not, in terms, declare a separate trust of the monies to be paid to the first respondent. It is then pointed out that by clause 6.6 the first respondent disclaimed ''any right to monies that are ... held in his favour under a separate trust''. The submission is made that if the October deed were an exercise of the power of variation contained by clause 9 of the trust deed clause 6.6 would have referred to ''any other separate trust''.

[27] These points have some force but I do not think they determine the question. The October deed was meant to have effect. It was the means the parties chose to resolve their dispute and provide for a division of trust income in a manner the parties thought fair and proper. A mechanism by which that result could be achieved lawfully existed in clause 9. I do not see why the trustee's solemn act in executing the October deed should not be regarded as an exercise of that power. By the October deed the trustee was obliged to hold a specified part of the trust in each year to be paid to the first respondent. I do not see why this is not the declaration of a trust concerning the trust income, as clause 9 permits.'

Overriding any implication

What would otherwise be an invalid/unlawful fetter can be allowed. This applies where:

- the trust deed (or articles of association) allow it; or
- it is allowed by statute; or
- all the beneficiaries (or shareholders in a company) agree.

Trust deed/articles

If the relevant decision or transaction is allowed by the power under the trust instrument (or articles of association of a company), then there is no invalid fetter when the power is exercised.[89] For cases on deed construction, see *Queensland Local Government Superannuation Board v Superannuation Complaints Tribunal*.[90]

For example if the trust deed expressly authorises the grant of options over investments, then the grant of an option is not an invalid fetter (effectively *Oceanic* could not apply). This can also apply by implication, for example if a trust deed (or statute) gives a wide investment power.

In *Jones v Firkin-Flood*,[91] Briggs J upheld the grant of warranties by trustees as being within their powers under the investment powers under the relevant will. He went on to hold that the restrictions on distributions by the trustees to beneficiaries were also allowed.

Thomas on Powers[92] includes a helpful (but cautious) comment:

> 'The application of the principle (or prohibition) against fettering their discretion may be excluded or restricted by an express provision (although, unlike express provisions authorising the release of powers, this is perhaps neither common nor always easy to draft). Moreover, it must be doubtful whether fetters and restriction of all kinds are prohibited, irrespective of circumstances. Thus, on a sale or purchase of land by trustees, are they prohibited (in the absence of express provision to the contrary) from entering into a covenant which restricts their future use of either retained land or the land thus purchased?'

This statement (in the previous edition) was cited with approval by Briggs J in *Jones v Firkin-Flood*[93] and by Smellie CJ in the Grand Court of the Cayman Islands in *ATC (Cayman) v Rothschild Trust Cayman Ltd*.[94]

Amendment powers (see above) allow powers to be exercised in future.

Statutory powers allowing advance exercise

Statute can also give powers to trustees to, in effect, fetter their discretion. For example:

- A power to invest as absolute owner, probably allows future sales and the grant of options.
- Pension trustees are required to set up a statement of investment principles and then to follow it, subject to review and revision from time to time.[95] Clearly operating this requirement cannot be seen as an invalid fetter.
- Pension trustees within the statutory scheme specific funding regime (under the

89 Eg the House of Lords in *Chambers v Smith* (1878) 3 App Cas 795, where Lord Blackburn (at p 815) referred to *Weller v Ker* but held that the trust in *Chambers* allowed the trustees to accumulate and then distribute (ie the power did not fall away after six months). Similarly *Re Wise: Jackson v Parrott* [1896] 1 Ch 281 (North J).

90 [2014] FCCA 2473 (Judge Burnett).

91 [2008] EWHC 2417 (Ch) at [213].

92 *Thomas on Powers* 2nd ed, (Oxford University Press, 2012) at p 515 (para 10.72).

93 [2008] EWHC 2417 (Ch) (Briggs J) at [209].

94 (2005) 9 ITELR 36; [2007] WTLR 951 (Smellie CJ) at [20].

95 Section 35 of the Pensions Act 1995. This does not apply to schemes with less than 100 members: see reg 6 of the Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378). A review and vary obligation in relation to investment applies to other trustees under s 4 of the Trustee Act 2000.

Pensions Act 2004) are required to put in place and maintain a schedule of contributions and recovery plan.[96] Again this is subject to an obligation to be reviewed and, if necessary, revised from time to time.[97] Operating this system and fixing contribution rates into the future cannot be seen as an invalid fetter.

Consent

It also seems that individual beneficiaries (or members of a company) or the articles or a trust deed could themselves authorise a fetter.

