24 May 2023

Stuart McMillan MSP
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Scottish Law Commission
promoting law reform

Your ref:
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by email only: DPLR.Committee@parliament.scot

Dear Stuart,

Thank you for your letter of 9 May following the evidence session before the Delegated Powers and and Law Reform Committee which Lord Drummond Young and I attended on 2 May 2023. We have considered the matters which you raise, and I am very grateful to Lord Drummond Young for the attached note which he has prepared in response. The talk mentioned in point number 2 is also attached.

I trust that this will assist you and your fellow Committee members in your deliberations. Please let me know if we can usefully provide further information at this stage.

Yours sincerely,

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Responses to questions asked by the Delegated Powers and Law Reform Committee

at its hearing on Tuesday 2 May 2023

relating to the Trusts and Succession (Scotland) Bill

1. Pension trusts

The Scottish Law Commission were strongly in favour of the Scottish Government's seeking an order under section 104 of the Scotland Act 1998 to include pension trusts in its definition of a trust for the purposes of the Trusts and Succession Bill. Neither I nor the Scottish Law Commission are directly involved in the dialogue taking place in relation to the section 104 order and therefore cannot offer any information in that regard. Nevertheless I would emphasize strongly the importance of pension trusts so far as the Scottish law of trusts is concerned.

At the hearing I mentioned the relatively recent case of *Plumbing Pensions (UK) Ltd*, [2022] CSIH 9; 2022 SLT 484. This was an application by the petitioner, Plumbing Pensions (UK) Ltd, for various orders by the Court of Session as to the administration of a pension trust which provided a pension scheme for those employed in the plumbing industry. The plumbing industry is characterized by large numbers of small firms, each of which has small numbers of employees. The employers (the firms engaged in the plumbing industry) take a range of legal forms (sole traders, partnerships, private companies), and these frequently merge or go out of existence. For that reason the existence of an identified and ring-fenced fund to secure the pensions of those employed in the industry is of great importance.

In the report of the case, it is recorded (at paragraphs [21] et seq) that the funds in the scheme amounted to approximately £2.3 billion; that there were 350 participating employers, and approximately 34,000 members, of whom approximately 21,000 were deferred members and approximately 13,000 were receiving pensions. This gives some indication of the scale of the funds involved in pension schemes and the number of individuals who are affected by them. I should add, however, that the Plumbing Pension scheme was not a particularly large one. Other schemes, covering for example local authority employees, have funds that can be as large as £39 billion.

All of these schemes are structured as trusts. This is because a trust is the only sensible way of ring fencing the funds that are required to fund the scheme. In this way the funds are protected against the possible insolvency of the employer, or indeed the scheme trustee itself; this follows from the "dual patrimony" analysis of the trust. The dual patrimony theory, in short, is that the trust assets are held as a separate patrimony, distinct from that of the trustee or trustees as individuals and distinct from those who have provided the funds in the trust (the employers in the case of a pension trust). The theory is discussed in a series of academic articles and in certain decisions in the Court of Session, in particular *Quinn (O'Boyle's Trustee) v Brennan*, [2020] CSIH 3.

It is probably fair to say that pension scheme trusts provide, in financial terms, the bulk of the property held on trust in Scotland. Their importance is very obvious. In 2020, on reaching retirement age from the Court of Session bench, I resumed advisory practice at the Bar, and found that most of the work that I was doing was related to pension scheme trusts. I think that it is fair to say that the importance of these trusts to Scots law, and to commercial life in Scotland and the people of Scotland generally, can scarcely be exaggerated.

It would be extremely unfortunate if pension scheme trusts were not made subject to the same legal regime as ordinary Scottish trusts. This is a point that has been repeatedly emphasized to me by those practising in the field. The reason is very obvious; lawyers move backwards and forwards between different types of trust, and pension schemes will usually be dealt with by lawyers who are considered "trusts experts". If anything other than the general system trust law is used, there will be wholly unnecessary complexity in the Scottish legislation.

