

CHAPTER 14

APPOINTMENT OF NEW TRUSTEES OUT OF COURT

3. GENERAL CONSIDERATIONS

Fiduciary character of the power

- 14–40** DELETE THE LAST SENTENCE OF THE TEXT AND NN.34 AND 35 AND REPLACE BY: Appointments of new trustees under section 36 of the Trustee Act 1925 have in the past not been held invalid on the ground of a failure to take into account relevant considerations³⁴ under what was then considered to be the principle in *Hastings-Bass*.³⁵ It is now clear that such appointments would not be held invalid on this ground, though they might be set aside on the ground of breach of fiduciary duty by the appointor if the failure amounted to a breach of fiduciary duty,^{35a} or remedied in appropriate circumstances under the court's powers of removal and appointment of trustees.^{35b}

Appointment of persons resident abroad

- 14–49** NOTE 69. FOR THE REFERENCE TO *Whiteman on Income Tax*, SEE NOW *Whiteman & Sherry on Income Tax* (4th edn), §§ 20.013 *et seq.*

NOTE 70. DELETE AND REPLACE BY: Income Tax Act 2007, ss.714 *et seq.*

³⁴ *Re Duxbury's Settlement Trusts* [1995] 1 W.L.R. 425 at 427–428, CA (appointment of trust corporation as sole trustee not rendered invalid by reason of fact that appointor failed to take account of provision in trust instrument that powers conferred on trustees not to be exercised at any time when there were less than two trustees; no appeal on this point); *Re Osiris Trustees Ltd and Goodways Ltd* (1999–00) 2 I.T.E.L.R. 404, Manx HC.

³⁵ [1975] Ch. 25, CA. See §§ 29–238 *et seq.* (online supplement).

^{35a} *Pitt v Holt* [2011] EWCA Civ 197; [2011] 2 All E.R. 450 especially at [126]–[131]. See §§ 29–238 *et seq.* (online supplement). It is thought that the fiduciary nature of the power of appointment of new trustees is sufficient, especially when vested in trustees, for the donee to have a duty to take into account relevant considerations and disregard irrelevant considerations, so as to come within the principles of *Pitt v Holt*.

^{35b} See §§ 13–47 *et seq.* This would be the better remedy in cases where it is appropriate for the remedy to have prospective effect only and not interfere with previous decisions of the new trustee whose appointment is sought to be set aside.

Retirement in contemplation of breach of trust

- 14–52** NOTE 75. Supreme Court Act 1981 is renamed Senior Courts Act 1981 from October 1, 2009, see Constitutional Reform Act 2005, Sch.11, para.1 and Constitutional Reform Act 2005 (Commencement No.11) Order 2009 (SI 2009/1604).

Indemnity of former trustees upon appointment of new trustees

Continuance of former trustee's right of indemnity after appointment of new trustees

- 14–59** NOTE 98. AT THE END OF THE FIRST SENTENCE ADD: *Commissioner of Taxation v Bruton Holdings Pty Ltd* [2007] FCA 1643; (2008) 244 A.L.R. 177 at [62]; *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344; (2008–09) 74 N.S.W.L.R. 550.

AFTER THE TEXT TO N.99 ADD: It has further been held in Australia that a former trustee does not have a right to retain, as against a new trustee, the trust assets as security for an accrued right of indemnity, though the former trustee is entitled to ensure that the new trustee does not take steps which will destroy, diminish or jeopardise the former trustee's rights of indemnity in the trust assets after they have been transferred to the new trustee.^{99a}

Express covenants for indemnity of former trustees

- 14–61** NOTE 9. ADD: See too *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch); [2008] All E.R. (D) 175 (Oct) at [207]–[217] (retention provisions in respect of sale of shares).

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^{99a} *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*, above, at [50].