This is particularly the case where something has been agreed by all the shareholders in a company. Perhaps a particular concern about the position of external creditors. There seems to be no reason why the members cannot amend the articles or agree to the directors doing something that otherwise might be seen as being a 'fetter'. See for example *Cabra, Thorby* and *Ringuet v Bergeron*.[98]

Statutory powers and discretions

The non-fetter principle can clearly arise in relation to the exercise of statutory powers and discretions by pension scheme trustees (there may be more of a public interest in overturning invalid early exercises?) See for example *Bradstock*[99] and *Imperial Tobacco*.[100]

A trustee (or fiduciary may not be able to fetter the exercise of a statutory power or discretion unless the statute allows it, for example powers/discretions under the Pensions Acts 2004 and 1995.[101]

For example, in *Russell v Northern Bank Development Corpn Ltd*,[102] the House of Lords held that a shareholder agreement could not fetter the company's power to increase its share capital or amend its articles of association by special resolution.[103] But there was nothing preventing the shareholders from entering into an agreement about how they would vote. That agreement remained valid even though the company was party to the agreement (and the limitation was not enforceable against the company).[104]

Pensions Act 1995 and investment?

But the statutory investment power in PA 1995 is subject to any restrictions in the trust deed.[105] However any requirement for the consent of the employer is overridden.[106]

96 Part 3 of the Pensions Act 2004 and the Occupational Pension Schemes (Scheme Funding) Regulations 2005 (SI 2005/3377).

97 Eg regs 8(5) (recovery plan) and 9(2) (schedule of contributions) of the Occupational Pension Schemes (Scheme Funding) Regulations 2005 (SI 2005/3377).

98 (1960) 24 DLR (2d) 449, Can Sup Ct.

99 *Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc* [2002] EWHC 1461 (Ch), [2002] ICR 1427 (Charles Aldous QC).

100 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Browne-Wilkinson V-C).

101 See s 117 (Overriding requirements) of the Pensions Act 1995 and s 306 (Overriding requirements) of the Pensions Act 2004.

102 [1992] 3 All ER 161, HL.

103 Following Lord Porter in *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 739: 'a company cannot forgo its right to alter its articles' and Lindley MR in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 671: '... the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (ss 50 and 51); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: *Walker v London Tramways Co* (1879) 12 ChD 705.'

104 [1992] 3 All ER 161, HL at pp 166 to 168 (Lord Jauncey).

105 Section 34(1) of the Pensions Act 1995.

106 Section 35(5) of the Pensions Act 1995.

Setting policies or guidelines?

Pension scheme trustees often set a policy in advance on rates to be used in the calculation of benefits, eg for early retirement/commutation. In practice it is unusual for the trustees of a pension scheme of any size to consider each request or option by a member at the time the benefit is drawn. Instead they leave it to the scheme administrators to follow the policy. This does not seem to have been challenged as an invalid fetter to date. Why is there not an obligation on trustees to set rates only at the right time (ie when requested) or to consider the policy again once requested?

Policies or guidelines can be a good thing. They can end up with a conflict between principles of fairness and fetters (this is particularly true in the public sector). There can end up being a conflict between:

- raising (reasonable?) expectations that a policy will be followed – so a claim if the trustee does not? and
- being too rigid and giving rise to a fetter claim by someone where they do not like the policy.

Cases on trustees and policies

Trustees are allowed to set policies – but must not be too rigid. In the private trust case *Re Vestey's Settlement*,[107] Evershed MR held (in the passage already cited above) that:

> 'the first resolution ... appears on the face of it to be a resolution covering future exercise of the discretion, but it has been pointed out that it could not, of course, be an effective exercise, *nunc pro tunc*, for the future and that it must therefore, be regarded as a statement of policy to be followed, subject of course to review and possible alteration on every subsequent occasion'.

This seems unobjectionable. However, in the Cayman case, *Re the B Trust; RBS Coutts (Cayman) Ltd v W*,[108] Henderson J was dealing with an application for directions by the trustees of a trust established in the Cayman Islands and governed by Cayman law in the light of matrimonial proceedings in Hong Kong which may involve use of a statutory power in Hong Kong to vary the trust. Henderson J referred to the general fetter principle but considered that the trustee should not give any indication in advance to the Hong Kong court about how it may act in the future. This would be 'fraught with difficulty and therefore inappropriate'.

Henderson J commented:

> 'Indication of Future Intention
> [41] The trustee has asked whether it would be appropriate for it to give "some indication, without binding itself" as to how it may exercise its powers if and when available assets are transferred into the distribution fund.
> [42] Any such indication will necessarily establish in the minds of the parties an expectation that the trustee's discretion will thereafter be exercised in the way it has

107 [1950] 2 All ER 891 (CA), an unreserved judgment.
108 (2010) 14 ITELR 557 (Henderson J).

> intimated. The court itself may share that view. After all, there can be no purpose in the trustee providing an ''indication'' as to how it may exercise its powers other than influencing the positions of the parties and shaping their expectations. There is a risk that the trustee will find itself in a position where it feels obliged to exercise its discretion in a particular way because it accords with an indication given earlier. There is always the danger, however, that the circumstances may have changed somewhat in the interim. I consider the suggestion that the trustee might give an indication now of how it might exercise its discretion in the future to be fraught with difficulty and therefore inappropriate.'