2. Trustees' powers of investment (sections 16 and 17 of the Bill)

I attach the text of the talk that I gave in June last year on ESG investment. This was given at a conference organized by the Swiss Embassy, but I have been asked to give a similar talk next month. There is considerable interest in the subject in the profession.

My talk I think indicates why it is undesirable to have specific provisions for ESG investment in the Trusts and Succession Bill, because the primary duty of trustees is to secure the (usually financial) interest of the beneficiaries of the trust, or those who may benefit from the trust purposes in a purpose trust. That gives rise to fiduciary duties in favour of those persons, which may be inconsistent with a straightforward general power to make ESG investments. For that reason it is better that any particular power to make such investments should be in the individual trust deed, to ensure that it conforms with the intentions of the persons who set up the trust.

3. Court actions (section 7 of the Bill)

The Scottish Law Commission's reasoning on this part of the Bill is set out at paragraphs 4.25-4.28 of their Report. This acknowledges that there was a difference of view on the matter, and that there was some force in the criticisms of the proposals put forward in response to the Discussion Paper on Trustees and Trust Administration (DP No 126; 2004). The Commission decided ultimately to permit the removal of a trustee by a majority of the remaining trustees in certain carefully defined circumstances, which are those now set out in section 7 of the Bill (Recommendation 8).

At the hearing I endorsed the Commission's view when the its Report was prepared, that there was some force in the criticisms, but I pointed out that any decision made by a majority of the trustees can be challenged in court. I should emphasize that any decision made by trustees can be challenged in court by any person who has an interest to sue to challenge the decision; that is to say, any pecuniary interest in the outcome of that decision.

I am now asked to provide some more details in relation to the type of legal challenge that might be available. The normal form would be an action of declarator, possibly combined with conclusions for reduction, interdict or specific implement. Scots law generally permits a wide range of remedies for any alleged legal wrong; it does not follow the policy of English law of regarding damages as normally the sole remedy, unless the principles of equity, in the technical English sense of that word, can be invoked.

The right of challenge is a matter of common law, and it is, I may say, extremely well established. I can see no reason for enacting an express statutory provision to deal with the right of challenge; it is simply too well established to merit any legislative intervention

Such a case could be considered by either the Court of Session or the appropriate sheriff court; the choice of court would depend on the general rules governing the jurisdiction of those two courts.

In the event of a successful court action, the remedy awarded would depend upon the circumstances. Declarator is generally available in Scots law (another point of distinction from English law, where the corresponding remedy, known as "declaration" is somewhat limited in its scope). Frequently declarator is quite sufficient, because responsible trustees will invariably act in accordance with a decree of declarator granted by a court. Other remedies are available, however. In some cases reduction of the trustees' decision may be appropriate. In others the appropriate remedy may be interdict against implementing a particular decision (possibly combined with the remedy of declarator). In yet other cases an order to perform a specific act (a form of specific implement) may be appropriate. The choice of remedy would depend upon the particular circumstances of the case. I would emphasize that the remedies available in Scots law are wide ranging and flexible, and are not subject to the technicalities of English law and equity.

I should perhaps add two further points. First, I can see no point in placing these remedies as such in statutory form. They are all well established, and their present common law basis means that they are essentially flexible and accordingly are able to adapt to changing circumstances. Secondly, the Commission recommends, in recommendations 73 and 74 of its Report, supplemented by recommendations 75 and 76, that the powers of the courts should be increased in certain respects. These are designed to enable trustees to obtain, where necessary, full authorization from the Court to act appropriately in any case where there may be any doubt about the matter. These can be said to enhance the existing powers of the court has. These are enacted in sections 64 and 67 of the draft Bill.

