Date: 19/05/2013 11:24AM

For the Chairman of the Bills Committee on Trust Law (Amendment) Bill 2013 Meeting on 27 May 2013 to receive views
From David Gunson

Here are my views, as requested in your Clerk's letter of 29 April 2013, on the paragraphs in that letter:

(a)
I first proposed abolition of the rule against perpetuities in my paper on trust law reform commissioned by The Hong Kong Trustees' Association nearly 20 years ago. The reasons for abolition then remain valid today. The purpose of the rule is to promote vesting of interests in land and in the Hong Kong context we already have it. The Government owns the land and can resume any leasehold or subsidiary interest it has granted at any time it sees fit, in the end. The rule is redundant on that ground alone. However, the rule has been expanded over the centuries to cover not just land but any property. This has lead to severe problems on re-settlement of old trusts such as pension funds being declared invalid by the rule however well the trusts may have been managed. The rule is unique in that it imposes an arbitrary time limit on the existence of a particular legal form of activity but a company limited by guarantee for instance, The Chinese Manufacturers' Association of Hong Kong, incorporated on 11 March 1960 has no such limit even though the implication of their own submission to you on this point - a 50 year time limit - says that were they a trust, they would have been deemed dissolved 3 years ago. Abolition of the rule is guaranteed to bring trust business to Hong Kong: I have a case of a huge pension fund wanting to organise itself in Hong Kong and can and will do so if the rule is abolished.

(b)
The irony of a statutory control rule on trustees' exemption clauses is that it is never within the trustees' powers or duties to commit fraud, wilful misconduct and gross negligence in the first place. So from that point of view the rule is redundant. All it does is create a code of conduct and I can guarantee that the code as set out will lead to litigation counsel successfully arguing that their hapless trustee client is within the code. Defining bad behaviour is a primarily criminal law fancy and the Courts in trust cases have almost always found a way to distinguish the two for the benefit of beneficiaries. For all that, some form of conceptual guidance code is a good

thing so long as it does not handcuff the Courts. There is a big difference, when defining bad behaviour, between the criminal standard of being beyond reasonable doubt, the civil standard of the balance of probabilities and the trustees' standard of prudence. In the latter case, "reasonableness" has utterly no place. So don't make a law saying that it does.

(c) See (b) and also note that the control of management of companies is always a shareholder matter: what else are shareholders to do? It is their money. Why should trustee-shareholders be a special class of shareholder who have rights but don't need to exercise them. What sort of law is that? This area is best dealt with case-by-case not generically, by the trustees making a protocol with the company managers and the beneficiaries on how the show is going to be run. That works, in my experience, but it requires a basic decision by trustees as to if they are to become owners in the first place. A law exonerating that decision is a crock.

(d)
I can only repeat my recommendation that the standard of trustee investment law ought to be the benchmark internationally: the prudent man rule and not a throwback to 18th century English law - the legal list of permitted investments - as a reaction to the South Sea Bubble. Just because a trustee invests in the list doesn't make it prudent to do so. The financial crash of 2007-8 and continuing, proves that.

(e)
The idea of regulating trustees sounds good if one says it quickly but we have had the Courts for centuries as successful regulators. Who is to say that a regulatory rule today will fit a pension fund in 20 years? Don't make a law regulating trustees and trustee companies. I refer you to my paper of 20 years ago on this point because the reasons given then remain valid today.