Such comments could apply to all policies adopted and published by trustees. While the decision by Henderson J may be right in the particular circumstances of that case, *Re Vestey's Settlement* was not referred to and it seems right that trustees should be able to set and publish policies in appropriate cases (eg pension schemes).

Pension trustees and policies: Entrust

This approach of allowing policies applies to pension trustees too. In a pensions context, Henderson J had to consider in the second (December 2012) *Entrust* judgment[109] whether a previous trustee (now replaced) had exercised a discretionary power under a scheme to increase member benefits on them becoming a deferred member.

Henderson J had held in the first (June 2012) *Entrust* judgment[110] that the terms of the power meant that the trustee needed to exercise the discretion at the time a member left pensionable service and not at the later time when he or he first started to draw benefits.

In the second judgment, Henderson J held:

> 'ANALYSIS OF THE EVIDENCE: POINTS OF PRINCIPLE
> [34] Given the almost complete absence of primary evidence, it is relevant to consider whether there are any points of principle which should guide me in my examination and assessment of the indirect, or secondary, evidence from which inferences may legitimately be drawn about what the Previous Trustee actually did. I begin by recording two matters which were common ground between counsel for the members and counsel for the employers.
> [35] First, it is agreed in principle that the Previous Trustee could have validly exercised the relevant discretion without there being a record of it in a formal minute of a board or trustee meeting. It would suffice if a suitable officer or employee, with the appropriate authority to represent the ''controlling mind'' of the Previous Trustee for this purpose, took the decision to exercise the discretion. Such authority could, if necessary, have been delegated by the board either formally or informally.'

So this is authority (if it were needed) that a delegation by the board of a corporate trustee is allowed. Henderson J went on:

> '[36] Secondly, it is agreed that the Previous Trustee was not entitled either to fetter the future exercise of its discretion, or to exercise it pre-emptively. On the other hand, it

109 *Entrust Pension Ltd v Prospect Hospice Ltd* [2012] EWHC 3640 (Ch), [2012] All ER (D) 156 (Dec) (Henderson J).
110 *Entrust Pension Ltd v Prospect Hospice Ltd* [2012] EWHC 1666 (Ch), [2012] All ER (D) 113 (Jun) (Henderson J).

> would in principle have been possible for the Previous Trustee to adopt a general, or blanket, policy to allocate surplus to deferred members in such a way as to permit the payment of target benefits when they exceeded those which could be funded by a member's Accrued Amount, and then to implement that policy on a case by case basis, whether by taking a decision at board level on each occasion or by conferring properly delegated authority on another person who then took a decision on each occasion. It would, however, have been the duty of the Previous Trustee to keep any such policy under review, and to consider from time to time whether it should be maintained or revised.'

This seems to be arguing that a decision still needs to be made (by the board or a relevant officer) each time it arises, ie as each member leaves pensionable service. But Henderson J went on to explain this further and made it clear that this is not required. Instead the trustee can lay down a policy to be followed for the future (subject to future review or changes):

> '[37] The latter point may, I think, be more accurately expressed by saying that, once the Previous Trustee had decided to adopt a general policy as to the future exercise of its discretion, the only positive requirements were that it should continue to keep an open mind when occasions for exercise of the discretion arose, and it should never purport to bind itself to exercise the discretion in the future. There is no further positive requirement for the policy to be consciously reviewed from time to time, nor is there a maximum period after which it must lapse in the absence of active reconsideration. To make the point in less abstract terms, I consider that it would in principle have been open to the Previous Trustee to adopt a general policy at or around the time when the 1976 Rules came into force, to the general effect that a deferred pension based on target benefits would be awarded to members who left service before retirement, and that this policy would remain in force indefinitely provided that the funding position of the Scheme remained strong enough to justify its continued application and there were no other material changes of circumstance. Mr Moeran[111] cited in this context *Lewin on Trusts*, 18th edition (2008), at para 29-205:
>
> > ''Similarly, trustees may properly adopt a general policy as to the future exercise of their powers and discretions, provided that they do not thereby purport to bind themselves. Indeed, when delegating their powers of investment, they are required by statute to adopt a policy for the guidance of their agent [the reference is to section 15(2) of the Trustee Act 2000].''
>
> I did not understand Mr Evans[112] to dissent from this statement, which I consider to be correct in principle.'

Clearly it is possible for a trust deed to deal with this by including an express policy making power (although I cannot recall ever having seen one).

Similarly the Pensions Ombudsman has commented on policies in relation to death benefits payable by a local government pension scheme:[113]

111 Counsel representing the members.
112 Counsel representing the scheme employers.
113 Mr R and Mrs M Hercberg, 10 November 2011 (82431/2 and 82835/1)

> '[15] The Council was entitled to have regard to any established policies, but not to be fettered by them.'