4. Private purpose trusts (Chapter 6 of the Bill)

In the Scottish Law Commission's Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law (DP No 148, 2011) we considered in Chapter 12 the possibility of legislating for private purpose trusts in Scotland. The Discussion Paper is in large part based on the form of private purpose trust found in a number of jurisdictions outwith the United Kingdom, with special reference to the Cayman Islands institution known as the STAR trust. We were well aware that public purpose trusts were well established in Scotland; the possibility of setting up a non-charitable public purpose trust is a significant distinction between Scots law and English law, which since the decision in *Morice v Bishop of Durham*, (1804) 9 Ves 399; (1805) 10 Ves 522, has refused to recognize non-charitable purpose trusts of any sort. I should add that public purpose trusts are in regular use, and applications relating to them come frequently before the Court of Session, for example under the so-called cy-près jurisdiction, which is used where owing to a change of circumstances the trust purposes have become impossible or impracticable.

On consultation we received a very interesting response from Dr Patrick Ford of Dundee University, which made us reflect further on the current position of Scots law. In the light of this, we concluded that purpose trusts are clearly permissible in Scots law; the English restriction on such trusts has never been recognized in Scotland, and for the reasons set out in detail in Chapter 14 of our Report on Trust Law we considered that purpose trusts, public as well as private, were permissible in Scotland. We consider that there was no substance in any of the possible objections that had been put forward to the existence of such trusts.

I should add personally that on reflection I have come to the conclusion that many of the commercial trusts discussed in paragraphs 3.14-3.17 of the Commission's Report are properly considered purpose trusts. For example, trusts set up for the purpose of carrying out debt factoring, invoice discounting or securitization agreements are purpose trusts rather than trusts that benefit defined individuals; the purpose is to create a form of security. Likewise, a trust set up to provide funds to meet possible future environmental liabilities resulting from a particular development is essentially a purpose trust; no doubt individuals will benefit from what happens, but when the trust is set up it is impossible to know who those individuals will be, and the fundamental premise of the trust is to provide funding for certain environmental benefits. In the typical case, however, such a trust is essentially private rather than public. There are, of course, public environmental trusts; a clear example of this is the Nuclear Liabilities Fund, which obviously has very wide implications that may affect large parts of the public. In each case it seems to me that the proper characterization of the trust is as a private purpose trust. There is little doubt that at present trusts of that nature would be regarded as valid in Scots law.

Perhaps the most significant of the possible objections to purpose trusts was the method of enforcement. In this respect Dr Patrick Ford's contribution was particularly valuable. He pointed out the importance of the traditional and well established Scottish concept of interest to sue, which means, essentially, a pecuniary interest in the outcome of a particular obligation or litigation. In the case of a private purpose trust, as Dr Ford pointed out, the critical point is that the purposes will have a material (essentially financial) effect on individuals, who will be able to enforce the purposes of the trust by raising appropriate proceedings, in the manner that I have already discussed in relation to section 7 of the Bill.

The concept of interest to sue is frequently invoked in Scots law, and it does not give rise to any special difficulty in its application.

5. Trustees' duties to provide information (sections 25 and 26 of the Bill)

The primary difficulty that faced the Commission here was the almost total absence of existing Scottish authority on the subject: see the Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law (Scot Law Com No 148, 2011), paragraph 10.2. The same point is made in the Commission's Report on Trust Law at paragraphs 11.5-11.7. The Commission noted that other jurisdictions have much more clearly defined obligations to provide information. In this respect the distinction appeared to be drawn between the right of a beneficiary to be informed of his or her status as a beneficiary and other information rights. The Commission in its Discussion Paper asked specific questions for consultation (questions 29-32). The responses to these questions are discussed in Chapter 11 of the Commission's report. The Commission's primary conclusion (stated at paragraph 11.7 and recommendation 30) was that the existing lack of legal guidance as to a trustee's duty to pass information to a beneficiary was sufficiently unsatisfactory as to merit reform. This is especially so in view of the variety of uses to which trusts are put at the present day, including commercial trusts. The Commission considered that transparency as to the roles of those involved in trusts was important.

Various theories as to the nature of the duty to inform were discussed in the Report (paragraphs 11.8-11.11, and in more detail at paragraphs 11.12 et seq). The final views advanced by the Commission, which are incorporated in recommendations 31-40 of the Report, are that (1) trustees should have a fiduciary duty to inform a person of his/her status as a beneficiary and the identities and contact details of the trustees (recommendation 31), but that (2) otherwise the duty should be confined to responding to reasonable requests from beneficiaries for information (recommendation 37). In fulfilling these duties, the trustees are obliged to take account of all the circumstances. This involves an element of judgment, which is inevitable in cases of this sort.

