

## CHAPTER 26

## DISTRIBUTION OF THE TRUST FUND WITHOUT THE INTERVENTION OF THE COURT

### 2. GENERAL DUTY OF TRUSTEE

#### The trustee must distribute correctly

##### *Proof of entitlement*

**26-03** NOTE 3. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), §§ 4-017 *et seq.*

##### *Liability for incorrect distribution*

AFTER § 26-04 INSERT THE FOLLOWING NEW PARAGRAPH:

**26-04A** Trustees may be uncertain that they have identified all the beneficiaries, a difficulty most likely to arise where the beneficiaries are numerous, as in the case of pension funds. There may be beneficiaries known to the trustees whom they cannot trace, beneficiaries known to them who decline to accept benefits and beneficiaries unknown to them. Various courses are open to the trustees. They may make inquiries to trace beneficiaries<sup>15a</sup> and they may protect themselves by advertising.<sup>15b</sup> They may make a retainer, if they can estimate the fund required, though doing so will prevent them from winding up the trust. In some cases they may effect insurance and distribute only to the known beneficiaries.<sup>15c</sup> Where they have a power to exclude beneficiaries, it may well be a proper exercise of the power to exclude such beneficiaries.<sup>15d</sup> They may ask the court to make a *Benjamin* order, an order authorising them to distribute on a specified footing, *e.g.* that a given person is dead.<sup>15e</sup> As a last resort, they may pay the trust fund into court.<sup>15f</sup>

<sup>15a</sup> See §§ 26-22 to 26-24.

<sup>15b</sup> See §§ 26-08 to 26-18.

<sup>15c</sup> See § 26-06.

<sup>15d</sup> *NBPF Pension Trustees Ltd. v Warnock-Smith* [2008] EWHC 455 (Ch); [2008] 2 All ER (Comm) 740 (where it is not wholly clear, see [38], how the power had arisen).

<sup>15e</sup> See §§ 27-15 *et seq.*, together with §§ 26-45, 26-50.

<sup>15f</sup> See §§ 27-42 *et seq.*

## DISTRIBUTION WITHOUT THE INTERVENTION OF THE COURT

*Insurance*

- 26–06** DELETE THE SECOND SENTENCE AND N.19 AND REPLACE BY: Such insurance will necessarily benefit the trustee by protecting him, to some extent at least, from a claim for breach of trust. But a trustee is not entitled to effect insurance with a view to his own benefit, whether against a liability for a failure to distribute correctly or for other breach of trust,<sup>19</sup> unless so authorised by the trust instrument; the test is whether the insurance will be for the benefit of the beneficiaries,<sup>19a</sup> as it often will be where the alternative is for the trustee to make a retainer against a possible claim.<sup>19b</sup>

**3. ADVERTISEMENT, SEARCHES AND INQUIRIES FOR THOSE ENTITLED****Advertisement for claims***Effect of advertisement*

- 26–14** NOTE 39. AT THE END ADD: *MCP Pension Trustees Ltd v AON Pension Trustees Ltd* [2010] EWCA Civ 377; [2010] All E.R. (D) 48 (Aug).

AT THE END OF THE TEXT ADD: For that purpose a trustee has notice of claims of which he had at any time been aware, even though he later overlooked or forgot them;<sup>39a</sup> and notice to the trustee’s agent is notice to the trustee.<sup>39b</sup>

**Inquiries**

- 26–23** NOTE 57. IN THE FIRST SENTENCE DELETE THE REFERENCE TO THE PRACTICE DIRECTION AND REPLACE BY: CPR, Practice Direction Pt 40A—Accounts & Inquiries, para. 7. DELETE penultimate AND REPLACE BY: ante-penultimate.

<sup>19</sup> *Kemble v Hicks* [1999] P.L.R. 287, not cited in *Leadenhall Independent Trustees Ltd v Welham* [2004] EWHC 740 (Ch); [2004] O.P.L.R. 115.

<sup>19a</sup> *NBPF Pension Trustees Ltd. v Warnock-Smith* [2009] EWHC 455 (Ch); [2008] 2 All ER (Comm) 740; see in particular [54], [57]. Note that if the trustee is protected by an exoneration clause, it will be necessary to consider effecting the insurance on terms that the insurer will not seek to rely on the clause; *cf. ibid.*, at [37].

<sup>19b</sup> *ibid.*, at [50].

<sup>39a</sup> *MCP Pension Trustees Ltd v AON Pension Trustees Ltd*, above (incorrect deletion of members from records of pension scheme). How far constructive notice sufficed was left open.

<sup>39b</sup> *ibid.* See the decision at first instance [2009] EWHC 1351 (Ch); [2010] 2 W.L.R. 268.

## DISTRIBUTION WITHOUT THE INTERVENTION OF THE COURT

**4. DISTRIBUTION NOTWITHSTANDING THIRD PARTY CLAIMS****Upsetting the trust**

**26–26** NOTE 65. AT THE BEGINNING INSERT *Representation of BNP Paribas Jersey Trust Corp. Ltd* [2010] JRC 199; (2010–11) 13 I.T.E.L.R 867.

**Liabilities and trustee’s rights of indemnity**

**26–29** INSERT AT THE END OF THE SEVENTH SENTENCE: including a claim for breach of trust (since the trustees may become entitled to take their costs out of the trust fund).<sup>89a</sup>

NOTE 90. AT THE END ADD: See too *Hayman v Equity Trustees Ltd*, above, at [65].

**26–31** NOTE 1. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), § 33–027.

**5. CIRCUMSTANCES AFFECTING DISTRIBUTION****Incapacity of childbearing**

**26–47** NOTE 62. AT THE END ADD: *Simpson v Trust Co. Fiduciary Services Ltd* [2009] NSWSC 912.

**26–51** NOTE 83. INSERT AT THE END OF THE SECOND SENTENCE: and in *Simpson v Trust Co. Fiduciary Services Ltd* [2009] NSWSC 912.

**Identifying children and other issue**

**26–52** NOTE 90. For the reference to Kessler, *Drafting Trusts and Will Trusts*, see now (9th edn), §§ 5.22 and 6.29.

---

<sup>89a</sup> *Hayman v Equity Trustees Ltd* [2003] VSC 353; (2003) 8 V.R. 548 at [62]–[63]. For such orders, see § 21–98.

DISTRIBUTION WITHOUT THE INTERVENTION OF THE COURT

**8. FINAL DISTRIBUTION—SETTLING ACCOUNTS: RELEASE**

**Release of trustee**

**26–72** NOTE 33. DELETE THE LAST SENTENCE AND REPLACE BY: Nor has he an unrestricted power to apply trust money in effecting insurance against his own breach of duty: see § 26–06 (including online supplement).

© 2012 Thomson Reuters (Professional) UK Limited