Public law and guidelines/policies

This is certainly allowed in public law cases. The arguments and decisions in this area resonate and are of value in the trust area, particularly in relation to pension schemes.

The Treasury Solicitor guidance for the UK Government, 'The Judge over your Shoulder'[114] ('JOYS') includes sections on policies and on delegation. This emphasises that the relevant decision maker must only delegate decisions where this is authorised and must:

> '. . . keep an open mind and consider each case on its own merits: otherwise he is failing to exercise his discretion. The Court has held that it is lawful for the Minister to have a policy as to the way in which discretion should be exercised – indeed, to achieve consistency in decision-making (which is a virtue), it is essential that he should have a policy – but that he should nevertheless direct his mind to the facts of the particular case and be prepared to make exceptions.'[115]

Lord Reid in *British Oxygen Co Ltd v Minister of Technology*[116] held:

> 'The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say . . .'.

In *R (Nicholds) v Security Industry Authority*[117] Kenneth Parker QC (sitting as a Deputy High Court Judge) gave a clear analysis of why the existence of policies is helpful and the limits and issues that arise.

The claimants argued that the relevant authority had fettered its discretion by issuing a policy, under which in effect certain claimants could not even apply for licences. On the fetter claim, Kenneth Parker QC held that the relevant Act of Parliament clearly authorised the making of a policy and indeed one that went so far as to provide for an automatic refusal of a license where the applicant had been convicted of a serious criminal offence.

This decision was followed by the Divisional Court in *Security Industry Authority v Stewart*[118] – the policy was authorised by the Act of Parliament and, once issued, the

114 Issued by the Treasury Solicitor. The latest (4th) edition was in 2006. See https://www.gov.uk/government/publications/the-judge-over-your-shoulder-joys-edition-4.

115 At para 2.32.

116 [1971] AC 610, HL at p 625.

117 [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067 (Kenneth Parker QC).

118 *Security Industry Authority v Stewart; Rahim v Security Industry Authority; R (on the application of Egenti) v Highgate Justices* [2007] EWHC 2338 (Admin); [2008] 2 All ER 1003 (Divisional Court: Laws LJ and Mitting J).

Authority was bound to follow the policy and had no discretion to apply a different rule in individual cases.

The comments made in JOYS and in the first *Security Industry* decision as to the merits of having a policy, resonate in the a trust area, particularly of pension trusts (which can, of course, be large).

The Judge Over Your Shoulder (JOYS)

The JOYS publication (2006) includes guidance for the public sector on policies or guidelines:

> '*Having a "Policy"*
> 2.31 Where a statute has conferred a discretionary power on a Minister to issue, say, licences, or to decide applications for some benefit, he will potentially have to deal with hundreds, or thousands of cases. The statute may spell out the criteria for the grant of the licence/benefit in general terms, but the Minister may be left with – on the face of it – a wide discretion. In order to ensure consistency and indeed to promote administrative efficiency, the Minister (or more likely his officials) will probably develop a standard way of dealing with such cases: they will try to apply the same criteria, attaching the same weight in each case. They will, in short, develop a "policy" for dealing with cases.
> 2.32 However a very important theme runs through administrative law, that, where statute confers a discretion on an individual, he must not surrender or abdicate that discretion – to another person, or to a set of rules, or to a "policy". He must keep an open mind and consider each case on its own merits: otherwise he is failing to exercise his discretion. The Court has held that it is lawful for the Minister to have a policy as to the way in which discretion should be exercised – indeed, to achieve consistency in decision-making (which is a virtue), it is essential that he should have a policy – but that he should nevertheless direct his mind to the facts of the particular case and be prepared to make exceptions. This is particularly important in cases involving human rights. Equally, where the Minister does have a policy, then he should not depart from it without giving an explanation. The line is not always an easy one to draw. The Daly case is an example of these principles being applied. Here is another, again in the prison context.

Case Example

P had been convicted of a serious assault upon a child and sentenced to a term of imprisonment. The Secretary of State had a policy that persons convicted of such serious offences, and who were judged still to be dangerous, should be detained in Category A conditions, which was reserved for 'prisoners whose escape would be highly dangerous to the public ..., no matter how unlikely that escape might be and for whom the aim must be to make escape impossible'.

One practical effect of the strict application of this policy to P was greatly to restrict the range of treatment available to him. In fact P had never shown any propensity to escape and was in such poor health that there was no realistic prospect of his escaping. The Court held that in itself the policy of making escape impossible for prisoners such as P was not unlawful, but since the Secretary of State had failed to have regard to P's particular circumstances and to exercise any discretion in relation to his case, the application of the policy to P was unlawful. *The Queen on the application of Pate v Secretary of State for the Home Department* [2002] EWHC 1018.