In relation to the first of these duties, the mandatory duty to inform a beneficiary of his/her right, there may be significant uncertainty as to whether a person is actually likely to become entitled to any property. For example, under a traditional family trust, a person may be entitled to property in the event that a number of other members of the family predecease him or her, but not otherwise. Sometimes the beneficial right depends upon the order in which beneficiaries die, or alternatively whether a beneficiary dies with or without issue. In these circumstances it is impossible to be wholly prescriptive.

In the event of uncertainty, it is always possible for either trustees or beneficiaries to apply to the court for directions. This is specifically provided for in section 6(vi) of the Court of Session Act 1988. In its Report, the Commission recommended that section 6 of that Act should be supplemented with a new section 6A, and provision for that is made in section 64 of the Commission's Bill. The background discussion to this area is found in sections 16.5-16.12 of the Commission's report. The intention was to ensure that the power to obtain directions from the court was as wide as possible. The Commission referred to the fact that the power to obtain directions from the court is a matter of great importance, and were anxious that that should be available for use in any case of doubt. That would unquestionably apply to any case where there was any doubt about the trustees' duty to inform a beneficiary of his or her status.

In relation to the second category of information duty, relating to requests from beneficiaries, express provision is made in the Bill in section 26. In subsection (7) of that section an express power is conferred on trustees to seek a direction from the court as to the fulfilment of their duty under subsection (1) of this section to provide information.

The Committee refers to concerns expressed by respondents requiring the information duties. The Commission were aware of concerns that were expressed by various parties during the consultation

process. Those who responded to consultation expressed differing views, which meant that inevitably the Commission had to reach a form of compromise among those views. The overall exercise is discussed in Chapter 11 of the Commission's Report. The form of legislation that was ultimately recommended, and is contained in the Bill, inevitably represents a compromise, the reasons for which are discussed in Chapter 11.

I understand that further representations have been made to the Committee by persons who are not wholly satisfied with the compromise reached by the Commission. In response to this, I would emphasize three matters. First, the views that are now being advanced were put to the Commission, and were properly considered by it, along with other contrary views. That is an inevitable part of a proper law reform exercise. It is likely that those who supported an approach along the lines adopted by the Commission are still supportive of that approach. They have presumably not repeated their submissions to the Committee, simply because those submissions have been incorporated, more or less, into the draft Bill. This is an inevitable problem with repeated consultation. Those whose views are accepted by the Commission tend not to comment further on a subsequent consultation by the Scottish Government or the Parliament, but some of those whose views are rejected are likely to come forward. This means that repeated consultation can produce a very misleading impression of opinion in the profession; it can easily become slanted in favour of those whose views were rejected (for good reason) following the Law Commission's consultation. It is important to avoid this risk.

Secondly, in any case where there is doubt about information duties, the trustees, or potential beneficiaries, can always apply to the court for directions. This is a very important power (a point that was made by the Commission in Chapter 11), and it should provide an effective remedy in any doubtful case. It is obviously important that the procedure for a petition for directions should be simple and straightforward, but that is a matter for the Court of Session, and in particular the judge or judges who are designated to hear trust applications. I have no doubt that the court can deal, on a case-by-case basis, with any problems that arise in relation to the information duties of trustees.

Thirdly, I would emphasize that the approach ultimately taken by the Commission represents a compromise among competing views. I cannot see any insuperable problem in what is proposed in the Report and incorporated into sections 25 and 26 of the Bill.

6. Charities (Regulation and Administration) (Scotland) Bill

I was requested to examine section 8 of the Charities (Regulation and Administration) (Scotland) Bill and to comment on how that might interact with the Court's power to appoint trustees under Part 1 of the Trusts and Succession (Scotland) Bill. I have had an opportunity to read section 8 of that Bill. It is concerned with the appointment of interim trustees by OSCR , and confers power to make such an interim appointment in the circumstances defined in subsection (2), which makes amendments to section 70A of the Charities and Trustee Investment (Scotland) Act 2005. In a case where section 8, or strictly speaking section 70A, applies, I would expect trustees, or in an appropriate case OSCR, to make use of that section, because it is directed towards a particular situation in relation to the administration of charitable funds.

The power in section 1 of the present bill, by contrast, is a general power, of an essentially default nature, which means it is directed towards cases where there is no other means of appointing a trustee. In an ordinary trust, including probably the majority of charitable trusts, there will be an express power to assume new trustees. In such a case that particular power prevails over the default power in section 1 of the present Bill. The power in section 8/section 70A is another such particular power, and in accordance with the usual rule the particular power prevails over the default power.

7. Expenses of litigation (sections 65 and 66 of the Bill)

These sections give effect to recommendations 77 and 78 in the Commission's Report on Trust Law, which result from paragraphs 16.22-16.33 and 16.35-16.37 of the Report. These paragraphs of the Report make it clear that the Commission consulted on these matters and took account of the responses that were received. In paragraph 16.33, in particular, it is recorded that in the light of comments made by the Law Society and the Commission's Advisory Group (which consisted mostly of solicitors) the proposed scheme was revised so that a trustee will not normally incur personal liability for the expenses of litigation to which the trustee is a party. The result is that a trustee should normally have a right of relief against the trust estate if he or she is found liable for litigation expenses. A court order can provide to the contrary, but it must be assumed that the court will generally exercise this discretion in an appropriate manner, only departing from the normal rule in cases where that seems to be clearly fair in the circumstances.

I would also draw attention to section 65(4) and (6), which confer power on the court to allow a trustee relief against the trust property for expenses, including (subsection (6)(b)) expenses that have not yet been incurred. It can be expected that the court will apply these provisions in a sensible manner. The ability to give relief in advance, in particular, should go a considerable way towards meeting the objection taken by the Law Society.

Subject to these comments about the general scheme of section 65 as proposed by the Commission, I would not regard the points made by the Law Society as being of fundamental importance to the general structure of the Bill. Ultimately expenses will normally be a matter for the court, and I am content to rely on the sense of fairness, and indeed common sense, of the judges who are selected to deal with trust work. Indeed, whatever scheme is ultimately adopted, I would strongly urge that there should be a residual discretion in the court to deal with expenses; this is the only way in which an unfair result can be avoided generally.

Succession

The representatives of the Scottish Law Commission were also asked a number of questions relating to Part two of the Bill, dealing with succession. I have not been involved with the preparation of this part of the Bill. I will therefore express my reaction briefly.

In relation to the position of spouses or civil partners who were living with the deceased person at the time of their death, I can entirely understand the concern that has been expressed, but I do not state that view following any detailed research on the matter.

ESG investing

This event is entitled ESG investing – political ambition and practical reality.

It asks the question: how can professionals and trustees support the Green Agenda?

I have been asked to say something about the position of trustees from a lawyer's perspective. Can Trustees adapt to the new green agenda? Must they?

My concern is obviously with the legal position of trustees, in particular under the Scots law of trusts, although I think that much of what I have to say applies to other systems of trust law. One of the most fundamental aspects of a trust relationship in Scotland (and I understand in most other jurisdictions that recognize the trust) is the fiduciary nature of the trust. This is discussed in all the leading works on trust law; for example, it is considered in detail in a separate section of the Trusts volume of the Stair Memorial Encyclopaedia. At its simplest, the fiduciary relationship prevents a trustee from entering into engagements in which he or she has, or can have, a personal interest that conflicts with those of the beneficiaries or the purposes of the trust. This was established as long ago as 1854, in *Aberdeen Railway Co v Blaikie Bros*, 1 Macq 461, and the principle has been repeated in numerous cases since then. Apart from the fact that a trustee must avoid conflicts of interest, it is an important aspect of the principle that when dealing with trust property a trustee must at all times place the interests of the trust, and the beneficiaries or purposes of the trust, above any of his or her own personal preferences. I should emphasize the words "or purposes"; at the time when the fiduciary principle was first laid down most trusts were for named or identified beneficiaries, but in modern conditions many trusts, including the great majority of commercial trusts, are purpose trusts rather than trusts for identified beneficiaries. Private purpose trusts are considered at length in chapter 14 of the Scottish Law Commission's Report on Trust Law of 2014 (Scot Law Com No 239), and I think that a similar analysis applies to trusts set up to achieve public, non-charitable purposes. All trusts are subject to the fiduciary principle.