Although a ''policy'' on the way in which a discretion is to be exercised is usually essential, the decision maker must keep an open mind and consider the facts of the particular case – and make it clear that he has done so by the terms of his decision. Such an approach is also more likely to be proportionate, in Convention terms, since it will allow a proper assessment of whether any interference with the Convention rights is necessary on the facts of the particular case.'

The Securities Industry case: regulation of door supervisors

In *R (Nicholds) v Security Industry Authority*[119] Kenneth Parker QC (sitting as a Deputy High Court Judge) gave a clear analysis of why the existence of policies is helpful and the limits and issues that arise. This was in a public law context, but still has echoes and resonances in a private setting.

The claimants argued that the relevant authority had fettered its discretion by issuing a policy, under which in effect certain claimants could not even apply for licences, On the fetter claim, Kenneth Parker QC held that the relevant Act of Parliament clearly authorised the making of a policy and indeed one that went so far as to provide for an automatic refusal of a license where the applicant had been convicted of a serious criminal offence.

The comments made in this decision resonate in a private trust area.

The statute and background

The Private Security Industry Act 2001 provided for the regulation of door supervisors, establishing a regulatory authority. Section 7 of Act provided:

> '(1) It shall be the duty of the Authority, before granting any licences, to prepare and publish a document setting out –
>
> (a) the criteria which it proposes to apply in determining whether or not to grant a licence; and
>
> (b) the criteria which it proposes to apply in exercising its powers under this Act to revoke or modify a licence.
>
> (2) The Authority may from time to time revise the document for the time being setting out the criteria mentioned in subsection (1)(a) and (b): and, if it does so, it shall publish the revised document.
>
> (3) The criteria set out by the Authority under this section –
>
> (a) shall include such criteria as the Authority considers appropriate for securing that the persons who engage in licensable conduct are fit and proper persons to engage in such conduct;
>
> (b) may include such criteria as the Authority considers appropriate for securing that those persons have the training and skills necessary to engage in the conduct for which they are licensed.'

The authority prepared and published licensing criteria for door supervisors. Subsequently, none of the claimants, who had all worked as door supervisors for many years, qualified under the licensing criteria as a fit and proper person to engage in the occupation of door supervisor as each had a conviction for a relevant criminal offence that

119 [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067 (Kenneth Parker QC).

automatically debarred them for a substantial period from so qualifying. Consequently, all the claimants were denied licences to work as door supervisors by the defendant. The claimants applied for judicial review.

They submitted that:

- Parliament could not have intended to permit the defendant to include in criteria for a fit and proper door supervisor any rule of automatic debarment such as the published criteria had established;
- the published criteria were a complete fetter on the defendant's statutory discretion and provided no opportunity to consider the individual circumstances of the particular applicant for a licence; and
- the published criteria had infringed the claimants' rights contrary to Art 1 of the First Protocol to the European Convention on Human Rights.

Analysis of fetter claims in Security Industry

Kenneth Parker QC rejected the claims, giving a clear analysis of why the existence of policies is helpful and the limits and issues that arise. This is in a public law context, but still has echoes and resonances in a private setting. On the fetter claim, Kenneth Parker QC held:

> 'The Third Ground
> 51. The third ground, as I have already observed, is closely related to the second. Mr Cragg contends that the Published Criteria are a complete fetter on the Authority's discretion and provide no opportunity to consider the individual circumstances of the particular applicant for a licence. Again it is important to bear in mind that Mr Cragg's argument is that the Authority must retain discretion in every case: there is no conviction so serious that the Authority is entitled, in drawing up the Criteria under section 7 of the Act, to treat the conviction as an absolute bar on obtaining a licence for a significant period after it has ceased to have effect (within the meaning of the Published Criteria).
> 52. For the principle that there should generally be no fetter imposed in respect of the exercise of a statutory discretion, Mr Cragg naturally relies upon the well known statement by Lord Reid in *British Oxygen Co. Ltd v Minister of Technology* [1971] AC 610 at 625:
>
> > ''The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say. . . .''
>
> 53. Ms Lieven, who appeared for the Authority, contended that this ground was misconceived. She submitted that the authorities in which the 'no fetter' principle was invoked concerned circumstances where Parliament had conferred a broad discretion upon a public authority to take decisions conferring benefits or imposing burdens, and did not expressly empower the public authority to make rules or to establish a policy for exercising the discretion. A question has then arisen in such cases whether, and to what

extent, the authority may make such rules or establish such a policy. In this case Parliament, by section 7, has expressly conferred a rule or policy making power on the Authority. The only question then is whether the authority has made rules that fall within the purpose and scope of the statutory power (the ultra vires test), that are rational (the Wednesbury test) and that are proportionate (if the matter has a Convention dimension). This case is on all fours with *R (Elias v Secretary of State for Defence* [2005] EWHC 1435, where the executive exercised a rule making prerogative power to create an ex gratia scheme of compensation and was not obliged to award compensation to a person who did not satisfy the strict criteria for award of compensation.