The fiduciary principle has important implications for ESG investing. It means that, even if trustees wish to adopt an ESG investment policy, they may be prevented from doing so by the legal requirement to put the interests of the beneficiaries or trust purposes above their own preferences. A trust is, in essence, a legal device that permits the identification and "ring fencing" of a fund in order to benefit defined persons or fulfil defined purposes. The fund – the trust property – is an essential feature of any trust. As a matter of elementary common sense, the protection and growth of that property is fundamental to the notion of a trust, and to the trustees' fiduciary duties. The trustees have a duty to secure the best financial interests of the trust in accordance with the trust purposes, and to invest the trust assets to the best financial advantage of the trust. Thus, at a general level, trustees who wish to pursue an ESG policy must ensure that it is consistent with the protection and growth of the trust fund.

A further problem arises in relation to the general policy of making ESG investments. If the trustees decide to pursue such a policy in all cases, that will normally be regarded as fettering their future discretion in a manner that is unacceptable in law. That has been established in a number of cases; perhaps the clearest Scottish case is *Martin v City of Edinburgh District Council*, 1988 SLT 229. In that case the Council had decided, without professional investment advice, that public and charitable funds held by it in trust should be disinvested from South Africa. That was to apply to all such investments. It was held that that amounted to a breach of trust,

because the trustees had not considered expressly whether it was in the best interests of the beneficiaries to follow such a course and ha not obtained professional advice on the matter. It was expressly affirmed that trustees have a duty not to fetter their investment discretion by any *ab ante* decision.

Nevertheless, it should be noted that in that case the judge refused to accept that trustees have an unqualified duty simply to invest trust funds in the most profitable investment available; that would involve substituting the discretion of financial advisers for the discretion of the trustees. Moreover, while the judge held that individual trustees must genuinely apply their minds and judgment to decisions affecting the trust, he refused to hold that trustees must when making such decisions divest themselves of all personal preferences, or any moral, religious, political or other conscientiously held principles. That course was neither reasonable nor practicable. The trustee had to recognize that he had those preferences, but do his best to exercise fair and impartial judgment on the merits of the issue before him. Thus true objectivity is absolutely fundamental.

Notwithstanding the importance of trustees' fiduciary duties, in particular their duty to protect and grow the trust funds so far as that is possible, and the duty not to fetter future discretion in making investment decisions, there are in my opinion three routes by which ESG considerations can be taken into account in a trust's investment policy.

(1) The first, and perhaps most obvious of these, is to make express provision in the trust deed. A trust deed will normally set out express investment powers, and there is nothing to prevent these from including a power to take account of ESG considerations in deciding how to invest the trust funds – in this way trustees <u>may</u> adapt to the new Green agenda. That is what a power achieves. If it is thought desirable to ensure that trustees <u>must</u> adapt to the Green agenda, such a power can be supplemented by a duty to take account of ESG considerations. Styles for such powers and duties are inevitably being developed, which makes the draftsman's task easier. At this point, however, I should raise one small note of caution. As a very wise person once said, never make predictions, especially about the future. If an inflexible duty is imposed, there is a danger that the trustees will find themselves in an extremely difficult situation if, for example, at a future date the stock market over-prices Green investments in relation to other forms of investment. In that situation, if funds had to be invested straight away (to secure a reasonable return), it might be desirable at least as a short-term measure to invest in, say, government stock or a collective investment vehicle, to tide matters over. A degree of flexibility is therefore desirable if it is decided that a duty should be imposed to take account of environmental considerations.