54. In my judgment, Ms Lieven is correct in her submission.

55. The extent to which as a matter of public policy discretion should be replaced by rules is a difficult question upon which different views are strongly held: see Craig, *Administrative Law*, 5th edition 2003, 536-540.

56. The advantages of rules are numerous. They ensure fairness and consistency. They promote efficiency of administration. If the rules are transparent, individuals know where they stand and can plan their affairs; and they can subject the rules to searching examination and so further the public accountability of government.

57. It is not, therefore, surprising that the courts have tended to encourage, rather than discourage, public authorities from making transparent rules and developing published policies. For example, in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2001] 2 All ER 929, at [143] Lord Clyde said:

> ''The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions.''

58. In *R v Southwark LBC ex p Udu* [1996] ELR 390 at 391 Staughton LJ said:

> ''The Council are perfectly entitled to have a policy. Fairness, after all, demands that like cases should be treated alike, and the policy will promote that objective''.

59. In *R v Secretary of State for the Home Department, ex p Venables* [1997] UKHL 25; [1998] AC 407 at 432 Lord Woolf MR said:

> ''The Home Secretary's discretion as to release is very wide. It is the type of discretion which calls out for the development of policy as to the way it will be exercised. This should assist in providing consistency and certainty which are highly desirable in an area involving the administration of justice where fairness is particularly important.''

60. However, in this instance Parliament has deliberately, by section 7, conferred a rule making power on the Authority. It is for the Authority to draw up what it believes are the appropriate criteria for the grant of licences for door supervisors. The criteria are challengeable only on the grounds of ultra vires, Wednesbury irrationality or lack of proportionality. I have already dealt with the challenge of invalidity; there is no challenge on Wednesbury grounds, and I shall shortly deal with proportionality.

61. It seems to me that there is also a further reason why Mr Cragg's third ground of challenge is misconceived. His argument rests upon the premise that the ''no fetter'' principle applies invariably wherever a discretionary power is conferred, whatever the statutory context. This argument not only infringes the prescription of the ''no fetter'' principle itself (as he reads it), which assumes that there is an exception to every case,

but, more importantly, it is not, in my view, supported by authority or legal policy. Lord Reid was careful, in the passage cited from British Oxygen, to refer to ''the general rule.'' In most instances where a discretionary power is conferred it would be wrong for the decision maker to frame a rule in absolute terms because to do so would defeat the statutory purpose. However, it seems to me that there are certain exceptional statutory contexts where a policy may lawfully exclude exceptions to the rule because to allow exceptions would substantially undermine an important legislative aim which underpins the grant of discretionary power to the authority. There is, for example, a well-known line of cases concerning ''taxi'' licensing where licensing rules, which admitted of no exceptions for any ''special'' circumstances, were held lawful: see, for example, *R v Manchester City Justices, ex p McHugh* [1989] RTR 285; 88 LGR 180; *R v Wirral MBC ex p The Wirral Licensed Taxi Owners Association* [1983] 3 CMLR 150.

62. In my view, the statutory context must be examined with great care. In this case, for the reasons already given, the statutory context empowers the Authority to make the commission of certain serious criminal offences an absolute bar to obtaining a licence to work as a door supervisor. The rule is intra vires and rational. Not to have such a rule in respect of offences of such great gravity would tend to undermine a fundamental aim of the Act, and such a failure would be truly vulnerable to challenge on grounds both of ultra vires and Wednesbury irrationality.

63. The importance of context is demonstrated by considering certain prison cases. In *R v Secretary of State for the Home Department, ex p Simms* [1999] UKHL 33 [2000] 2 AC 115 and in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 WLR 1622, prison rules that prisoners should not receive visits from journalists acting as such and that prisoner's correspondence, including legal correspondence, should be read in the absence of the prisoner were struck down. The rules in question imposed ''blanket'' restrictions that did not give due regard to important competing values. However, in a different context the court has upheld prison rules requiring category A prisoners to be strip searched after visits, a rule to which for compelling reasons no exceptions were permitted, even if the prisoner was a ''model'' inmate and believed that submission to such a search offended the tenets of his faith: see *R v Secretary of State, ex p Zulficar* (judgment of the Divisional Court, 21 July 1995). Similarly, in the present statutory context certain offences are intrinsically so grave as to justify the imposition of an absolute bar, and no other matter is capable of counterbalancing the fact of conviction and sentence.

64. For completion, I should make one final observation in this context. It is important to bear in mind that Parliament has conferred upon the Authority the power to draw up the relevant criteria. The Authority is the industry regulator and has the experience and expertise for the task. This Court should be very cautious before seeking to ''second-guess'' the evaluation that the Authority has made. In my judgment, and putting aside any Convention dimension for the moment, the Court should only strike down the criteria if it could be said that there was no reasonable basis for the conclusion that certain offences were so serious as to justify the imposition of an absolute bar. For the reasons already given, I believe that the claimants in this application signally fail to show that that is the case.'

Public law: fetters and pensions bodies

This applies in the pensions area. Both the Pensions Regulator and the Pension Protection

Fund[120] (PPF) are statutory bodies established by the Pensions Act 2004. They are able to set policies and issue general guidance. Indeed this is mandated under the Pensions Act 2004:

- **Guidance and Codes of Practice** The Pensions Regulator (TPR) issues guidance and codes of practice. It has statutory authority to do this under s 90 of the Pensions Act 2004. But the guidance generally makes it clear that it is not legally binding, not is it advising on the legal position (eg the double counting guidance referred to above).
- **TPR clearance power** The Pensions Act 2004 includes express provision for TPR to give advance clearance that it will not in the future use its 'moral hazard' powers under the Act to issue contribution notices or financial support direction to third parties requiring them to give support to a pension schemes.[121] This is an example of an express fetter power in a statute. Absent this express provision, TPR would probably have been reluctant to give any comfort or clearance and if it had both TPR and the donee would have run the risk of it being held to be invalid as an improper fetter.
- **PPF levy** The PPF makes a determination of the way to calculate the PPF levy payable by occupational pension schemes.

In Re West of England Ship Owners Insurance Services,[122] the trustees of a pension scheme sought to challenge the Pension Protection Fund (PPF) levy assessment that had been made. Part of this challenge was on the grounds that the levy amount was based on an insolvency risk score set by an external provider. Andrew Spink QC (sitting as a Deputy High Court judge) dismissed the claim as not being an improper delegation of powers by the PPF. Instead it was allowed by the statute (citing the Divisional Court decision in *Security Industry Authority v Stewart* (above) and the Court of Appeal in *Audit Commission for England and Wales v Ealing LBC*[123]).

Avoiding fetter issues

1 Amend trust to provide express power

It is clear than an express power can allow a fetter of future actions. Alternatively an amendment can authorise a future action.

2 Add express provision allowing policies

An express power to make policies may be helpful for a trust. It could usefully make clear that any policy is subject to review and amendment at any time.

120 Strictly the statutory body is called 'the Board of the Pension Protection Fund': Pensions Act 2004, s 107.

121 Sections 42 and 46 of the Pensions Act 2004. Such formal clearance is not binding in some circumstances: ss 42(8) and 46(5).

122 *Re West of England Ship Owners Insurance Services Ltd Retirement Benefits Scheme; Board of the Pension Protection Fund v Trustees of the West of England Ship Owners Insurance Services Ltd Retirement Benefits Scheme* [2014] EWHC 20 (Ch) (Andrew Spink QC).

123 [2005] EWCA Civ 556, CA.

3 Trustees consider that agreement/indication now is at the right time

Trustees need to exercise their powers at the right time for the power. If there is an express restriction (eg calculations of a 'share of fund' on a bulk transfer out of a pension trust) then fixing in advance may not be allowed. If greater flexibility is wanted, then an amendment to the trust may be necessary. The trustees will always need to consider that the exercise of the relevant power is the right thing to do (ie proper purpose, etc) at the time the decision is made.

4 Include express reservation of later changes

It will depend on the individual facts as to whether or not there may be an implied term in any contract that the fiduciary is free to reconsider or exercise its discretion again at the time for performance. Certainly in *Cabra Estates*,[124] the Court of Appeal was clear that such a term was not implied in that case (overruling Chadwick J).

However, if a term is expressly included or implied, then this will mean what it says and so have effect to see off any 'fettering' claim. For example, in *Re NRMA Limited*[125] Santow J dealt with an express reservation in a contract and held:

> **'Qualified Duty upon Directors**
> 109 The proposed alterations to the constitution of Insurance include the imposition of a duty on the directors to cause to be done everything which it is necessary for the company and the directors to do to implement the Proposal (by the insertion of a new rule 38A sub-rules (1) and (2)). It is subject to the qualification in sub-rule 38A(4) that nothing in those sub-rules requires any director to act in a way which would be in breach of any duty owed by that director or which would be unlawful. A similar duty subject to a similar qualification is proposed to be inserted in the constitution of Association by the insertion of a new rule 52A. Those rules are set out in the notices at pages 148 and 152 of the Information Memorandum.
> 110 During the hearing of the application, a question arose concerning the qualification. It is a director's duty to implement and honour binding obligations entered into by the company: *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597, 605–606, 612, 618; *ANZ Executors & Trustee Company Ltd v Qintex Australia Ltd* (1990) 2 ACSR 676, 688–689; Ford's cases where a director would be entitled, or indeed bound, to cause the company to breach its obligations. Without the qualification, there would be an issue as to whether the proposed resolutions would be effective to preclude the directors from an independent exercise of their discretion or to relieve them from their statutory and common law duties in relation to their decision whether or not to act on the directions of the general meetings. With that qualification, that issue goes away.'