In this connection I mentioned the use of styles. When I was chairman of the Scottish Law Commission one of my favourite sayings was that the law reformer's greatest tool is plagiarism. I remain of that view. Historically Scotland has been one of the great centres of common sense philosophy, and one of the fundamental principles of common sense at a philosophical level is to take account of what knowledgeable and experienced people operating in a particular field write, or how they act in practice. Trusts that take detailed account of a Green agenda are a fairly new development, but styles will develop rapidly, and these should assist anyone who wishes to set up an ESG-friendly trust (and their legal advisers). It is of course nearly always possible to improve on what has gone before, or at least to adapt it to the individual circumstances of a particular trust.

(2) The second route relates principally to certain types of charitable trust, although in Scotland it may apply to other non-charitable public trusts. This route was considered by the English Chancery Division in *Harries v Church Commissioners*, [1992] 1 WLR 1241, and much more recently in *Butler-Sloss v The Charity Commission for England and Wales*, [2022] EWHC 974 (Ch), a decision issued on 29 April this year. Those two cases affirm that, with certain types of trust, a failure to take ethical considerations into account in making investment decisions may be fundamentally at variance with the trust purposes (and hence a breach of trust). In *Harries*, the judge, Nicholls V-C, accepted that in most cases the best interests of a charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify and balance risk against return. It seems to me that that view is significantly more limited than the view expressed by Lord Murray in *Martin*; I would hope that in Scotland, at least, it is the approach in *Martin* that will prevail.

Nevertheless, Nicholls V-C accepted that the position "in a minority of cases" was not so straightforward as he had described. He accepted that there were some cases where the objects of a charity would be such that a particular type of investment would conflict with its aims. Examples given were cancer research companies and tobacco shares, trustees of temperance charities and brewery and distillery shares, and trustees of the Society of Friends (or Quakers) and shares in armaments manufacturers. There might be other cases were trustees' holdings of particular investments might hamper the charity's work, by making potential recipients of aid unwilling to be helped or by alienating some of those who would otherwise support the charity. In these cases the likely financial loss might exceed anything that resulted from excluding particular categories of investment from the charity's portfolio. Nevertheless, excluding investments of that nature was unlikely to have a major impact on the charity's financial performance; the charity would still be left with an adequately wide range of investments from which to choose a properly diversified portfolio. In my opinion that is clearly correct, and important, for reasons that I will discuss subsequently.

Nicholls V-C went on to observe that investments should not be used for making mere moral statements; their purpose is to generate money. He further referred to the fact that with some charities, such as a religious body, the members may support a range of views in relation, for example, to the arms industry. In these circumstances there is no identifiable criterion that can be used to state that one answer is right and the other is wrong; in that situation the law does not require the trustees to find any answer. The trustees can, however, refuse to make particular investments provided that they are satisfied that there is not a risk of significant financial detriment. I think that that is probably an inevitable conclusion.

Today's discussion is of course concerned with ESG investing and the Green agenda. In this connection I should draw attention to the fact that Scottish purpose trusts are regularly set up in order to deal with environmental issues. In land developments it is not unusual to find that a purpose trust is used to hold ring-fenced funds for the purpose of meeting possible environmental liabilities in the future. Other essentially environmental trusts have been established; a prominent example is the Nuclear Liabilities Fund, which is structured as a Scottish trust and company and is the principal fund set up to ensure the decommissioning of the United Kingdom's nuclear power stations. I am sure you will all appreciate that this is a matter of the utmost importance; similar funds have been established in other countries that use nuclear power generation, although they are obviously structured in accordance with the

local law. In the United Kingdom, Scots law was used because, unlike English law, it permits purpose trusts that are not strictly charitable in nature. With trusts of an essentially environmental nature, it would be quite legitimate in my opinion for the trustees to take account of the underlying environmental purpose in deciding how they should invest. That is entirely in accordance with the basic trust purposes. There is thus no conflict with the notion of fiduciary duty, and the consequential need to act at all times in accordance with the trust purposes.