The reference to the directors generally having to ensure that the company carries out its obligations looks like a question of the duty owed by the directors to the company (rather than a third party). Usually the consequences of the company failing to carry out its obligation will outweigh any benefit the company may otherwise receive as a consequence of not performing, but there may be circumstances where this is not the case – presumably the

124 [1994] 1 BCLC 363, CA: see Part 1 of this article.
125 [2000] NSWSC 82 (Santow J). Cited by Jonathan Swil and Roger Forbes: 'Fettering the fiduciary discretion by agreement: Breach of duty or commercial reality?' (2010) 84 ALJ 32.

'exceptional cases' to which Santow J is referring. For example, the company may decide that it is better to dismiss an employee straight away and accept the risk of a damages claim?

The comments in *NRMA* about the obligation to carry out the contract potentially being a breach of directors' duties looks odd in the context of that obligation having been written into the company's constitution, but this may perhaps reflect a concern with the statutory directors' duties in Australia. Including the obligation in the constitution has been held to be enough in other cases: see *BrisConnections*[126] discussed above.

NRMA has been cited on this point in other cases. For example, in *Elkington v Farsands Solutions Pty Ltd*,[127] Barrett JA (with whom Tobias AJA agreed) dismissed an application for leave to appeal and held:

> '37. Third, there are objections of principle to any contractual promise by a company as to the way in which its board of directors will be constituted, being a promise breach of which may subject the company to liability for damages. This is because a company has no capacity to decide who will or will not be a member of its board of directors. In *Re MIA Group Ltd* [2004] NSWSC 712; (2004) 50 ACSR 29, I had occasion to consider a proposed covenant by a company that it would, in a certain event, reconstitute its own board of directors in a particular way. I said (at [16]):
>
> > ''It is by no means clear that a company can itself give any effective covenant as to the composition of its own board of directors where the relevant power of appointment to fill vacancies resides with that company's directors. A decision by directors on the question whether they should exercise their power to fill casual vacancies on the board of directors can only be made by reference to particular persons eligible and available for appointment. A number of factors will influence the decision whether it is to the good of the company that a particular person be appointed at a particular time. Directors could not conscientiously (or effectively) fetter their discretion by contracting to appoint whomever a particular third party might in future propose: see the brief discussion on this subject generally in *Re NRMA Ltd* [2000] NSWSC 82; (2000) 33 ACSR 595 at [109] to [111] referring to *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597.''
>
> 38 These observations were made with respect to circumstances where the appointing power resides with the existing directors. Similar considerations apply to appointments where the appointing power is confided to the company in general meeting and the relevant actors are members. The position in relation to removal or dismissal is the same.
>
> 39 In short, it is not possible to regard the company, as a contracting entity, as having any capacity to promise that the board will be constituted (or not constituted) in any given way.'

With respect, the comments of Barrett JA look to be too wide from a UK perspective. There seems no reason not to allow directors to promise (or cause the company to promise) who can be on the board if:

- such a power (to contract in advance) is given under the constitution; or

126 *Macquarie Capital Advisers Ltd v BrisConnections Management Co Ltd* [2009] QSC 82; (2009) 71 ACSR 234 (Dutney J).

127 [2012] NSWCA 334, New South Wales Court of Appeal.

- the obligation is confirmed by the shareholders – so as to be an obligation on them – eg *Russell v Northern Bank*;[128] or
- The contract is considered to be a proper use of the power now, eg from the public law space: *L'Huillier v State of Victoria*.[129]

Endpiece

The term 'fetter on discretion' is much used in cases (and by practitioners). But in practice it is not much analysed.

In modern trusts and companies it adds little to a duty on fiduciaries to exercise powers and discretions for a proper purpose, often in what they consider to be the best interests of the scheme or company. *Cabra Estate*s and *Jones v Firkin-Flood* are clear authorities that the courts will be reluctant to allow 'fetter' arguments to get in the way of transactions that the trustee or fiduciary considers will benefit the trust or company.

Having said this, it is clearly the case that some powers are only exercisable at a particular time. This can arise under the terms of a trust or company's articles of association or by reason of a statutory provision.

But in practice it will usually be clear where this is an issue. A general, 'all purpose', no fetter restriction does not and cannot apply.

128 [1992] 3 All ER 161, HL.
129 [1996] Vic Rp 79; [1996] 2 VR 465, Victoria Court of Appeal. Discussed above.