(3) The third route by which PSG considerations can be taken into account is of very general application, and can work for existing trusts as well as trusts that are newly set up. It might be described as a "micro-approach" to ethical investment management; it focuses on the details of each individual decision to acquire a particular investment rather than laying down any general investment policy in advance. Trustees have a duty to invest in such a way as to protect and, so far as possible, to increase the trust assets, but in doing so they make a multiplicity of individual decisions as to which investments should be acquired or sold. In all of the cases that I have mentioned, including *Martin* in Scotland, judges have held that in making investment decisions trustees may properly take account of moral, religious or other conscientiously held principles, or even political beliefs; to suggest otherwise was described in *Martin* as being neither reasonable nor practicable. A trustee must, however, recognize that he or she has particular commitments or principles but nevertheless do his or her best to exercise a fair and impartial judgment on the merits of any particular investment issue. In other words, in selecting an investment, moral principles may be relevant, but true objectivity is paramount.

A further factor is important in this connection. When a decision to invest is made, there will typically be a wide range of investments to choose from, and across a considerable number of these there will be no decisive financial or investment reason for choosing one rather than another. For example, trustees investing funds might have a choice between investing on one hand in an oil company, or a manufacturing or retailing company that has made no attempt to wean itself off fossil fuels, and on the other hand in a company that has a clear – and implemented – policy of using Green energy or selling products that have been responsibly sourced. The financial prospects of these companies may not appear greatly different – as ever, the difficulty is foreseeing the future. That would permit trustees considering investment to choose a company following broadly Green policies over one that does not. From the point of view of their duty to protect and grow the assets of the trust, one is as good as the other. So the trustees' investment decision in an individual case can easily, and reasonably, favour an ESG agenda.

Furthermore, in the event of a retrospective challenge to an investment decision that trustees have made, in practice it will often – perhaps usually – be difficult or impossible to prove that at the time when a particular investment was made it was not as financially meritorious as other possible investments. Even if subsequent events favour a particular category of "non-Green" companies over those compatible with a Green agenda – for example the effects of the war in Ukraine on the price of oil, with a consequent impact on the share price of oil companies – it is almost impossible to demonstrate retrospectively that the decision to invest in another type of company was unreasonable at the time when it was made. Once again, the sheer range of available investments is enough to make it extremely difficult to challenge the choice of one particular investment over another. Moreover, the comparison must be made at the time when

the investment was acquired, without the benefit of hindsight. That makes challenge even more difficult.

Thus it is possible for trustees to make use of a "micro-approach" to investment, in which they consider the ESG credentials of possible investments on an individual basis at the point when they are investing funds. This in my opinion gives trustees considerable scope to take into account moral, social or sometimes even political considerations. In a sense, the sheer range of investments that are available means that it is not difficult to choose companies that can be regarded as "green", or as pursuing environmentally or socially desirable programmes. Trustees can take that into account if they wish.

Nevertheless, such considerations cannot be conclusive, because the trustees must continue to look at the merits and prospects of the companies that they are considering, with proper professional advice. They must at all times ensure that they are pursuing a responsible investment policy, investing in companies or other entities that are likely to deliver a good financial return to the trust. For this reason it is probably undesirable for trustees to adopt too prescriptive a policy in relation to ESG considerations; if they are too prescriptive there is the danger that a court might hold that they had fettered their discretion. It is better to rely on a general understanding, or congruence of beliefs, among the individual trustees, and to approach investment decisions on a case-by-case basis.

In conclusion, I should repeat the basic point that I made at the beginning of this talk. Trustees are subject to fiduciary duties, and these involve fulfilling their responsibilities as trustees, including the investment of funds, in a manner that promotes the interests of the beneficiaries or purposes of the trust. They cannot avoid that fundamental obligation. They can accommodate Green considerations in the three ways that I have described, by an express power, or perhaps even duty, in the trust deed, by taking account of the particular purposes of charitable and certain other public purpose trusts, and by taking environmental considerations into account in making individual investment decisions, but the fundamental duty remains.